Court File No.: 05-145-15

ONTARIO
SUPERIOR COURT OF JUSTICE
ESTATES LIST

IN THE MATTER OF THE ESTATE OF PAUL ZIGOMANIS, deceased

GAIL MacDONALD

Applicant

- and -

VIOLET COOPER

Respondent

BOOK OF AUTHORITIES OF THE MOVING PARTY
(Returnable May 24, 2017)

February 10, 2017

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Pecore v. Pecore

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Michael Pecore (Appellant) and Paula Pecore and Shawn Pecore (Respondents)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: December 6, 2006
Judgment: May 3, 2007
Docket: 31202

Proceedings: affirming *Pecore v. Pecore* (2005), 2005 CarswellOnt 4043, 19 E.T.R. (3d) 162, 17 R.F.L. (6th) 261, 202 O.A.C. 169 (Ont. C.A.); affirming *Pecore v. Pecore* (2004), 2004 CarswellOnt 748, 7 E.T.R. (3d) 113, 48 R.F.L. (5th) 89 (Ont. S.C.J.)

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Subject: Estates and Trusts; Corporate and Commercial; Family

Headnote

Estates and trusts --- Estates — Legacies and devises — Residuary gifts — Rights or obligations of residuary legatee

Appellant M was rendered quadriplegic and later married his nursing care provider P — Twenty years later, P's father ("testator") made P joint owner of his substantial investments — Testator, in last will, named M and P as residuary legatees and P as sole executrix — On testator's death, P decided not to probate will and did not inform M of his entitlement as legatee — After P and M divorced, M brought action claiming 50 per cent of estate as residuary legatee — Trial judge, in dismissing action, determined that it was obvious presumption of advancement applied since relationship between P and testator was strong, and of his three children, she was closest to him, was one he most trusted and was financially dependent on him — M's appeal was dismissed, appeal court holding that presumption of advancement is relevant only if, after considering all evidence and circumstances surrounding transfer, court is unable to draw conclusion about transferor's actual intention — Testator's statements and conduct supported actual intention to give P beneficial interest in investments, so that resort to presumption of advancement was unnecessary — M appealed to Supreme Court of Canada — Appeal dismissed — General rule for gratuitous transfers is that presumption of resulting trust applies and onus is on transferee to demonstrate that gift was intended — However, where transfer is from parent to child, presumption of advancement may apply and it falls on party challenging transfer to rebut presumption of gift — Appropriate standard of proof is civil standard of balance of probabilities — With joint accounts, rights of survivorship, both legal and equitable, vest when account is opened and therefore gift is inter vivos in nature and gift to transferee is what is in account at time of transferor's death — Evidence regarding transferor's intention when opening account depends on facts of each case but may include bank documents, control and use of account funds, granting of power of attorney by transferor to transferee and tax treatment of such accounts — Also, court may consider evidence arising subsequent to transfer if it is relevant to intention of transferor at time of transfer — Given that principal justification for presumption of advancement is parental obligation to support

dependent children, presumption of advancement does not apply in respect of transferor's independent adult children — Accordingly, trial judge erred in applying presumption of advancement since P was not minor child, but this did not affect disposition as there was sufficient evidence of father's intention to benefit P.

Estates and trusts --- Gifts — Presumption of advancement — Parent to child — General principles

Appellant M was rendered quadriplegic and later married his nursing care provider P — Twenty years later, P's father ("testator") made P joint owner of his substantial investments — Testator, in last will, named M and P as residuary legatees and P as sole executrix — On testator's death, P decided not to probate will and did not inform M of his entitlement as legatee — After P and M divorced, M brought action claiming 50 per cent of estate as residuary legatee — Trial judge, in dismissing action, determined that it was obvious presumption of advancement applied since relationship between P and testator was strong, and of his three children, she was closest to him, was one he most trusted and was financially dependent on him — M's appeal was dismissed, appeal court holding that presumption of advancement is relevant only if, after considering all evidence and circumstances surrounding transfer, court is unable to draw conclusion about transferor's actual intention — Testator's statements and conduct supported actual intention to give P beneficial interest in investments, so that resort to presumption of advancement was unnecessary — M appealed to Supreme Court of Canada — Appeal dismissed — General rule for gratuitous transfers is that presumption of resulting trust applies and onus is on transferee to demonstrate that gift was intended — However, where transfer is from parent to child, presumption of advancement may apply and it falls on party challenging transfer to rebut presumption of gift — Appropriate standard of proof is civil standard of balance of probabilities — With joint accounts, rights of survivorship, both legal and equitable, vest when account is opened and therefore gift is inter vivos in nature and gift to transferee is what is in account at time of transferor's death — Evidence regarding transferor's intention when opening account depends on facts of each case but may include bank documents, control and use of account funds, granting of power of attorney by transferor to transferee and tax treatment of such accounts — Also, court may consider evidence arising subsequent to transfer if it is relevant to intention of transferor at time of transfer — Given that principal justification for presumption of advancement is parental obligation to support dependent children, presumption of advancement does not apply in respect of transferor's independent adult children — Accordingly, trial judge erred in applying presumption of advancement since P was not minor child, but this did not affect disposition as there was sufficient evidence of father's intention to benefit P.

Successions et fiducies --- Successions — Legs — Dons universels — Droits ou devoirs du légataire du reliquat de la succession

Appelant M est devenu tétraplégique puis a épousé P, celle qui lui prodiguait des soins infirmiers — Vingt ans plus tard, le père de P (le « testateur ») a placé l'essentiel de ses biens dans des comptes conjoints à son nom et à celui de P — Testateur, dans son dernier testament, a désigné M et P à titre de légataires du reliquat de la succession et P à titre d'exécutrice testamentaire unique — À la mort du testateur, P a décidé de ne pas homologuer le testament et n'a pas informé M de son droit à titre de légataire — Après le divorce de P et M, M a intenté une action en justice pour réclamer 50 pour cent de la succession à titre de légataire du reliquat de la succession — Juge de première instance a conclu qu'il était clair que la présomption d'avancement s'appliquait puisque la relation entre P et le testateur était solide et que, de ses trois enfants, P était celle dont il était le plus proche, qu'il lui faisait grandement confiance et qu'elle était financièrement dépendante de lui — Cour d'appel a rejeté l'appel de M en soutenant que la présomption d'avancement n'est pertinente que si, après avoir pris en compte toute la preuve et toutes les circonstances entourant le transfert, la preuve de l'intention réelle de l'auteur du transfert n'est pas concluante ou est inexistante — Déclarations et conduite du testateur soutenaient son intention réelle de faire don à P de l'intérêt bénéficiaire sur les biens; il n'était donc pas nécessaire de s'appuyer sur la présomption d'avancement — M a interjeté appel de la décision auprès de la Cour suprême du Canada — Pourvoi rejeté — Présomption de fiducie résultoire est la règle générale applicable aux transferts à titre gratuit et la preuve de l'intention de faire un don incombe au destinataire du transfert — Toutefois, dans le contexte d'un transfert en faveur d'un enfant, la présomption d'avancement peut s'appliquer et le fardeau de réfuter la présomption de don incombe à la partie qui conteste le transfert — Norme de preuve à appliquer est la norme utilisée en matière civile, c'est à dire la prépondérance des probabilités — Droit de survie, tant en common law qu'en equity, rattaché à un compte conjoint, est dévolu à l'ouverture du compte, et le don du droit de survie constitue donc un don entre vifs; le don au destinataire du transfert est le solde du compte au moment du

décès de l'auteur du transfert — Preuve concernant l'intention de l'auteur du transfert lors de l'ouverture du compte dépend des circonstances de l'affaire, mais elle peut inclure le libellé des documents bancaires, le contrôle et l'utilisation des fonds placés dans le compte, la signature d'une procuration et le traitement fiscal du compte — Cour peut aussi examiner les éléments de preuve postérieurs au transfert, à condition que cette preuve soit pertinente quant à l'intention de l'auteur du transfert au moment du transfert — Étant donné qu'une justification principale de la présomption d'avancement est l'obligation des parents de subvenir aux besoins de leurs enfants à charge, cette présomption ne s'applique pas lorsqu'il s'agit d'enfants adultes autonomes — Par conséquent, le juge de première instance a commis une erreur en appliquant la présomption d'avancement puisque P n'était pas une enfant mineure, mais cette erreur n'a changé en rien l'issue du pourvoi puisque la preuve a clairement démontré l'intention du père que le solde des comptes qu'il détenait conjointement avec P soit dévolu à celle-ci.

Successions et fiducies --- Dons — Présomption d'avancement — Par le parent en faveur de son enfant — Principes généraux

Appelant M est devenu tétraplégique puis a épousé P, celle qui lui prodiguait des soins infirmiers — Vingt ans plus tard, le père de P (le « testateur ») a placé l'essentiel de ses biens dans des comptes conjoints à son nom et à celui de P — Testateur, dans son dernier testament, a désigné M et P à titre de légataires du reliquat de la succession et P à titre d'exécutrice testamentaire unique — À la mort du testateur, P a décidé de ne pas homologuer le testament et n'a pas informé M de son droit à titre de légataire — Après le divorce de P et M, M a intenté une action en justice pour réclamer 50 pour cent de la succession à titre de légataire du reliquat de la succession — Juge de première instance a conclu qu'il était clair que la présomption d'avancement s'appliquait puisque la relation entre P et le testateur était solide et que, de ses trois enfants, P était celle dont il était le plus proche, qu'il lui faisait grandement confiance et qu'elle était financièrement dépendante de lui — Cour d'appel a rejeté l'appel de M en soutenant que la présomption d'avancement n'est pertinente que si, après avoir pris en compte toute la preuve et toutes les circonstances entourant le transfert, la preuve de l'intention réelle de l'auteur du transfert n'est pas concluante ou est inexistante — Déclarations et conduite du testateur soutenaient son intention réelle de faire don à P de l'intérêt bénéficiaire sur les biens; il n'était donc pas nécessaire de s'appuyer sur la présomption d'avancement — M a interjeté appel de la décision auprès de la Cour suprême du Canada — Pourvoi rejeté — Présomption de fiducie résultoire est la règle générale applicable aux transferts à titre gratuit et la preuve de l'intention de faire un don incombe au destinataire du transfert — Toutefois, dans le contexte d'un transfert en faveur d'un enfant, la présomption d'avancement peut s'appliquer et le fardeau de réfuter la présomption de don incombe à la partie qui conteste le transfert — Norme de preuve à appliquer est la norme utilisée en matière civile, c'est à dire la prépondérance des probabilités — Droit de survie, tant en common law qu'en equity, rattaché à un compte conjoint, est dévolu à l'ouverture du compte, et le don du droit de survie constitue donc un don entre vifs; le don au destinataire du transfert est le solde du compte au moment du décès de l'auteur du transfert — Preuve concernant l'intention de l'auteur du transfert lors de l'ouverture du compte dépend des circonstances de l'affaire, mais elle peut inclure le libellé des documents bancaires, le contrôle et l'utilisation des fonds placés dans le compte, la signature d'une procuration et le traitement fiscal du compte — Cour peut aussi examiner les éléments de preuve postérieurs au transfert, à condition que cette preuve soit pertinente quant à l'intention de l'auteur du transfert au moment du transfert — Étant donné qu'une justification principale de la présomption d'avancement est l'obligation des parents de subvenir aux besoins de leurs enfants à charge, cette présomption ne s'applique pas lorsqu'il s'agit d'enfants adultes autonomes — Par conséquent, le juge de première instance a commis une erreur en appliquant la présomption d'avancement puisque P n'était pas une enfant mineure, mais cette erreur ne change en rien l'issue du pourvoi puisque la preuve a clairement démontré l'intention du père que le solde des comptes qu'il détenait conjointement avec P soit dévolu à celle-ci.

The appellant M was rendered a quadriplegic in a motor vehicle accident. M subsequently married the respondent P, who was his nursing care provider. Twenty years later P's father ("the testator"), who was in ill health, moved into M and P's house and made P joint owner of his substantial investments. Shortly thereafter M was placed in an institution as P and M's doctors decided that P could no longer provide the necessary care for M. The testator was closer to P than to his other two children who were financially independent and he had helped P and M financially in the past. The testator subsequently

made a will naming M and P as residuary legatees and P as sole executrix. When he died he left an estate valued at $1.2 million and the investments in the joint names of himself and P were worth $949,674 of that amount.

M and P had divorced and P decided not to probate the will and not to inform M of his entitlement as legatee. M brought proceedings claiming 50 per cent of the estate as residuary legatee. The trial judge, in dismissing the action, determined that it was obvious the presumption of advancement applied since the relationship between P and the testator was strong, and of his three children, she was closest to him, was the one he most trusted and was financially dependent on him.

M's appeal was dismissed. The court held that the presumption of advancement is relevant only if, after considering all the evidence and circumstances surrounding the transfer, the court is unable to draw a conclusion about the transferor's actual intention. It was only after the testator had transferred the investments to P by putting them in joint names that he amended his will to include M as a residuary beneficiary. When the amendment to the will was made the testator told the lawyer about the joint ownership of the investments and that they would devolve outside his estate. Accordingly, the testator's statements and conduct supported his actual intention to give P a beneficial interest in the investments, and that was consistent with his relationship with P and his pattern of conduct towards her. Accordingly, the testator's intention was known and it was unnecessary for the trial judge to resort to the presumption of advancement

M appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Rothstein J. (McLachlin C.J.C, Bastarache, Binnie, LeBel, Deschamps, Fish, Charron JJ. concurring): The general rule for gratuitous transfers is that the presumption of resulting trust applies and the onus is on the transferee to demonstrate that a gift was intended. However, where the transfer is from a parent to a child, the presumption of advancement may apply and it falls on the party challenging the transfer to rebut the presumption of a gift. The appropriate standard of proof is the civil standard of balance of probabilities and the applicable presumption only determines the result where there is insufficient evidence to rebut it.

With joint accounts, rights of survivorship, both legal and equitable, vest when the account is opened and therefore the gift is inter vivos in nature and the gift to the transferee is what is in the account at the time of the transferor's death. The evidence regarding the transferor's intention when opening a joint account depends on the facts of each case, but may include bank documents, the control and use of account funds, the granting of a power of attorney by the transferor to the transferee and the tax treatment of such accounts. Also, the court may consider evidence arising subsequent to the transfer if it is relevant to the intention of the transferor at the time of the transfer.

Given that the principal justification for the presumption of advancement is the parental obligation to support the transferor's dependent children, the presumption of advancement does not apply in respect of a transferor's independent adult children. Accordingly, the trial judge erred in applying the presumption of advancement in this case since P was not a minor child. Although the presumption of resulting trust should have been applied, the error did not affect the disposition since there was sufficient evidence of the father's intention that the balance of the joint accounts go to P by right of survivorship on the father's death.

Per Abella J. (concurring in the result): There is no reason to claw back the common law in a way that disregards the lifetime tenacity of parental affection by introducing a limitation on the presumption of advancement by restricting its application to minor children. Since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship, not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to any of their children, regardless of the age or dependency of the child or the parent. Also, the intention to have an adult child manage a parent's financial affairs

during the parent's lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Accordingly, the trial judge properly applied the presumption of advancement in this case.

L'appelant M est devenu tétraplégique à la suite d'un accident de véhicule automobile. Par la suite, M a épousé l'intimée P, soit celle qui lui prodiguait des soins infirmiers. Vingt ans plus tard, le père de P (le « testateur »), qui était en mauvaise santé, a emménagé chez M et P et il a placé l'essentiel de ses biens dans des comptes conjoints à son nom et à celui de P. Peu de temps après, M a été placé dans un centre puisque P et les médecins de M ont jugé que P ne pouvait plus fournir les soins nécessaires à M. Le testateur était plus proche de P que de ses deux autres enfants, qui étaient financièrement indépendants, et il avait financièrement aidé P et M dans le passé. Le testateur a par la suite fait un testament dans lequel il a désigné M et P à titre de légataires du reliquat de la succession et P à titre d'exécutrice testamentaire unique. Lors de son décès, sa succession valait 1,2 million de dollars et les biens placés dans les comptes conjoints à son nom et à celui de P valaient 949 674 $ de cette somme.

M et P ont divorcé et P a décidé de ne pas homologuer le testament ni d'informer M de son droit à titre de légataire. M a intenté une action en justice pour réclamer 50 pour cent de la succession à titre de légataire du reliquat de la succession. Le juge de première instance, en rejetant l'action, a conclu qu'il était clair que la présomption d'avancement s'appliquait puisque la relation entre P et le testateur était solide et que, de ses trois enfants, P était celle dont il était le plus proche, qu'il lui faisait grandement confiance et qu'elle était financièrement dépendante de lui.

La Cour d'appel a rejeté l'appel de M. Elle a soutenu que la présomption d'avancement n'est pertinente que si, après avoir pris en compte toute la preuve et toutes les circonstances entourant le transfert, la preuve de l'intention réelle de l'auteur du transfert n'est pas concluante ou est inexistante. C'est seulement après que le testateur a transféré ses biens à P en les plaçant dans des comptes conjoints à son nom et à celui de P qu'il a modifié son testament pour inclure M à titre de légataire du reliquat de la succession. Lorsque le testateur a effectué la modification à son testament, il a informé son avocat des biens placés dans des comptes conjoints et il lui a indiqué qu'ils seraient dévolus hors de sa succession. Par conséquent, les déclarations et la conduite du testateur soutenaient son intention réelle de faire don à P de l'intérêt bénéficiaire sur les biens, et elles étaient conformes à sa relation avec P et sa conduite habituelle envers elle. Ainsi, l'intention du testateur était connue et il n'était pas nécessaire pour le juge de première instance de s'appuyer sur la présomption d'avancement.

M a interjeté appel de la décision auprès de la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Rothstein, J. (McLachlin, J.C.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Charron, JJ., souscrivant à son opinion): La présomption de fiducie résultoire est la règle générale applicable aux transferts à titre gratuit et la preuve de l'intention de faire un don incombe au destinataire du transfert. Toutefois, dans le contexte d'un transfert en faveur d'un enfant, la présomption d'avancement peut s'appliquer et le fardeau de réfuter la présomption de don incombe à la partie qui conteste le transfert. La norme de preuve à appliquer est la norme utilisée en matière civile, c'est à dire la prépondérance des probabilités, et la présomption applicable ne sera déterminante quant au résultat que dans les cas où la preuve n'est pas suffisante pour la réfuter.

Le droit de survie, tant en common law qu'en equity, rattaché à un compte conjoint est dévolu à l'ouverture du compte, et le don du droit de survie constitue donc un don entre vifs. Le don au destinataire du transfert est le solde du compte au moment du décès de l'auteur du transfert. La preuve concernant l'intention de l'auteur du transfert lors de l'ouverture d'un compte conjoint dépend des circonstances de l'affaire, mais elle peut inclure le libellé des documents bancaires, le contrôle et l'utilisation des fonds placés dans le compte, la signature d'une procuration, le traitement fiscal du compte. La cour peut aussi examiner les éléments de preuve postérieurs au transfert, à condition que cette preuve soit pertinente quant à l'intention de l'auteur du transfert au moment du transfert.

Étant donné qu'une justification principale de la présomption d'avancement est l'obligation des parents de subvenir aux besoins de leurs enfants à charge, cette présomption ne s'applique pas lorsqu'il s'agit d'enfants adultes autonomes. Par conséquent, en l'espèce, le juge de première instance a commis une erreur en appliquant la présomption d'avancement puisque P n'était pas une enfant mineure. Bien que la présomption de fiducie résultoire aurait donc dû être appliquée, cette erreur n'a changé en rien l'issue du pourvoi puisque la preuve a clairement démontré l'intention du père que le solde des comptes qu'il détenait conjointement avec P lui soit dévolu après son décès par effet de son droit de survie.

Abella, J. (souscrivant au résultat des juges majoritaires): Rien ne justifierait que l'on dénature la common law en limitant désormais l'application de la présomption d'avancement aux enfants mineurs, alors que l'affection parentale dure toute la vie. Puisque l'on considère que cette présomption découle tout autant de l'affection des parents que de la dépendance des enfants et que cette affection tient à la nature même du lien parental et non à la dépendance des enfants, la présomption d'avancement devrait logiquement s'appliquer à tous les transferts à titre gratuit effectués par un père ou une mère en faveur de leur enfant, indépendamment de l'âge ou du degré de dépendance de l'enfant ou du parent. En outre, l'intention d'un parent de confier à son enfant adulte la gestion de ses finances pendant sa vie n'est pas vraiment incompatible avec l'intention de faire don à cet enfant des fonds placés dans un compte conjoint. Par conséquent, le juge de première instance a appliqué correctement la présomption d'avancement aux faits de l'espèce.

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Mailman, Re (1941), [1941] S.C.R. 368, 1941 CarswellNS 23, [1941] 3 D.L.R. 449 (S.C.C.) — referred to

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s. 31 — referred to

s. 31(1) — referred to

s. 32 — referred to

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s. 73 — referred to

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s. 31(1) — referred to

Family Law Act, S.N.W.T. 1997, c. 18
s. 46(1) — referred to

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s. 14 — referred to

s. 14(a) — referred to

s. 14(b) — referred to

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s. 14(1) — referred to

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s. 50(1) — referred to

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s. 7(2) — referred to

Matrimonial Property Act, R.S.N.S. 1989, c. 275
s. 21(1) — referred to

Marital Property Act, S.N.B. 1980, c. M-1.1
s. 15(1) — referred to

Statute of Uses, 1535 (27 Hen. 8), c. 10
Generally — referred to

APPEAL by ex-husband from judgment reported at *Pecore v. Pecore* (2005), 2005 CarswellOnt 4043, 19 E.T.R. (3d) 162, 17 R.F.L. (6th) 261, 202 O.A.C. 169 (Ont. C.A.), dismissing his appeal from judgment denying him share of deceased father-in-law's estate.

POURVOI de l'ex-mari à l'encontre de l'arrêt publié à *Pecore v. Pecore* (2005), 2005 CarswellOnt 4043, 19 E.T.R. (3d) 162, 17 R.F.L. (6th) 261, 202 O.A.C. 169 (Ont. C.A.), qui avait rejeté son pourvoi à l'encontre de l'arrêt qui lui avait nié de partager dans la succession de feu son beau-père.

***Rothstein J.*:**

I. Introduction

1 This appeal involves questions about joint bank and investment accounts where only one of the account holders deposits funds into the account. These types of joint accounts are used by many Canadians for a variety of purposes, including estate-planning and financial management. Given their widespread use, the law relating to how these accounts are to be treated by courts after the death of one of the account holders is a matter appropriate for this court to address.

2 Depending on the terms of the agreement between the bank and the two joint account holders, each may have the legal right to withdraw any or all funds from the accounts at any time and each may have a right of survivorship. If only one of the joint account holders is paying into the account and he or she dies first, it raises questions about whether he or she intended to have the funds in the joint account go to the other joint account holder alone or to have those funds distributed according to his or her will. How to answer this question is the subject of this appeal.

3 In the present case, an ageing father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter, who was one of his adult children. The father alone deposited funds into the accounts. Upon his death, a balance remained in the accounts.

4 It is not disputed that the daughter took legal ownership of the balance in the accounts through the right of survivorship. Equity, however, recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "[t]he real owner of property even though it is in someone else's name": *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570. The question is whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will.

5 While the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, intention is often difficult to ascertain, especially where the transferor is deceased. Common law rules have developed to guide a court's inquiry. This appeal raises the following issues:

1. Do the presumptions of resulting trust and advancement continue to apply in modern times?

2. If so, on what standard will the presumptions be rebutted?

3. How should courts treat survivorship in the context of a joint account?

4. What evidence may courts consider in determining the intent of a transferor?

6 In this case, the trial judge found that the father actually intended a gift and held that his daughter may retain the assets in the accounts. The Court of Appeal dismissed the appeal of the daughter's ex-husband.

7 I conclude that there is no basis to overturn this result. The appeal should be dismissed.

II. Facts

8 The dispute is between Paula Pecore and her ex-husband Michael Pecore regarding who is entitled to the assets held in joint accounts between Paula and her father upon her father's death. The assets in the joint accounts in dispute totalled almost $1,000,000 at the time Paula's father died in 1998.

9 Paula has two siblings but of the three, she was the closest to their father. In fact, her father was estranged from one of her sisters until shortly before his death in 1998. Unlike her siblings who were financially secure, Paula worked at various low-paying jobs and took care of her quadriplegic husband Michael. Her father helped her and her family financially by, for example, buying them a van, making improvements to their home, and assisting her son while he was attending university.

10 In 1993, Paula's father was told by a financial advisor that by placing his assets in joint ownership, he could avoid "the payment of probate fees and taxes and generally make after-death dispositions less expensive and less cumbersome" ((2004), 7 E.T.R. (3d) 113 (Ont. S.C.J.), at para. 7). In February of 1994, he began transferring some of his assets which were mainly either in bank accounts or in mutual funds to himself and to Paula jointly, with a right of survivorship (*ibid.*, at para. 6). In 1996, Paula's father was advised by his accountant that for tax purposes, transfers to his daughter (as opposed to a spouse) could trigger a capital gain, with the result that tax on the gain would be due as of the year of disposition. As a result, Paula's father wrote letters to the financial institutions purporting to deal with the tax implications. In these letters he stated that he was "the 100% owner of the assets and the funds are not being gifted to Paula" (*ibid.*, at para. 10).

11 Paula's father continued to use and control the accounts after they were transferred into joint names. He declared and paid all the taxes on the income made from the assets in the accounts. Paula made some withdrawals but was required to notify her father before doing so. According to her, this was because her father wanted to ensure there were sufficient funds available for her to withdraw.

12 In early 1998, Paula's father drafted what was to be his last will. By this time, he had already transferred the bulk of his assets into the joint accounts with Paula. For the first time, he named Michael in his will. The will left specific bequests to Paula, Michael and her children (whom Michael had adopted), but did not mention the accounts. The residue of the estate was to be divided equally between Paula and Michael.

13 The lawyer who drafted the will testified that he asked Paula's father "about such things as registered retirement savings plans, R.R.I.F.s, registered pension plans, life insurance, and in each case satisfied [him]self that they were not items which would pass as the result of a will and so that they needn't be included in the will" (*ibid.*, at para. 37). There was no discussion about the joint investment and bank accounts.

14 In 1998, Paula's father moved into Paula and Michael's house. In 1997 and 1998, the father had expressed to others, including one of Paula's sisters, that he was going to take care of Paula after his death, but said the "system" would take care of Michael.

15 Paula's father died in December 1998. His estate paid tax on the basis of a deemed disposition of the accounts to Paula immediately before his death.

16 Paula and Michael later divorced. The dispute over the accounts arose during their matrimonial property proceedings.

III. Judicial History

A. Ontario Superior Court of Justice (2004), 7 E.T.R. (3d) 113 (Ont. S.C.J.)

17 The trial judge looked at the operation of the presumption of a resulting trust and the presumption of advancement and found that the latter applied given Paula's relationship with her father. Karam J. concluded that the evidence failed to rebut the presumption of advancement and held that the money in the joint accounts therefore belonged to Paula. He found that the evidence clearly indicated that Paula's father intended to gift the beneficial ownership of those assets held in joint ownership to her while he continued to manage and control them on a day-to-day basis before his death.

B. Ontario Court of Appeal (2005), 19 E.T.R. (3d) 162 (Ont. C.A.)

18 The Court of Appeal agreed with the trial judge that there was ample evidence to show that Paula's father intended to give Paula beneficial interest in his investments when he placed them in joint ownership. As a result, Lang J.A. found that it was not necessary to rely on the presumption of advancement, saying that a presumption is only relevant when evidence of actual intention is evenly balanced or when there is no evidence of actual intention.

IV. Analysis

A. Do the Presumptions of Resulting Trust and Advancement Continue to Apply in Modern Times?

19 A discussion of the treatment of joint accounts after the death of the transferor must begin with a consideration of the common law approach to ascertaining the intent of the deceased person.

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C. S.C.).

21 Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to *advance* his children in the world": A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 573 (emphasis added).

22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Mailman, Re*, [1941] S.C.R. 368 (S.C.C.), at p. 374; *Niles v. Lake*, [1947] S.C.R. 291 (S.C.C.); *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 451; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

23 For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597 (Ont. C.A.), the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

1. The Presumption of Resulting Trust

24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

2. The Presumption of Advancement

27 The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead: see *Waters' Law of Trusts*, at p. 378. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.

28 Historically, the presumption of advancement has been applied in two situations. The first is where the transferor is a husband and the transferee is his wife: *Hyman v. Hyman*, [1934] 4 D.L.R. 532 (S.C.C.), at p. 538. The second is where the transferor is a father and the transferee is his child, which is at issue in this appeal.

29 One of the earliest documented cases where a judge applied the presumption of advancement is the 17th century decision in *Lord Grey v. Lady Grey* (1677), 23 E.R. 185, [1677] Rep. t. F. 338 (Eng. Ch.):

> ...the Law will never imply a *Trust*, because the natural Consideration of Blood, and the Obligation which lies on the Father in Conscience to provide for his Son, are predominant, and must over-rule all manner of Implications. [Underlining added; p. 187.]

30 As stated in *Lord Grey*, the traditional rationale behind the presumption of advancement between father and child is that a father has an obligation to provide for his sons. See also *Oosterhoff on Trusts*, at p. 575. The presumption also rests on the assumption that parents so commonly intend to make gifts to their children that the law should presume as much: *ibid.*, at pp. 581 and 598.

31 While historically the relationship between father and child gave rise to the presumption of advancement, courts in Canada have been divided as to whether the relationship between mother and child does as well. Some have concluded that it does not: see e.g. *Lattimer v. Lattimer* (1978), 18 O.R. (2d) 375 (Ont. H.C.), relying on Cartwright J.'s concurring judgment in *Edwards v. Bradley*, [1957] S.C.R. 599 (S.C.C.). Others have found that it does: see e.g. *Rupar v. Rupar* (1964), 49 W.W.R. 226 (B.C. S.C.); *Dagle v. Dagle* (1990), 38 E.T.R. 164 (P.E.I. C.A.); *Wilson, Re* (1999), 27 E.T.R. (2d) 97 (Ont. Gen. Div.). In concluding that the presumption applies to mothers and children in *Wilson, Re*, Fedak J., at para. 50, took into consideration "the natural affection between a mother and child, legislative changes requiring mothers to support their children, the economic independence of women and the equality provisions of the Charter".

32 The question of whether the presumption applies between mother and child is not raised in these appeals, as the transfers in question occurred between a father and daughter, but I shall deal with it briefly. Unlike when the presumption of advancement was first developed, women today have their own financial resources. They also have a statutory obligation to financially support their children in the same way that fathers do. Section 26.1(2) of the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), for instance, refers to the "principle" that spouses have a "joint financial obligation to maintain the children", and s. 31(1) of the

Family Law Act, R.S.O. 1990, c. F.3, provides that "[e]very parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so." Oosterhoff et al. have also commented on this issue in *Oosterhoff on Trusts*, saying at p. 575, "Mothers and fathers are now under equal duties to care for their children and are equally likely to intend to make gifts to them.... In Canada, it is now accepted that mothers and fathers should be treated equally."

33 I agree. As women now have both the means as well as obligations to support their children, they are no less likely to intend to make gifts to their children than fathers. The presumption of advancement should thus apply equally to fathers and mothers.

34 Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at paras. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents' financial affairs:

> Just as Dickson J. considered "present social conditions" in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.
>
> Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

35 Heeney J. also noted that the fact that the child was independent and living away from home featured very strongly in Kerwin C.J.'s reasons for finding that no presumption of advancement arose in *Edwards v. Bradley*. A similar conclusion was reached by Klebuc J., as he was then, in *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), at para. 19: "I have serious doubts as to whether presumption of advancement continues to apply with any degree of persuasiveness in Saskatchewan in circumstances where an older parent has transferred property to an independent adult child who is married and lives apart from his parent." Waters et al., too in *Waters' Law of Trusts*, at p. 395, said: "It may well be that, reflecting the financial dependency that it probably does, contemporary opinion would accord [the presumption of advancement] little weight as between a father and an independent, adult child."

36 I am inclined to agree. First, given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children. As Heeney J. noted in *McLear*, at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

37 Some commentators and courts have argued that while an adult, independent child is no longer financially dependent, the presumption of advancement should apply on the basis of parental affection for their children: see e.g., *Madsen Estate*, at

para. 21; *Dagle*; *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Gen. Div.); and *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.).

I do not agree that affection is a basis upon which to apply the presumption of advancement to the transfer. Indeed, the factor of affection applies in other relationships as well, such as between siblings, yet the presumption of advancement would not apply in those circumstances. However, I see no reason why courts cannot consider evidence relating to the quality of the relationship between the transferor and transferee in order to determine whether the presumption of a resulting trust has been rebutted.

38 The remaining question is whether the presumption of advancement should apply in the case of adult dependent children. In the present case the trial judge, at paras. 26-28, found that Paula, despite being a married adult with her own family, was nevertheless dependent on her father and justified applying the presumption of advancement on that basis.

39 The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.

40 As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regards to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41 There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

B. On What Standard Will the Presumptions Be Rebutted?

42 There has been some debate amongst courts and commentators over what amount of evidence is required to rebut a presumption. With regard to the presumption of resulting trust, some cases appear to suggest that the criminal standard, or at least a standard higher than the civil standard, is applicable: see e.g. *Bayley v. Trusts & Guarantee Co.* (1930), [1931] 1 D.L.R. 500 (Ont. C.A.), at p. 505; *Johnstone v. Johnstone* (1913), 12 D.L.R. 537 (Ont. C.A.), at p. 539. As for the presumption of advancement, some cases seem to suggest that only slight evidence will be required to rebut the presumptions: see e.g. *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), at p. 814; *McGrath v. Wallis*, [1995] 2 F.L.R. 114 (Eng. C.A.), at pp. 115 and 122; *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250 (Man. C.A.), at para. 31.

43 The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumptions: *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (Ont. C.A.), at paras. 5-21; *Lohia v. Lohia* (January 1, 2001) (Eng. C.A.), at paras. 19-21; *Dagle*, at p. 210; *Wilson, Re*, at para. 52. See also Sopinka et al., at p. 116. This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The 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. Thus, as discussed by Sopinka et al. in

The Law of Evidence in Canada, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

C. How Should Courts Treat Survivorship in the Context of a Joint Account?

45 In cases where the transferor's proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime (regardless of whether or not the transferee chose to exercise that right) and also to gift the balance of the account to the transferee alone on his or her death through survivorship, courts have had no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor's death.

46 In certain cases, however, courts have found that the transferor gratuitously placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship: see e.g. *Standing v. Bowring* (1885), 31 Ch. D. 282 (Eng. C.A.), at p. 287; *Edwards v. Bradley*, [1956] O.R. 225 (Ont. C.A.), at p. 234; *Yau Estate*, at para. 25.

47 There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. A typical reason is that the transferor wishes to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is ageing or disabled. At the same time, the transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

48 Courts have understandably struggled with whether they are permitted to give effect to the transferor's intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to ariseonly on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: see e.g. *Hill v. Hill* (1904), 8 O.L.R. 710 (Ont. H.C.), at p. 711; *Larondeau v. Laurendeau*, [1954] O.W.N. 722 (Ont. H.C.); Hodgins J.A.'s dissent in *Reid, Re* (1921), 64 D.L.R. 598 (Ont. C.A.). For the reasons that follow, however, I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature. This has also been the conclusion of the weight of judicial opinion in recent times: see e.g. *Mordo v. Nitting*, [2006] B.C.J. No. 3081, 2006 BCSC 1761 (B.C. S.C.), at paras. 233-38; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306 (N.S. S.C.), at para. 49; and *Reber v. Reber* (1988), 48 D.L.R. (4th) 376 (B.C. S.C.); see also *Waters' Law of Trusts*, at p. 406.

49 An early case that addressed the issue of the nature of survivorship is *Reid, Re* in which Ferguson J.A. of the Ontario Court of Appeal found that the gift of a joint interest was a "complete and perfect *inter vivos* gift" from the moment that the joint account was opened even though the transferor in that case retained exclusive control over the account during his lifetime. I agree with this interpretation. I also find MacKay J.A.'s reasons in *Edwards v. Bradley*, at p. 234, to be persuasive:

> The legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot be the subject of a testamentary disposition. If A's intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A's intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account. In either event B has the legal title and the only question that can arise on A's death is whether B is entitled to keep any money that may be in the account on A's death or whether he holds it as a trustee under a resulting trust for A's estate. [Emphasis added.]

Edwards v. Bradley was appealed to the Supreme Court of Canada but the issue of survivorship was not addressed.

50 Some judges have found that a gift of survivorship cannot be a complete and perfect *inter vivos* gift because of the ability of the transferor to drain a joint account prior to his or her death: see e.g. Hodgins J.A.'s dissent in *Reid, Re*. Like the Ontario Court of Appeal in *Reid, Re*, at p. 608, and *Edwards v. Bradley*, at p. 234, I would reject this view. The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee's survivorship interest in the account balance — whatever it may be — at the time of the transferor's death, not to any particular amount.

51 Treating survivorship in these circumstances as an *inter vivos* gift of a joint interest has found favour in other jurisdictions, including the United Kingdom and Australia: see *Russell v. Scott* (1936), 55 C.L.R. 440 (Australia H.C.), at p. 455; *Young v. Sealey*, [1949] 1 All E.R. 92 (Eng. Ch. Div.), at pp. 107-8; (in *obiter*) *Aroso v. Coutts & Co* (2001), [2002] 1 All E.R. (Comm) 241 (Eng. Ch.), at paras. 29 and 36.

52 While not entirely analogous, the American notion of the "Totten trust" (sometimes referred to as the "Bank account trust") is now recognized as valid in most states in the United States; an individual places money in a bank account with the instruction that upon his or her death, whatever is in that bank account will pass to a named beneficiary: see *Restatement (Third) of Trusts* (2003), at para. 26 of Part 2, Chapter 5. The Totten trust is so named for the leading case establishing its validity: see *Totten, Re*, 179 N.Y. 112 (U.S. N.Y. Ct. App. 1904). While a Totten trust does not deal with joint accounts as such, it recognizes the practicality of the depositor having control of an account during his or her lifetime but allowing the depositor's named beneficiary of that account to claim the funds remaining in the account upon the death of the depositor without the disposition being treated as testamentary: see e.g. *Berson, Re*, 566 N.Y.S.2d 74 (U.S. N.Y. 1991); *Halpern's Estate, Re*, 303 N.Y. 33 (U.S. N.Y. Ct. App. 1951).

53 Of course, the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

54 Should the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter.

D. What Evidence May a Court Consider in Determining Intent of the Transferor?

55 Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

1. Evidence Subsequent to the Transfer

56 The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so," to the transaction: see *Clemens v. Clemens Estate*, [1956] S.C.R. 286 (S.C.C.), at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456 (Eng. Ch.). Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in *Shephard v. Cartwright* (1954), [1955] A.C. 431 (U.K. H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153:

> The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them....

The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in *Dreger*, at para. 33: "Self-serving statements after the event are too easily fabricated in order to bring about a desired result."

57 Some courts, however, have departed from the restrictive — and somewhat abstruse — rule in *Shephard v. Cartwright*. In *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. C.A.), for example, a brother transferred land to his sister 8 years before he died and the trial judge considered the conduct of the parties during the years after the transfer to see whether they treated the land as belonging beneficially to the brother or the sister.

58 The rule has also lost much of its force in England. In *Lavelle v. Lavelle* (January 1, 2004) (Eng. C.A.) at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case:

> It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. [Emphasis added.]

59 Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartwright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Taylor* (1879), 2 S.C.R. 616 (S.C.C.). The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

2. Bank Documents

60 In the past, this Court has held that bank documents that set up a joint account are an agreement between the account holders and the bank about legal title; they are not evidence of an agreement between the account holders as to beneficial title: see *Niles* and *Mailman, Re.*

61 While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at p. 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry.

3. Control and Use of the Funds in the Account

62 There is some inconsistency in the caselaw as to whether a court should consider evidence as to the control of joint accounts following the transfer in ascertaining the intent of the transferor with respect to the beneficial interest in the joint account. In the present case, for example, Paula's father continued to manage the investments and to pay the taxes after establishing the joint accounts. The Court of Appeal, at para. 40, held that this factor was not determinative of Paula's father's intentions: "[w]hile control can be consistent with an intention to retain ownership, it is also not inconsistent in this case with an intention to gift the assets." In contrast, in *Madsen Estate*, at para. 34, one of the main factors the Court of Appeal relied on to show that the father did not intend to create a beneficial joint tenancy was that he remained in control of the accounts, and that he paid the taxes on the interest earned on the funds in the accounts.

63 I am of the view that control and use of the funds, like the wording of the bank documents, should not be ruled out in the ascertainment of the transferor's intention. For example, the transferor's retention of his or her exclusive beneficial interest in the account in his or her lifetime may support the finding of a resulting trust, unless other evidence proves that he or she intended to gift the right of survivorship to the transferee. However, evidence of use and control may be of marginal assistance only and, without more, will not be determinative for three reasons.

64 First, it may be that the dynamics of the relationship are such that the transferor makes the management decisions. He or she may be more experienced with the accounts. This does not negate the beneficial interest of the other account holder. Conversely, evidence that a transferee controlled the funds does not necessarily mean that the transferee took a beneficial interest. Ageing parents may set up accounts for the sole purpose of having their adult child manage their funds for their benefit.

65 Second, in cases involving an ageing parent and an adult child, it may be that the transferee, although entitled both legally and beneficially to withdraw funds, will refrain from accessing them in order to ensure there are sufficient funds to care for the parent for the remainder of the parent's life.

66 Finally, as previously discussed, the fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor's death through the gift of the right of survivorship.

4. Granting of Power of Attorney

67 Courts have also relied to varying degrees on the transferor's granting of a power of attorney to the transferee in determining intent. The Court of Appeal in *Madsen Estate*, at para. 72, noted that the transferor had granted the transferee power of attorney but did not view it "as a factor that suggested that the joint account was not set up merely as a tool of convenience for mutual access to funds". The Court of Appeal in the present case, on the other hand, placed substantial weight on Paula's father having given her both joint ownership of the accounts and power of attorney in finding that he intended to gift the assets to her. Lang J.A. reasoned, at para. 34, that had Paula's father intended only for Paula to assist in the managing of the accounts, this could have been accomplished solely by giving her power of attorney: "With that power of attorney, joint ownership of the investments was unnecessary unless [Paula's father] intended something more: to ensure the investments were given to Paula and to avoid probate fees, both entirely legitimate purposes." Lang J.A. also found, at para. 35, that the weight to be afforded a particular piece of evidence is a matter within a trial judge's discretion.

68 I share Lang J.A.'s view that the trier of fact has the discretion to consider the granting of power of attorney when deciding the transferor's intention. This will be especially true when other evidence suggests that the transferor appreciated the distinction between granting that power and gifting the right of survivorship. Again however, this evidence will not be determinative and courts should use caution in relying upon it, because it is entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will. For example, the transferor may have granted power of attorney in order to have assistance with other affairs beyond the account and may have made the transferee a joint account holder solely for added convenience.

5. Tax Treatment of Joint Accounts

69 Courts have relied to varying degrees on the transferor's tax treatment of the account in determining intent. In *Madsen Estate*, the trial judge relied in part on the fact that the transferor was the one who declared and paid income tax on the money in the joint accounts in finding that the transferor intended a resulting trust ((2004), 13 E.T.R. (3d) 44 (Ont. S.C.J.), at para. 29). In the present case, at para. 44, the trial judge noted that Paula's father continued to pay taxes on the income in joint accounts but nevertheless found that he intended to gift the joint accounts to her. I do not find either of these approaches inappropriate. The weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge. However, whether or not a transferor continues to pay taxes on the income earned in the joint accounts during his or her lifetime should not be determinative of his or her intention in the absence of other evidence. For example, it may be that the transferor made the transfer for the sole purpose of obtaining assistance in the management of his or her finances and wished to have the assets form a part of his or her estate upon his or her death. Or, as discussed above, it is open to a transferor to gift the right of survivorship to the transferee when the joint accounts are opened, but to retain control over the use of the funds in the accounts (and therefore to continue to pay taxes on them) during his or her lifetime.

70 As for the matter of taxes on capital gains, it was submitted to this Court that for public policy reasons, transferors should not be permitted to transfer beneficial title while asserting to the tax authorities that such title has not been passed in order to defer or avoid the payment of taxes: appellant's factum, at p. 24. In principle, I agree. Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, where the transferor's intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account: see s. 73 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). That said, the issue of the proper treatment of capital gains in the setting up of joint accounts was not argued in this appeal. I can say no more than these are matters for determination between the Canada Revenue Agency and taxpayers in specific cases.

E. Should the Decision of the Trial Judge Be Overturned?

71 The trial judge in the present case found that, at the time of the transfers, Paula and her father had a very close relationship and that Paula "clearly was the person, other than his wife, that he was closest to and most concerned about" (para. 32). Given this relationship and her financial hardships, her father preferred her over her siblings. Indeed, he was estranged from one of his daughters at the time the accounts were set up (para. 25). While he may have grown close to his son-in-law, the trial judge concluded they were simply "good friends" (para. 38). Moreover, his wife was seriously ill and not expected to outlive him.

72 Paula and her family relied on her father for financial assistance. While he maintained control of the accounts and used the funds for his benefit during his life, the trial judge found his concern lay with providing for Paula after his death. This is consistent with an intention to gift a right of survivorship when the accounts were set up.

73 The statements of Paula's father while drafting his last will are also an important indicator of intention. Although the statements were made in years subsequent to the transfer, the trial judge considered the lawyer's testimony about them reliable. The lawyer had nothing to gain from his testimony. This evidence indicates that Paula's father was of the view that the accounts had already been dealt with and understood these assets would not form part of the estate. I agree with the trial judge that "if [the father's] intention was to have his jointly held assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor, since they constituted a substantial proportion of what he owned" (para. 43), particularly after the lawyer asked him about life insurance policies, RRIFs and other assets. All of this evidence is consistent with Paula's father havinggifted away the right of survivorship when the joint accounts were opened, and thus is relevant to his intention at the time of the transfer.

74 There is of course the issue of Paula's father writing to financial institutions saying that the transfers were not gifts to Paula. Consistent with these letters, Paula's father continued to control the funds in the accounts and paid income tax on the earnings of the investments before his death. The trial judge found that Paula's father's intention when he wrote the letters was "simply to avoid triggering an immediate deemed disposition of the assets in question, and therefore avoid capital gains taxes" (para. 39). I agree with the trial judge that this is not inconsistent with an intention that the balance remaining in the accounts would belong to Paula on his death.

75 The trial judge erred in applying the presumption of advancement. Paula, although financially insecure, was not a minor child. Karam J. should therefore have applied the presumption of a resulting trust. Nonetheless, this error does not affect the ultimate disposition of the appeal because the trial judge found that the evidence "clearly demonstrate[d] the intention" on the part of the father that the balance left in the joint accounts he had with Paula were to go to Paula alone on his death through survivorship (para. 44). I am satisfied that this strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.

V. Disposition

76 For the reasons above, I would dismiss this appeal, with costs. Michael Pecore asked this Court for costs throughout from Paula or the estate. As noted in the judgment of the Ontario Court of Appeal, at para. 48, the trial judge denied Michael costs out of the estate or from Paula. He did so because he found that on the issues raised in the divorce proceeding, success was divided, Paula made an offer to settle that exceeded the result, and Michael's conduct was "less than candid". I see no reason to interfere with that disposition, or that costs should not follow the event in this Court.

Abella J.:

77 Tolstoy wrote at the beginning of *Anna Karenina* that "Happy families are all alike, every unhappy family is unhappy in its own way". That unhappiness often finds its painful way into a courtroom.

78 This appeal involves a father who opened joint bank accounts with his daughter, signing documents that specifically confirmed that the daughter was to have a survivorship interest. The daughter's entitlement to the remaining funds in the accounts

was challenged by her ex-husband. The trial judge, who was upheld in the Court of Appeal ((2005), 19 E.T.R. (3d) 162 (Ont. C.A.)), applied the presumption of advancement and concluded that the father's intention was to make a gift of the money to his daughter ((2004), 7 E.T.R. (3d) 113 (Ont. S.C.J.)). In the companion appeal, *Saylor v. Madsen Estate*, 2007 SCC 18 (S.C.C.), the daughter's entitlement to the funds was challenged by her siblings. The trial judge applied the presumption of resulting trust rather than the presumption of advancement, and concluded that the father had *not* intended to make a gift to his daughter ((2004), 13 E.T.R. (3d) 44 (Ont. S.C.J.)). The issue in both appeals is which presumption applies and what the consequences of its application are.

Analysis

79 Historically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child's age. If we are to continue to retain the presumption of advancement for parent-child transfers, I see no reason, unlike Rothstein J., to limit its application to non-adult children. I agree with him, however, that the scope of the presumption should be expanded to include transfers from mothers as well as from fathers.

80 The presumptions of advancement and resulting trust are legal tools which assist in determining the transferor's intention at the time a gratuitous transfer is made. The tools are of particular significance when the transferor has died.

81 If the presumption of advancement applies, an individual who transfers property into another person's name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership. The burden of proving that a gift *was* intended, is on the recipient of the transfer.

82 There is an ongoing academic and judicial debate about whether the presumptions, and particularly the presumption of resulting trust, ought to be removed entirely from the judicial tool box in assessing intention. E. E. Gillese and M. Milczynski offer the following criticism, echoed by others, in *The Law of Trusts* (2nd ed. 2005):

> ... modern life has caused many to question the utility of the presumptions. When I voluntarily transfer title to property to another, is it more sensible to assume that I have made a gift or that I transferred title under the assumption that the transferee would hold title for me? Surely, it is more likely that, had I intended to create a trust, I would have taken steps to expressly create the trust and document it. It is more plausible to presume the opposite to that which equity presumed. If someone today gives away property, it is at least as likely that he intended a gift as that they intended to create some type of trust. And, if they did intend to create a trust, they should be held to the requirements that exist for express trusts and not be favoured by the presumption of a resulting trust. The fact that the presumption is out of step with modern thought explains the courts' new approach to such cases, which is to look at all the evidence with an open mind and attempt to determine intention on that basis. If that were the end of the matter, we could say that the presumption of resulting trust had been eradicated. Unfortunately, the courts have not gone that far, and the presumption will operate where the evidence is unclear. [pp. 109-10]

83 Similarly, in *Nelson v. Nelson* (1995), 184 C.L.R. 538 (Australia H.C.), the High Court of Australia dealt with a case involving a mother's purchase of a house which she then transferred into the names of her children. In his concurring reasons, McHugh J. made the following comments about the presumption of resulting trust:

> No doubt in earlier centuries, the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property. But times change. To my mind — and, I think, to the minds of most people — it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee. ...
>
> A presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs existed or has occurred. ... If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them. [Emphasis added; p. 602]

84 McHugh J.'s allusion to "earlier centuries" reflects the origins of the presumption of resulting trust. In the 15th century, it was not uncommon for landowners in England to have title to their property held by other individuals on the understanding that it was being held for the "use" of the landowner and subject to his direction. This had the effect of separating legal and beneficial ownership. The purpose of the scheme was to avoid having to pay feudal taxes when land passed from a landowner to his heir.

85 It became so common for owners to transfer land to be held for their own use, that the courts began to *presume* that a transfer made without consideration, or gratuitously, was intended to be for the transferor's own use, giving rise to the presumption of resulting use. Because these nominal transfers caused a significant loss of revenue to the Crown, the *Statute of Uses, 1535* was enacted, which "executed the use", reuniting legal and equitable title (R. Chambers, "Resulting Trusts in Canada" (2000), 38 *Alta. L. Rev.* 378; *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.)).

86 The presumption of resulting trust is the vestigial doctrine that emerged from the evolutionary remains of the executed use. The presumption of advancement, on the other hand, evolved as a limited exception to the presumption of resulting trust, generally arising in two situations: when a gratuitous transfer was made by a father to his child; and when a gratuitous transfer was made by a husband to his wife.

87 The traditional presumption of advancement as between husband and wife has been largely abandoned, both judicially (*Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.)) and legislatively (New Brunswick, *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 15(1); Prince Edward Island, *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 14(1); Nova Scotia, *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 21(1); Newfoundland and Labrador, *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 31(1); Ontario, *Family Law Act*, R.S.O. 1990, c. F.3, s. 14; Northwest Territories and Nunavut, *Family Law Act*, S.N.W.T. 1997, c. 18, s. 46(1); Saskatchewan, *The Family Property Act*, S.S. 1997, c. F-6.3, s. 50(1); Yukon, *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 7(2)).

88 But in the case of gratuitous transfers to children, the presumption "appears to retain much of its original vigour" (D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 381). As noted by Cullity J. in *Yau Estate*, at para. 35:

> [I]t would be a mistake to extrapolate the treatment of the equitable presumptions in *Rathwell* out of their matrimonial property context to other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children.

89 Rothstein J. rejects parental affection as being a basis for the presumption, stating that "a principal justification for the presumption of advancement" in the case of gratuitous transfers to children was the "parental obligation to support their dependent children" (para. 36). With respect, this narrows and somewhat contradicts the historical rationale for the presumption. Parental affection, no less than parental obligation, has always grounded the presumption of advancement.

90 It is in fact the rationale of parental affection that was cited in *Waters' Law of Trusts in Canada* as an explanation for the longevity of the presumption of advancement in transfers to children:

> The presumption of advancement between father and child has not been subjected to the same re-evaluation which in recent years has overtaken the presumption between husband and wife. ... The factor of affection continues to exist, something which cannot be presumed in the relationship between strangers, and possibly for this reason the courts have seen no reason to challenge its modern significance. [Emphasis added; p. 395.]

91 In his article, "Reassessing Gratuitous Transfers by Parents to Adult Children" ((2006), 25 *E.T.P.J.* 174), Prof. Freedman acknowledges that while the "original rationale of the advancement rule is somewhat difficult to pin down" (p. 190), it did not arise only from the parental obligation to provide support for dependent children:

> Would that satisfaction of legal obligations was the explicit rationale of the presumption of advancement in the older cases; unfortunately, the authorities are inconsistent in approach and lead to little certainty in justifying doctrine. Indeed,

this was decidedly an inquiry into gifting, not compelling support payments, and gratuitous transfers were recognized as advancements in a number of situations that are problematic for this elegant explanation of the equitable doctrine — for example, where the donee was of legal age and even independent of his father, or was already provided for, or was illegitimate, or where the *loco parentis* principle was liberally applied to a wider class of people that would not be the object of any enforceable legal obligation. While later cases have gone on to demonstrate the highly refined skills of both counsel and judges in distinguishing one case from another based on factual considerations in determining whether the presumption ought to apply in any given circumstance, I would suggest that no uniform principle can be found in the cases. The simple fact is that the extent of the obligation between the transferor and transferee was never the focus of the inquiry, only the probable intent of the transferor in seeking to retain the beneficial interest for himself in the context of a given relationship that on its face gave rise to reasonable expectations that such gifts might be forthcoming. [Emphasis added; pp. 190-91.]

92 Even at the elemental stage in the development of the doctrine, the court in *Lord Grey v. Lady Grey* (1677), 2 Swans. 594, 36 E.R. 742 (Eng. C.A.), identified natural affection as a rationale for the application of the presumption of advancement:

... For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law. ... [Emphasis added; p. 743.]

93 In *Yau Estate*, Cullity J. also observed that parental affection is a rationale for the presumption, leading Prof. Freedman in his article to conclude:

In other words, parental affection grounds the presumption and is the greatest indicator of the probable intent of the transferor. This is an attractive argument which I suggest most would agree accords with common experience. [p. 196]

94 Because parental affection has historically been seen as a basis for the presumption of advancement, it was routinely applied to adult as well as to minor children. In *Sidmouth v. Sidmouth* (1840), 48 E.R. 1254, 2 Beav. 477 (Eng. Rolls Ct.), for example, the court applied it in the case of a gratuitous transfer to an adult son, explaining:

As far as acts strictly contemporaneous appear, there does not appear to be anything to manifest an intention to make the son a trustee for the father. The circumstance that the son was adult does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred, but in the relation between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him, and it does not follow that because the reason for doing it is not known, there was no intention to advance at all. [Emphasis added; p. 1258.]

(See also *Scawin v. Scawin* (1841), 1 Y. & C. Ch. 65, 62 E.R. 792 (Eng. Ch.), and *Hepworth v. Hepworth* (1870), L.R. 11 Eq. 10 (Eng. Ch.).)

95 It is true, as was noted in *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at pp. 581-86, that some courts in the mid-90s began questioning whether the presumption of advancement should apply to transfers between parents and their adult children (see *Dreger (Litigation Guardian of) v. Dreger*, ((1994), 5 E.T.R. (2d) 250 (Man. C.A.), *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), and *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)).

96 But in most cases, the presumption of advancement continues to be applied to gratuitous transfers from parents to their children, regardless of age. In *Saylor v. Madsen Estate*, for example, the companion appeal, the Ontario Court of Appeal found that the trial judge erred in applying the presumption of resulting trust, concluding that "the presumption of advancement can still apply to transfers of property from a father to a child, including an independent adult child" ((2005), 261 D.L.R. (4th) 597 (Ont. C.A.), at para. 21).

97 And in this appeal, the Ontario Court of Appeal took no issue with the trial judge's application of the presumption of advancement to the transfer by the father, notwithstanding that the beneficiary of the transfer, his daughter, was an adult at the time. (See also *Young v. Young* (1958), 15 D.L.R. (2d) 138 (B.C. C.A.); *Royal Trust Corp. of Canada v. Walker*, [1984] B.C.J. No. 460 (B.C. S.C.); *Dagle v. Dagle* (1990), 38 E.T.R. 164 (P.E.I. C.A.); *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Gen. Div.); *Reain v. Reain* (1995), 20 R.F.L. (4th) 30 (Ont. Gen. Div.); *Sodhi v. Sodhi*, [1998] 10 W.W.R. 673 (B.C. S.C.); *Wilson, Re* (1999), 27 E.T.R. (2d) 97 (Ont. Gen. Div.); *Kappler v. Beaudoin*, [2000] O.J. No. 3439 (Ont. S.C.J.); *Clarke v. Hambly* (2002), 46 E.T.R. (2d) 166, 2002 BCSC 1074 (B.C. S.C. [In Chambers]); and *Plamondon v. Czaban* (2004), 8 E.T.R. (3d) 135, 2004 ABCA 161 (Alta. C.A.).

98 The origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children on their father or on the father's obligation to support his children. Natural affection also underlay the presumption that a parent who made a gratuitous transfer to a child of any age, intended to make a gift.

99 Rothstein J. relied too on the argument made in *McLear*, at paras. 40-41, against applying the presumption of advancement to adult children, namely, that since people are "living longer" and there are more aging parents who will require assistance in the managing of their daily financial affairs, it is "dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset".

100 This, with respect, seems to me to be a flawed syllogism. The intention to have an adult child manage a parent's financial affairs during one's lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for assuming that the desire to benefit them has been displaced. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance, intends to make a gift in gratitude for this assistance. In any event, if the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account without survivorship rights.

101 The fact that some parents may enter into joint bank accounts because of the undue influence of an adult child, is no reason to attribute the same impropriety to the majority of parent-child transfers. The operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child.

102 I see no reason to claw back the common law in a way that disregards the lifetime tenacity of parental affection by now introducing a limitation on the presumption of advancement by restricting its application to minor children. Since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship, not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to any of their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.

103 While, as Rothstein J. observes, affection arises in many relationships, familial or otherwise, it is not affection alone that had earned the presumption of advancement for transfers between father and child. It was the uniqueness of the parental relationship, not only in the legal obligations involved, but, more significantly, in the protective emotional ties flowing from the relationship. These ties are not attached only to the financial dependence of the child. Affection between siblings, other relatives, or even friends, can undoubtedly be used as an evidentiary basis for assessing a transferor's intentions, but the reason none of these other relationships has ever inspired a legal presumption is because, as a matter of common sense, none is as predictable of intention.

104 It seems to me that bank account documents which specifically confirm a survivorship interest, should be deemed to reflect an intention that what has been signed, is sincerely meant. I appreciate that in *Mailman, Re*, [1941] S.C.R. 368 (S.C.C.), *Niles v. Lake*, [1947] S.C.R. 291 (S.C.C.), and *Edwards v. Bradley*, [1957] S.C.R. 599 (S.C.C.), this Court said that the wording of bank documents was irrelevant in determining the intention behind joint bank accounts with respect to beneficial title. Fifty years

later, however, I have difficulty seeing any continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed.

105 It is significant to me that even though the presumption of advancement has generally been replaced in the spousal context by the presumption of resulting trust, it has nonetheless been conceptually retained in the case of spousal property which is jointly owned, such as joint bank accounts. Section 14(a) of the Ontario *Family Law Act*, for example, provides that "the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants". Section 14(b) further specifies that "money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a)".

106 Equally, a presumed intention of joint ownership in the case of jointly held property should apply to parent-child relationships, and the appropriate mechanism for achieving this objective, absent legislative intervention, is the application of the presumption of advancement.

107 The trial judge, whose conclusion was upheld by the Court of Appeal, properly applied the correct legal presumption to the facts of the case. Like Rothstein J., therefore, I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

End of Document

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.

2013 BCCA 367
British Columbia Court of Appeal

Bronson v. Hewitt

2013 CarswellBC 2452, 2013 BCCA 367, [2013] 10 W.W.R. 654, [2013] B.C.W.L.D. 7503, [2013] B.C.W.L.D. 7504, [2013] B.C.W.L.D. 7506, [2013] B.C.W.L.D. 7510, [2013] B.C.W.L.D. 7513, [2013] B.C.W.L.D. 7514, [2013] B.C.W.L.D. 7515, [2013] B.C.W.L.D. 7580, [2013] B.C.W.L.D. 7581, [2013] B.C.W.L.D. 7582, [2013] B.C.W.L.D. 7583, [2013] B.C.W.L.D. 7584, [2013] B.C.W.L.D. 7585, [2013] B.C.W.L.D. 7586, [2013] B.C.W.L.D. 7587, [2013] B.C.W.L.D. 7596, [2013] B.C.W.L.D. 7717, [2013] B.C.W.L.D. 7722, 236 A.C.W.S. (3d) 733, 343 B.C.A.C. 160, 41 C.P.C. (7th) 10, 50 B.C.L.R. (5th) 303, 586 W.A.C. 160, 90 E.T.R. (3d) 1

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis, Sr., Respondents (Plaintiffs) and Howard H. Hewitt, Appellant Respondent by Cross Appeal (Defendant) and A. Eugene Lewis, Respondent by Cross Appeal (Defendant) and Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper and Bull, Housser & Tupper LLP (Defendants)

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr., Respondents (Appellants by Cross Appeal) and A. Eugene Lewis, Appellant (Respondent by Cross Appeal) and Howard H. Hewitt, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, in his capacity as Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP (Defendants)

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr., Respondents (Plaintiffs) and Howard H. Hewitt, Appellant (Defendant) and A. Eugene Lewis, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP (Defendants)

Newbury, Chiasson, A. MacKenzie JJ.A.

Heard: June 10-12, 2013
Judgment: August 14, 2013 * **
Docket: Vancouver CA037941, CA037947, CA038299

Proceedings: varying *Bronson v. Hewitt* (2010), 58 E.T.R. (3d) 14, 2010 BCSC 169, 2010 CarswellBC 285 (B.C. S.C.); affirming *Bronson v. Hewitt* (2010), 58 E.T.R. (3d) 123, 90 C.P.C. (6th) 42, 2010 BCSC 871, 2010 CarswellBC 1514 (B.C. S.C.); affirming *Bronson v. Hewitt* (2010), 2010 CarswellBC 3136, 2010 BCSC 1638, 63 E.T.R. (3d) 71 (B.C. S.C.); affirming *Bronson v. Hewitt* (2011), 2011 BCSC 102, 2011 CarswellBC 126, 65 E.T.R. (3d) 71 (B.C. S.C.); affirming *Bronson v. Hewitt* (2011), 2011 BCSC 482, 2011 CarswellBC 933, 66 E.T.R. (3d) 19 (B.C. S.C.); affirming *Bronson v. Hewitt* (2011), 2011 BCSC 1115, 2011 CarswellBC 2172, 70 E.T.R. (3d) 8 (B.C. S.C.)

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Subject: Civil Practice and Procedure; International; Estates and Trusts; Evidence; Public; Torts

Related Abridgment Classifications

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

Civil practice and procedure

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XVI.6 Money in court and offers to settle
XVI.6.c Offers to settle under rules of practice
XVI.6.c.iii Form of offer and acceptance

Civil practice and procedure

XXII Judgments and orders
XXII.10 Currency in which judgment to be paid

Civil practice and procedure

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Civil practice and procedure

XXII Judgments and orders
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XXIV.5.a.iii Success divided among defendants
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Civil practice and procedure

XXIV Costs
XXIV.5 Persons entitled to or liable for costs
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Estates and trusts

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Estates and trusts

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Estates and trusts

III Trustees
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Estates and trusts

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Headnote

Civil practice and procedure --- Judgments and orders — Currency in which judgment to be paid

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Question of proper currency for award was one of mixed fact and law — Residency was not determinative of award of currency — Sale of Canadian asset made it appropriate that award should be in Canadian dollars — If payment had been made properly by HH, payment would have been made in Canadian funds — Payment was ordered in Canadian funds equivalent to value of funds in U.S. dollars, in amount of $522,000 Canadian — In all other respects, appeal and cross-appeal were dismissed.

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Special costs

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Plaintiffs were not entitled to special costs, as breach of trust by H and E did not reach level of misconduct needed

for this finding — H and E's conduct in litigation was reasonable, and any refusal to admit facts was not grounds for award of increased costs — In all other respects, appeal and cross-appeal were dismissed.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Multiple parties — Success divided among defendants — Bullock order

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Bullock and Sanderson orders were inappropriate in this case, as H and E could not be required to reimburse plaintiffs for amounts that they were liable to successful party M — Unsuccessful parties had not done anything to be made liable for any costs to be paid to M — In all other respects, appeal and cross-appeal were dismissed.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Multiple parties — Success divided among defendants — Sanderson order

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Bullock

and Sanderson orders were inappropriate in this case, as H and E could not be required to reimburse plaintiffs for amounts that they were liable to successful party M — Unsuccessful parties had not done anything to be made liable for any costs to be paid to M — In all other respects, appeal and cross-appeal were dismissed.

Estates and trusts --- Trusts — General principles — Nature of trust

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Given nature of proceedings, it was unrealistic to have co-trustees from each side of family, or for H or his nominee to act alone — Trustee without prior involvement in matter was needed to deal with outstanding issues, and opposing counsel were directed to find this trustee jointly — In all other respects, appeal and cross-appeal were dismissed.

Estates and trusts --- Trusts — Express trust — Termination — General principles

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Given nature of proceedings, it was unrealistic to have co-trustees from each side of family, or for H or his nominee to

act alone — Trustee without prior involvement in matter was needed to deal with outstanding issues, and opposing counsel were directed to find this trustee jointly — In all other respects, appeal and cross-appeal were dismissed.

Estates and trusts --- Trustees — Nature of trustee's office — Removal of trustee — Miscellaneous

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Given nature of proceedings, it was unrealistic to have co-trustees from each side of family, or for H or his nominee to act alone — Trustee without prior involvement in matter was needed to deal with outstanding issues, and opposing counsel were directed to find this trustee jointly — In all other respects, appeal and cross-appeal were dismissed.

Civil practice and procedure --- Judgments and orders — Interest on judgments — Prejudgment interest — Rate of

Appellants H and E were lawyers and brothers who established family trust in 1978 — H moved from Florida to remote property in British Columbia in 2000 — Trust was formed to vest brothers' shares in their business for benefit of their children — Friend of brothers HH became trustee, under disputed circumstances — Purchaser made offer to buy out trust, which HH insisted be cash deal — Purchaser agreed to buy business for $888,889 representing 55.5 percent share of business — H was not supportive of sale when he learned of it some time after sale took place — E was supportive of sale and helped to move deal through, — HH's intention was to terminate trust post-sale — Action was brought by H and children for order removing HH as trustee, with HH bringing separate action to determine beneficiaries of trust — HH was found to have breached trust by acting as sole trustee, although H had not known of appointment — HH's sale of property was found to be improvident and without authority, and beneficiaries were entitled to damages as result — E was found to have assisted in sale and resulting breach of trust — Counsel for E was not found to have played part in breach of trust — Beneficiaries were paid equal shares based on number of children in each family — Breach by HH was considered not to be in good faith, and did not fall within exception in trust — H was not confirmed as trustee and it was left to parties as to whether to remove HH as trustee, and whether to appoint new trustee — Damages were to be paid jointly and severally by HH and E to beneficiaries — HH claimed that trial judge failed to relieve him of liability under terms of trust, and otherwise misapprehended evidence — E asserted that there had been no knowing assistance in any breach of trust by HH — Plaintiffs cross-appealed on ground that trial judge erred in awarding proceeds and damages to beneficiaries — Plaintiffs also claimed that trial judge improperly found that trust had ceased to exist, that H should have been found to be co-trustee, and that HH should be removed — Appeal allowed in part — Cross-appeal dismissed — Court originally declined to order compound interest, and interest was allowed to stand — It was not open to appeal court to vary interest as set out by trial judge — In all other respects, appeal and cross-appeal were dismissed.

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671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 204 D.L.R. (4th) 542, 274 N.R. 366, 55 O.R. (3d) 782 (headnote only), [2001] 4 C.T.C. 139, 17 B.L.R. (3d) 1, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, 12 C.P.C. (5th) 1, 150 O.A.C. 12, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, (sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.*) 2002 C.L.L.C. 210-013 (S.C.C.) — considered

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s. 1 — referred to

s. 1(1) — considered

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s. 27(1) — referred to

s. 96 — considered

s. 99 — considered

Rules considered:

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R. 1-3(1) — referred to

R. 7-7 — referred to

APPEALS by trustees from six judgments, final additional reasons reported at *Bronson v. Hewitt* (2011), 2011 BCSC 1115, 2011 CarswellBC 2172, 70 E.T.R. (3d) 8 (B.C. S.C.), dealing with various issues; CROSS-APPEALS by plaintiffs dealing with various issues.

Newbury J.A.:

1 These appeals and cross appeal are brought from six sets of reasons for judgment the first of which was issued by Mr. Justice Goepel on February 8, 2010 after a trial of 68 days. Further applications and appearances by counsel continued until the final reasons were issued on August 17, 2011. At the start of his main reasons (indexed as 2010 BCSC 169 (B.C. S.C.)), the trial judge noted that the case had the "sweep of an historical novel", spanning events that took place over the course of 30 years. The reasons themselves remind one of an historical novel, occupying two large volumes and constituting a fact-intensive story of family conflict played out in the dry words of legal documents. I doubt, however, that anyone other than the parties will be interested in reading this "sequel"; and will therefore confine myself in these reasons to the issues raised on appeal and the facts necessary to explain them. I will use many of the defined terms set out in the "Glossary" at para. 7 of the February 2010 reasons.

Description of Actions

2 As the trial judge noted at para. 33 of his main judgment, the proceedings before him arose from the consolidation of three separate actions. The first proceeding was in respect of the shares of "GRO", a company with which we are not concerned on this appeal. The remaining two proceedings consisted of an action commenced in May 2005 by Mr. Bronson ("Tommy") and others seeking an order removing Mr. Hewitt ("Howard") as the trustee of the "Big Nine Trust"); and an action commenced in October 2005 by Howard, seeking *inter alia* a determination of the identity of the beneficiaries of that trust. The pleadings were then amended and expanded substantially, both before and after the consolidation order dated April 7, 2006, notably to allege various breaches of trust on the part of the defendants.

3 The final Amended Statement of Claim in the consolidated action was 43 pages long. I have attached as a schedule to these reasons the relevant portions of the prayer for relief sought by the plaintiffs against Howard Hewitt, Eugene Lewis and his children, and Ms. Margaret Mason and her firm. For reasons that will become apparent later, it is important to note that no relief was sought as against the defendants Jennifer Browning ("Jennifer") or Julie Hendrickson ("Julie") and that no tracing or other *in rem* remedy was sought in respect of the breaches of trust alleged by the plaintiffs.

Background

4 The Big Nine Trust was established in 1978 by Harold Lewis, Sr. and his brother Eugene Lewis. The trial judge described the professional and family backgrounds of Harold and Eugene beginning at para. 42 of his reasons. Both brothers were lawyers who had attained some prominence in Florida, and for some time had practiced law together. Harold's career came to a crashing halt in 1997 when he was accused of wrong-doing by the Attorney General for the State of Florida and became the subject of a protracted investigation. At the end of it, no probable cause was found and no charges were brought against him. By April 2000, the trial judge recounted:

> ... Harold felt completely burnt out. His marriage was in trouble and he did not want to be in Florida for the 2000 presidential election. In June 2000, he left his wife and moved to Crying Girl Prairie ("Crying Girl"), which forms part of the GRO property.
>
> Crying Girl is located approximately 120 miles northwest of Fort St. John, BC. It is a completely isolated location. The nearest telephone and fax machines are 40 miles away. Mail goes to a post office box in Fort St. John.

When Harold moved to Crying Girl, he left behind in his garage his personal files, including his papers concerning Big Nine, the BNT and GRO. When he returned to Florida in November 2000, he learned that his wife had had his personal papers taken to the dump.

From June 2000 through to 2007, save and except for some brief trips back to the United States, Harold lived by himself at Crying Girl. He would pick up his mail once every five weeks. While he was living at Crying Girl, Harold and Tommy gave consideration to various schemes to make GRO profitable.

[At paras. 54-7.]

5 For his part, although Eugene practised law at various points over the 1980s and 1990s, he also engaged in some business activities that were unsuccessful and resulted in various judgments against him. His relationship with Harold became strained and the two brothers have not spoken to each other since August 2000. (Para. 65.)

6 Back in 1971, however, Harold had gone on a hunting trip in northern British Columbia. He returned to the area a year later with Eugene and some friends. One thing led to another and the group ended up incorporating Big Nine Outfitters Ltd. ("Big Nine") and using it to purchase the guide outfitting business of the guide, Mr. Powell ("Gary"). By 1975, Harold, Eugene and Gary each owned one-third of the shares. At least initially, the business was a success. (Para. 88.)

7 In order to ensure that Big Nine qualified as a Canadian-controlled private corporation under the *Income Tax Act*, the Lewises eventually decided to transfer their shares to a (Canadian-controlled) trust. The Trust was established by Trust Agreement dated as of February 1, 1978 between Harold and Eugene as settlors. Its purpose was to vest the brothers' shares in Big Nine in trust for the benefit of their respective children — Lee and Virginia Lewis, who were the children of Harold; and Jennifer and Julie, who were the children of Eugene. (Some time later, Harold had another son, Davis, who was added as a beneficiary.) The Trust was a simple one-generational trust: each child was entitled to an equal share in the Trust and during the lifetime of the settlors, the trustees were authorized in their discretion to "distribute or accumulate to or for the benefit of" the children, in equal shares, the income and principal of the Trust. Upon the death of the last surviving settlor, the trustees were directed to pay one-half of the corpus together with accumulated income to Lee and Virginia (and later, Davis), and the other half to Jennifer and Julie, provided they had attained the age of 21. No express provision was made for the children or heirs of the Lewis children, nor for the share of a beneficiary who might die before the death of both settlors.

8 Initially, the Trust was revocable: Article 11 provided that the trustees could at any time revoke the instrument entirely and re-convey the trust property to the settlors. The laws of British Columbia applied to the Trust, notwithstanding that the settlors and their children resided in Florida at the time.

9 For purposes of this appeal, Articles 15 and 13 of the Trust Agreement are of key importance. Article 15 provided:

Successor Trustees — In the event that Gary James Powell shall be unable to serve as Trustee herein for any reason whatsoever, Olive Powell, of Hudson Hope, British Columbia and Audrey Tompkins of Fort St. John, British Columbia, shall act as co-Trustees. In the event that Olive Powell and Audrey Tompkins shall be unable to serve as Trustees, then Harold D. Lewis and A. Eugene Lewis, or the survivor of them, shall act as Co-Trustees. The Grantors, or either of them, reserve the right to appoint successor Trustees in lieu of the above by notice in writing to the then existing Trustee.

[Emphasis added.]

and Article 13 stated:

Exoneration of Trustee — No Trustee provided he act in good faith, shall be held liable for any loss occasioned to the trust property except for [loss] caused by his own dishonesty, gross negligence or willful breach of trust.

10 At some point in 1980, the settlors learned that the revocability of the Trust might create tax difficulties. Each of Harold and Eugene therefore signed, in the presence of a notary, a letter addressed to Gary, the then trustee, in the following terms:

> Having been fully apprised in the premises of my right to revoke, alter or amend the above Trust Agreement as provided in paragraph 10 thereof, I hereby renounce and disclaim any power to revoke, amend or in any way alter said Trust Agreement, individually, or as a successor Trustee, and declare such Trust Agreement to be irrevocable by me from this date forward.
>
> In the event I am unable to serve as successor Trustee for any reason as provided in paragraph 15 thereof, I hereby appoint Howard H. Hewitt of Leesburg, Florida to act in my place and stead. I hereby renounce any right to remove or replace or appoint any present or future Trustee of said trust.
>
> [Emphasis added.]

These were the so-called "Revocation Letters".

11 On Gary's tragic death in an airplane accident in October 1983, his wife Olive and his sister Audrey became co-trustees. At some point in the 1980s, Olive resigned, leaving Audrey as the sole trustee.

12 In the early 1990s, there was a proposal by a Mr. Hall to buy a 25% share interest in Big Nine — an idea opposed by Harold. In the course of making his objections known, Harold retained a lawyer in Fort St. John, Mr. McAdam, and provided him with a copy of the Trust Agreement and related documents. A compromise was eventually reached under which Mr. Hall purchased a lesser share than previously proposed, leaving the Trust with 55.56% and each of Mr. Hall and TRL with 22.22% of the shares of Big Nine. (Para. 126.) The price paid by Mr. Hall was based on an assumed "enterprise value" of $1.6 million.

13 Sometime in early 1994, the "Davis Assignment" was prepared in order to permit Davis Lewis to be recognized as an equal beneficiary with his siblings. They transferred their interest to themselves and Davis. Also around this time, Harold's three children assigned 50% of their interest in the Trust to Tommy by means of the "Bronson Assignment" — even though Article 4 of the Trust Agreement prohibited any assignment of a beneficiary's interest. The trial judge observed:

> The purpose of the Bronson Assignment was to settle Harold's debt to Tommy. Throughout the 1980s and into the 1990s, Tommy had been advancing funds to Harold. Much of the money had been used to pay for the education of Harold's children.
>
> . . .
>
> The Bronson Assignment was drafted by Harold's lawyer, Dexter Douglass, in consultation with Eugene. Mason, when consulted by Audrey concerning the Bronson Assignment, had a concern as to whether Harold and Susan, as Davis' parents could, on his behalf, agree to the assignment, Davis then still being a minor. To alleviate that concern, Harold, Eugene, their wives and children all signed an indemnity in Audrey's favour protecting her from any claims arising out of the Bronson Assignment.
>
> [At paras. 130, 132.]

14 Both brothers had been acquainted for many years with Tommy, a successful businessman who had been involved in the purchase and sale of many businesses. He had made various loans over the years to Harold. Indeed, the trial judge noted at para. 143 that Harold was dependent on his children and Tommy for financial support after he moved to Crying Girl. Tommy took on the role of advising Harold's children over the years regarding various business matters and in 2002, wrote to both brothers asking to be kept "in the loop" in matters involving the Trust and Big Nine.

Findings of Fact

The Trusteeship

15 Howard was also a friend of the two brothers, as well as being their brother-in-law, and had provided financial assistance to them over the years. He had paid for the weddings of Virginia and Jennifer and assisted Harold's ex-wife with financial and other matters. (Para. 73.) At the time of trial, he held a mortgage on Eugene's home in the principal amount of $156,000 to secure part of Eugene's indebtedness to him. (Para. 75.)

16 The trial judge discussed the circumstances under which Howard became a trustee of the Trust, beginning at para. 141 of his reasons, and again beginning at para. 341. The series of missteps, miscommunications, and incomplete or ambiguous professional advice that characterize this matter speak for themselves, but below I note some of the judge's findings of fact regarding the first chapter of this "saga", the story of Howard's trusteeship:

- By 2002 Audrey was afflicted with dementia. Ms. Mason, who had had no involvement with the Trust since 1995, was asked by the lawyer in Fort St. John who acted for Big Nine, to contact Eugene. In a conversation on July 25, 2002, Eugene told Ms. Mason that he and Harold had named Howard as a successor to Audrey. He also said he wanted to "keep Harold out of the trusteeship." (Para. 149.) He sent her the Trust Agreement, Revocation Letters, and the Trust's 1997 financial statements. (Para. 150.) She regarded Audrey as her client.

- On August 2, 2002, Ms. Mason advised Eugene that the "basic route of the trusteeship" was as follows:

    1. Audrey dies/resigns;

    2. Gene and Harold (or survivor) become co-trustees;

    3. *If either Gene or Harold resign or die, Howard steps up;*

    4. If Howard dies, or refuses to accept his appointment, then the last man standing (either Gene or Harold) would appoint a new trustee by deed pursuant to section 27 of the *Trustee Act*.

  You and Harold could of course both resign and Howard could step up. An agreement could be reached with Howard that he, by deed, make a new appointment. [At para. 151; emphasis added.]

- In an e-mail to Tommy on August 5, Eugene "did not pass on ... Mason's advice that Harold *became a co-trustee* upon Audrey's resignation." (Para. 153; my emphasis.) Eugene wrote to Ms. Mason on August 22 that he wanted to:

    > avoid being a co-trustee upon Audrey's resignation so that Howard steps up for me and Audrey steps down. I do not know what Harold intends to do but at a minimum that would make Howard and Harold co-trustees would it not? ... Howard will accept for me (and Harold too if he steps down) ... [Emphasis added.]

- Ms. Mason responded that if Audrey stepped down and Eugene renounced his right to be a trustee and appointed Howard in accordance with the Revocation Letters, then Harold and Howard would be co-trustees "*providing that Harold takes up his appointment.*" (Paras. 153-55; my emphasis.)

- For reasons that were unexplained, Ms. Mason did not prepare a "renunciation" for Harold with the other documents she forwarded to Eugene in September 2002 to reflect Audrey's resignation and Howard's appointment. Audrey's resignation had attached to it acknowledgments for signature by *inter alia* Harold and Eugene and contained the following recitals:

    > AND WHEREAS paragraph 15 of the Trust Agreement provides that if I am unable to serve as trustee, then Harold D. Lewis and A. Eugene Lewis, or the survivor of them, shall be co-trustees;

> AND WHEREAS in accordance with paragraph 15 of the Trust Agreement, Harold D. Lewis and A. Eugene Lewis in their capacities as Grantors of the Trust, by way of a letter dated July 10, 1979, copies of which are attached as Schedule "A" hereto, each appointed Howard H. Hewitt to act in their stead as trustee in the event that either of them were unable to act as a successor trustee of the Trust;
>
> AND WHEREAS A. Eugene Lewis has tendered his Renunciation of Trusteeship dated September 18, 2002 to me, a copy of which is attached hereto as Schedule "B";

• Ms. Mason did not follow up to see if the documents were signed. Months later, she closed her file.

• Howard was "less than thrilled" about the prospect of becoming a trustee, but "accepted out of a sense of family obligation". (Para. 166.) The trial judge stated in later reasons ([*Murray v. Langley (Township)*] 2010 BCSC 102 (B.C. S.C.)) that Howard had decided to accept the appointment "with the best of intentions", and rejected the plaintiffs' allegation that Howard's conduct was motivated by a desire to help Eugene financially — the so-called "Liquidation Plan".

• Howard "must have realized", before he accepted the trusteeship, that Harold had not renounced his right to act as trustee: para. 365.

• Before accepting the position of trustee, Howard knew that "Harold had the right to become co-trustee". (Para. 366.) This finding was made independent of any adverse inference arising from Eugene's not appearing as a witness at trial, but the inference drawn by the Court was said to further strengthen that conclusion. (See also paras. 329-37.)

• Harold had no conflicts that would have disqualified him from acting as a trustee in September 2002. (Para. 425.)

• On October 4, 2002, Eugene wrote to Lee Lewis, with a copy to Tommy, enclosing his own resignation documents, and said that Howard had replaced Audrey as trustee on September 30. (Para. 380.)

• Eugene did not disclose Ms. Mason's advice that Harold "had the right" to be a trustee and instead deliberately misled Tommy. As part of his deception, Eugene did not send a copy of the Trust Agreement and Revocation Letters to Tommy when requested on October 23, 2002 and instead sent a "fax, which stopped prior to the key documents being forwarded." Tommy emailed back to say that not all the documents had been received, but Eugene did not send the rest of the documents. (Para. 404.)

• In early November 2002, Tommy wrote to Harold, stating that "Eugene was attempting to unilaterally appoint Howard as Audrey's successor relying entirely on the revocation of July 1979" and that Harold should "read carefully" Howard's acceptance document (prepared by Ms. Mason), which appeared to "contain a conflict." (Para. 181.)

• Harold was upset "when he learned of Howard's appointment."

• Tommy did not receive the Trust Agreement until "some time in 2003" and did not learn that Harold had the right to be a trustee until after the sale of the Big Nine shares. (Para. 395.)

• Harold did not have a copy of the Trust Agreement or the Revocation Letters in his possession and had "no recollection" of their terms. Moreover:

> He assumed that Howard had been properly appointed as trustee. He testified that he did not realize that he had a right to become co-trustee with Howard and says that if he had known he would have taken up the appointment immediately. [At para, 184.]

Sale of the Big Nine Shares

17 The circumstances of the Trust's sale of its shares in Big Nine — the second chapter in this story — were described by the trial judge beginning at para. 196 of the main reasons. It is clear that Howard and Tommy had various discussions, some with Barry (the manager of the Big Nine business) and some with Eugene, about the future of Big Nine.

18 The relationship between Tommy and Howard was rocky at this time, and at one point in March 2003 Tommy wrote to Howard complaining that:

> Big Nine Trust was created more than 20 years ago for a different set of reasons and a different set of beneficiaries. The naming of a successor Trustee did not follow the Trusts prescribed prescription and another person served as Trustee for some 20 years. Moreover at the time the Trust was formed there were five minor beneficiaries. Today and prior to the naming of you as a successor trustee, there are five (Harold, Lee, Davis, Gini, and Tom) of seven beneficiaries who, had they been asked, would oppose the naming of yourself as Trustee. And, that doesn't count me and I certainly think that you are the least qualified of all the adult beneficiaries because of your lack of knowledge and interest in these British Columbia interests.

Howard did not react, and suggested they should carry on notwithstanding their differences for the benefit of both sides of the family.

19 In a report dated April 8, 2003 (the "April Letter"), Barry wrote that Big Nine's income from hunting had "peaked out", but that he hoped the company's eco-tourism business would offset the decline in business. He continued:

> ... There is no doubt our sheep quota will be reduced substantially in the near future. The prices we are charging on hunts are all the market will bear. The exchange rate between U.S. and Canadian dollars are decreasing and on top of all of this our expenses and costs of operating are increasing. In my opinion all partners should consider selling at this time.
>
> All is not doom and gloom, we are in good shape financially and we don't require anymore major capital expenditures after the Blue Lake Lodge. Our income will no doubt go down but our capital costs are all but over. We will still make money in the future but margins will be down.
>
> [Emphasis added.]

Barry attached a list of assets and infrastructure, with the amounts that had been spent on them by Big Nine since 1986. The total "Infrastructure Value" was shown as $2.795 million, "Total Assets" at $1.595 million, for a total cost figure of $4.39 million.

20 Howard actively turned his mind to the affairs of Big Nine and became concerned about the company's dependence on Barry. (The business had suffered greatly when his predecessor, Gary, had been killed.) Howard learned that Barry was "somewhat discontented" with his position as a minority shareholder, and also began to wonder if the business should be sold. In his experience, businesses have a "life cycle" and the Big Nine business was "long in the tooth." Two meetings took place in the summer of 2003. As described by the trial judge:

> Tommy visited Big Nine in June 2003. It was his first visit in 13 years. He toured the property and spent time with Barry discussing Big Nine's operations. He learned from Barry that Big Nine was marginally profitable. Its significant investment in eco-tourism had yet to produce any revenue and the outlook for it to do so in the future was unclear. Big Nine was operating near capacity, but was realizing little to no return on capital. The future promised an increasingly challenging regulatory environment. He did not think Barry a good promoter of the business.
>
> In his discussions with Barry, Tommy learned of Barry's discontent as a minority shareholder. He wanted to own more or all of the company.

> At the August 15, 2003 meeting, Tommy reported to Howard and Eugene about his visit to Big Nine. During the meeting, they discussed a possible sale of Big Nine. I accept Tommy's evidence that during the meeting he discussed various ways of valuing a business, including cash flow, replacement cost and use of comparables. Tommy suggested that based on a multiple of cash flow basis Big Nine was worth more than $1 million and less than $2 million. Of the three individuals, Tommy was by far the most experienced in the buying and selling of businesses. He had sold over 60 businesses over the course of his career.
>
> At the meeting the parties discussed whether Barry would be prepared to buy Big Nine's shares. They had doubts whether Barry would be able to finance such a purchase. [At paras. 477-80; emphasis added.]

21 No effort was made by Harold or Tommy to involve a professional appraiser to evaluate the business. Howard consulted an appraiser, Mr. Pomeroy, who told him that guide-outfitting businesses were difficult to evaluate, and that the replacement cost method or the use of a multiple of earnings were two possible methods. (Para. 481.) However, Mr. Pomeroy declined to do an evaluation. Barry also tried to find someone to evaluate the business, but also without success. A realtor told him that "little was moving." (Para. 225.) After he reported to the group in August that he was having problems in obtaining an appraisal and that interested buyers could not be easily found, Howard asked him if he would be interested in buying. (Para. 227.)

22 Eventually, Barry made an offer on behalf of TRL to buy the Trust out for a price based on a total enterprise value of $1.6 million, payable over eight years. After discussing the offer with Tommy, Howard insisted on a cash deal. Barry managed to find financing, and agreed on a price of $888,889 (Cdn.) for the Trust's 55.5% share of the company, to be paid on or before February 15, 2004.

23 Harold learned of the proposed sale when Davis came to Crying Girl at Christmastime of 2003 and was "upset". He felt the price was not reasonable based on other sales in the area. (Para. 246.)

24 Eugene, who had initially not favoured any sale, took an active role in 'pushing' the deal through and both Howard and Barry testified that they relied on him to protect their respective interests. Eugene, to whom Howard looked to handle the closing on his behalf, contacted Ms. Mason, presumably to act for the Trust. (Para. 248.) In his e-mail to her, Eugene stated:

> Audrey stepped down as Trustee in September 2002 and Howard became the Trustee. The issue of Harold being a co-trustee has not arisen to this point and Howard has conducted all affairs for the Trust since September 30, 2002. We have little to no direct contact with Harold (who is living at Crying Girl — Graham River) but Howard has attempted to keep Tommy Bronson and Lee Lewis informed. [Para. 248; emphasis added.]

25 Barry also retained a lawyer, Mr. Long, in connection with the purchase by TRL. In response to an inquiry from Mr. Long, Ms. Mason advised him that:

> Both Harold and [Eugene] signed the letter in February 1, 1978 indicating that they would appoint Howard Hewitt as trustee in the event they were not able to act as trustee (and renounced their future ability to appoint trustees — paragraph 15 provides that Harold and [Eugene] have the power to appoint trustees notwithstanding the listed successor trustees). In furtherance of their 1979 agreement, both Harold and Eugene irrevocably renounced their appointment in September 2002 and appointed Howard Hewitt as trustee. [At 254; emphasis added.]

At trial, Ms. Mason admitted that this was incorrect. She had no explanation for her misstatement and agreed at trial that she should have told Mr. Long that "Harold had not stepped up and accepted his appointment as a trustee." (Para. 256.)

26 Eugene negotiated away Mr. Long's request for an opinion from the Trust's solicitors that Howard had the full power and authority to sell the Big Nine shares on behalf of the Trust, as well as a clause permitting the purchaser to hold back a portion of the purchase price pending the receipt of a clearance certificate from Revenue Canada. In return

for the latter concession, Howard agreed to indemnify TRL in respect of any Canadian or U.S. tax that might be payable by the Trust or its beneficiaries as a result of the transaction. (Para. 267.)

27 Ultimately, the closing was moved to the United States, and TRL paid the purchase price for the shares to the Trust in U.S. funds of $673,944.36.

The Distribution

28 Beginning at para. 273, the trial judge described the "aftermath" of the share sale. Howard had formed the intention to terminate the Trust and wrote the "Distribution Letter" to the beneficiaries, advising them of the sale and of the GRO transaction (not relevant to these proceedings). His letter stated in part:

> I am pleased to report that the transaction between Tompkins Ranching Ltd. [TRL] and the Big Nine Trust was closed on February 13, 2004. Your share of the $889,000 sales price ($673,944.36 in US dollars), less a reserve for Trust closing and termination expenses, is set forth in Schedule A. Prior to the closing I reached an agreement with Barry Tompkins that if ... Tompkins Ranching sells [its] shares or if Big Nine Outfitters, Ltd. is sold at any time within 2 years from date of closing for an amount greater than the sales price and Tompkins Ranching Ltd.'s closing expenses of this transaction, the Trust will receive its pro rata share of any excess amount. I feel this provision adequately protects your interests in terms of "fairness."
>
> Enclosed is an Acknowledgment, Release and Indemnity form prepared by counsel to the Trust. I understand a similar form was signed by all of you in favor of Audrey Tompkins in connection with the Hall Transaction and the assignments by Lee and [Virginia] of a part of their interest in the Trust to Davis and Tommy Bronson.
>
> Upon receipt of the executed original Acknowledgement, Release and Indemnity Agreement, I will forward a check to you at the above address. This will constitute a complete distribution of your beneficial interest in Big Nine Outfitters Ltd.
>
> Hopefully you are as pleased about the outcome in this matter as I am for you based on all of the factors and concerns that have come to my attention regarding this investment since I became trustee that I have shared with all of you.
>
> . . .
>
> In the event I do not receive an executed Acknowledgement, Release and Indemnity form within 30 days from the date hereof from any beneficiary, I will deal with the matter as advised by counsel for the Trust under British Columbia law.
>
> [Emphasis added.]

29 Jennifer and Julie duly signed and returned their copies of the release in Howard's favour and each received a cheque in the amount of $132,000 (U.S.). Virginia, Lee and Tommy did not sign the release and never received funds; Davis signed the release and returned it to Howard, but then decided not to cash the cheque because "by that point he had come to believe that the BNO share transaction was improvident and he wanted to preserve his legal rights." (Para. 282.) As a result, $396,000 (U.S.) of the proceeds remained in Howard's hands as trustee. (Evidently, the funds have been used to pay ongoing legal expenses arising from these proceedings. Para. 283.)) Howard does not challenge on appeal his obligation to pay the proceeds to Harold's children.

Trial Judge's Analysis and Conclusions

30 The trial judge formulated the issues before him as follows:

> The disputed issues of fact and law are several and in many cases inter-related. They include the following:

1. matters concerning Howard's appointment as trustee, including when he was first approached, whether he discussed the appointment with Mason, whether he knew Harold could be co-trustee and whether he was in a disqualifying conflict;

2. matters concerning Harold as co-trustee, including whether Harold, his children, or Tommy knew he had the right to be co-trustee, whether Howard and Eugene failed to disclose information concerning Harold's right to be co-trustee, whether Harold was able to act as co-trustee and whether Harold ever became the co-trustee;

3. the reasons Howard accepted his appointment as trustee and the existence of the Liquidation Plan;

4. matters concerning the BNO Share Transaction, including whether the BNT Trust Agreement contained a power of sale, whether Howard had authority to sell the shares, whether Tommy agreed to the sale and whether the way the sale was carried out was reasonable;

5. whether Eugene or Mason knowingly assisted in a breach of trust;

6. whether the sale of the Big Nine shares was at an improvident price such that the plaintiffs suffered damages;

7. matters involving the GRO and the GRT, including the original beneficial ownership of the GRO shares and nature of the GRT;

8. matters concerning the distribution of the BNT and the GRT, including whether Howard could require a release before distributing the proceeds of the BNO Share Transaction, whether the BNO Share Transaction proceeds could be properly distributed to some but not all beneficiaries and whether Howard distributed the beneficial interest in the GRO shares;

. . .

10. the validity of the Bronson and Davis Assignments;

11. whether Howard should be exonerated for any breaches of trust;

12. enforceability of the Davis Release;

13. the third party claim against Tommy; and

14. whether Howard should be removed as trustee. [At para. 339.]

Howard's Trusteeship — Conclusions

31 I set out below the Court's substantive conclusions material to Howard's trusteeship, some of which have already been mentioned:

• Contrary to his recollection, Howard did not consult with Ms. Mason prior to agreeing to become a trustee. (Para. 349.)

• Howard took on the role of trustee because he "considered it a family obligation". He thought it was in the beneficiaries' best interest that he act as trustee and that he do so to the exclusion of Harold. (Para. 435.) He had questions about Harold's mental health. (Para. 435.)

• It was "beyond doubt" that no later than August 23, 2002, Eugene knew Harold "had the right to become co-trustee" (para. 361), and it was "inconceivable" that Eugene would not disclose Harold's "potential role" to Howard. (Para. 363.)

• It was "inherently improbable" that Howard did not know in September 2002 that Harold had the right to become a co-trustee. (Para. 366.)

• The indebtedness of Eugene and the Lewis Family Trust to Howard did not place him in a position of conflict that precluded him from becoming a trustee. (Para. 372.)

• Harold learned of Howard's appointment in November 2002 when Tommy sent him the documents relating to Eugene's resignation. (Para. 378.)

• Harold "did not know he was entitled to be trustee" and could not be expected to have remembered the terms of the Trust Agreement. If he had been told he was entitled to become a trustee, he would have done so. (Para. 379.)

• The Trust Agreement and Revocation Letters were not faxed to Tommy by Eugene on October 23, 2002. If they had been sent, "Tommy surely would have sent them off to Harold with the balance of the documents that he sent on November 5." (Para. 392.)

• Tommy did not receive a copy of the Trust Agreement until "sometime in 2003" and did not learn until after the closing of the share transaction that Harold "had the right to be trustee." Had he known this, he "surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge." (Para. 395.)

• Eugene and Howard deliberately set out to mislead the plaintiffs as to Harold's right to be a co-trustee and did so in the hopes that Harold would not become aware of his rights and accept the appointment. (Para. 397.)

• Ms. Mason was not asked to prepare the "renunciation" for Harold's signature when Audrey resigned. Instead, Eugene did so. The form prepared by Eugene contained the phrase "pursuant to my previous instructions I do hereby renounce ..." which must have been intended to create the impression that Harold was resigning in accordance with his previous instructions. (Para. 402.) (No finding was made as to the fate of this document or why Eugene had prepared it if he had no intention of asking Harold to sign it.)

• In March 2003, Eugene and Howard told Tommy that Howard had been appointed as a trustee but did not tell him that Harold had the right to become a co-trustee. The trial judge inferred this about the motives of Howard and Eugene:

> The only explanation for the failure to disclose to the plaintiffs that Harold could become trustee was the desire of Howard and Eugene to keep that knowledge from Harold. They did not want him to be trustee and the only way to accomplish that goal was to keep from Harold, his children and Tommy that Harold had the right to be trustee. Howard and Eugene hoped the plaintiffs would not determine the true situation and they in fact did not do so until well after Howard had sold the Big Nine shares.
>
> A close reading of the Eugene Resignation Document certainly raises potential questions concerning Harold's status. Tommy's memo of October 10, 2002 raised certain of those questions. His November 5, 2002 letter to Harold also indicated that he had doubts concerning the process that had been followed. [At paras. 406-07; emphasis added.]

• Howard and Eugene "misled" the beneficiaries concerning Harold's right to be a co-trustee (para. 411) and engaged in a "subterfuge" to "keep Harold's right to be a trustee secret from Tommy, Harold and his children." (Para. 410.)

• Harold was not "unable to act" as trustee, contrary to the defendants' argument. (Para. 425.)

• The trial judge rejected the plaintiffs' argument that Howard had been appointed and "acted throughout to preserve and advance Eugene's interests." (Para. 427.)

• Howard's decision to sell the Big Nine shares "evolved over time and was done because he believed it was in the best interests of the beneficiaries." (Para. 428.)

The Big Nine Share Sale — Conclusions

32 With respect to the Trust's sale of the Big Nine shares to TRL, the trial judge formulated four issues before him as follows:

> The issues include whether the BNT Trust Agreement contained a power of sale, whether Howard could enter into the [Big Nine] Share Transaction without the consent of his co-trustee, whether Howard made the sale in good faith and whether the sale was at an improvident price. [At para. 439.]

(It will be noted that at this point, the trial judge referred to Harold as a co-trustee, not simply a person who had a right to become so.)

33 The judge found that the terms of the Trust contained a power of sale by implication (para. 449). With respect to Howard's position as "sole trustee", he noted that trustees must act jointly in the execution of their office and that if Harold was in fact a trustee, Howard could not have acted without his consent. Thus in the trial judge's analysis, it was necessary to determine whether Harold had impliedly *accepted* this responsibility. (Para. 452.) He stated:

> In order to become co-trustee, Harold had to step up and accept the appointment. The office of trustee may be accepted expressly, constructively through the acts of the would be trustee or possibly through long acquiescence: Waters at 832. The latter point has been a matter of considerable controversy and the subject of commentaries in the relevant texts. Unfortunately, there is little case authority on point.
>
> Harold did not expressly or constructively through his actions accept the appointment. Indeed, he says, and I have found, that he did not know of this appointment. [At paras. 453-54; emphasis added.]

34 With respect to the defendants' argument that Harold should be taken, through his inaction, to have effectively *disclaimed* his right to be a co-trustee, the Court noted in particular the following passage from Waters, Smith and Gillen, *Waters' Law of Trusts in Canada* (3rd ed, 2005):

> [I]t is hard to believe that one who has sat aside while the other trustee or trustees carried out the trust duties could later assert his right to act when he finds himself in disagreement with what the other trustees have done, or he decides that he would now like to act. [At 833, quoted by the trial judge at para. 458.]

In the judge's analysis, however, the difficulty with this submission was his finding that Harold had not known he was entitled to act as co-trustee. In the judge's words, "Lack of knowledge must displace any presumption of acceptance." (Para. 460.)

35 Proceeding on the assumption that Harold never became a co-trustee (para. 461) but was a "presumptive trustee on Audrey's resignation," the Court observed that Howard's first duty to the Trust had been to determine whether Harold was going to accept his appointment — a duty he had clearly breached — and that:

> ... Howard did not have the right to act as sole trustee. He did not have the right to enter into the BNO Share Transaction and in so doing he committed a breach of trust. [Para. 467.]

(I pause to emphasize that in these proceedings, the plaintiffs did not purport to challenge the validity of the share sale to TRL as having been carried out without authority. TRL was not a defendant and as seen earlier, the plaintiffs in their pleading sought an accounting of the value of the beneficial interests of the plaintiffs in the Trust, the payment to them of equitable compensation, or alternatively, damages. Although we are now told that a proprietary remedy is being sought against TRL in other proceedings, counsel on this appeal proceeded on the basis that the shares were validly transferred

to TRL (and by implication, that the remedies of an accounting, equitable compensation or damages were available and appropriate remedies against the defendants).)

36 In connection with the reasonableness of the sale of the Big Nine Shares, the trial judge briefly reviewed the factual circumstances again, focusing on the roles of Howard and Tommy leading up to the decision to sell. The Court noted that prior to the meeting of August 15, 2003, Howard had spoken to Mr. Pomeroy, whom he hoped to retain to evaluate the Trust's interest in Big Nine. Despite Tommy's testimony that no appraisals were mentioned, the judge accepted Howard's evidence that he had told Tommy and Eugene about consulting Mr. Pomeroy. (Para. 483.)

37 By the time of the August meeting, Tommy had formed the view that a sale of the shares was "the right thing to do". Howard was also "moving in this direction" in light of the ongoing conflict between the two sides of the Lewis family. The Court found that *his decision finally to proceed with a sale was reasonable (paras. 484-94); but that the "manner of sale" was not*, because Howard made only "minimal efforts" to determine the value of the shares before agreeing to sell to Barry. In the trial judge's analysis:

> Having decided to sell the shares, Howard made minimal efforts to determine the value of Big Nine before agreeing to sell the shares to Barry. He did speak to Mr. Pomeroy, but ignored his suggestion that the costs of replacing the assets was a basis to determine value. *He gave no weight to Barry's comments in the letter that Big Nine's assets were valued* in excess of $2.7 million or that Big Nine's infrastructure and support were "far better than any in our industry" or that Big Nine was the "best in the business". He contacted no realtors or others who might have experience in selling such properties to seek advice as to how to best sell the shares.
>
> Opinion evidence at trial indicates that to maximize value, a property like Big Nine needs exposure in the market place. No attempt was made to expose Big Nine to the market place. Nor were any enquiries made as to the price at which similar businesses had sold. As will be developed when I consider the evidence on valuation, the closest comparable to Big Nine was Muskwa Prophet. That business had sold in 1999 for $2.7 million. [At paras. 496-97; emphasis added.]

(I note that in the underlined sentence, the judge seems to accept Mr. Pomeroy's suggestion that the *cost* amounts of the assets listed in Barry's April Letter may indicate the market value thereof.)

38 At para. 535, the Court turned to the question of the appropriate compensation for Howard's breach of trust *by reason of his having sold the shares without determining whether Harold was "prepared to accept his appointment."* In the trial judge's analysis:

> ... The plaintiff beneficiaries are entitled to be placed in the same position so far as possible as if there had been no breach of trust. The beneficiaries' actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight: *Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 555. In determining the proper measure of damages, evidence as to changes in the value of the property after the sale is properly taken into account: *Toronto Dominion Bank v. Uhren* (1960), 32 W.W.R. 61, 24 D.L.R. (2d) 203 (Sask. C.A.). [At para. 535.]

39 The Court reviewed expert appraisal evidence adduced by both sides, concluding at para. 577 that the sale had been "improvident" and that:

> ... the Big Nine shares had a value of between $1,375,665 and $1,542,345. The Big Nine shares were sold for $888,889, leaving a shortfall of between $486,776 and $653,456. The plaintiffs held 60% of the beneficial interest. On the basis of these calculations, their loss is somewhere between $292,605 and $392,073.
>
> The court's task is to assess damages. Howard sold the Big Nine shares without authority and at an improvident price. If the shares had been properly marketed, the sales price would have been well in excess of what Barry paid. Damages are to be assessed, not calculated. It is impossible to know now what the sales price would have been. I assess the plaintiffs' damages for breach of trust arising from the Big Nine Share Transaction at $350,000.

> I have found that Eugene assisted in the breach of trust. Howard and Eugene are jointly and severally liable for the assessed damages, subject to consideration of Howard's submissions that he should be excused from any breach of trust. [At paras. 608-10; emphasis added.]

Pre-judgment interest was ordered to run on this amount (referred to in the Court's Order as the "Damage Award") from January 1, 2006, the second anniversary of the date of the sale. (The trial judge accepted expert evidence that it likely would have taken two years to market and sell the shares properly.)

Liability of Eugene and Ms. Mason

40 Turning next to whether Eugene and Ms. Mason had "knowingly assisted" Howard in his breach of trust, the Court noted the leading Canadian authority, *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.). It confirmed that third parties who "knowingly participate" in a breach or who are reckless or willfully blind to the breach may be held personally liable. With respect to the burden of proof on a plaintiff, the trial judge quoted a passage from Underhill and Hayton, *The Law Relating to Trusts and Trustees* (17th ed., 2006 at 1177) to the effect that a claimant "must at least show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been", and that the defendant's action must have "some causative impact." Thus, the court below said, it was not necessary to show a "precise causal link between the assistance and the loss": para. 500.

41 Applying the foregoing, the Court found that Eugene had had actual knowledge that Harold was entitled to act as co-trustee and therefore that Eugene had known Howard was acting in breach of trust. Thus Eugene had knowingly assisted in the breach. (Para. 501.)

42 With respect to Ms. Mason, the Court agreed with the opinion of an expert trust law practitioner that in advising Howard (as trustee) regarding the share transaction, she had had a duty to ensure that he had the authority to sell the Big Nine shares on behalf of the Trust. Thus, the Court said, Ms. Mason should have sought confirmation that Harold had "formally renounced" his trusteeship and should not have told Mr. Long that both Harold and Eugene had irrevocably renounced their appointments as trustees in September 2002.

43 The trial judge found that Ms. Mason's conduct failed to meet the applicable standard of care, but the question for determination here was whether she had been reckless or willfully blind, and therefore could be said to have knowingly assisted in the breach of trust. (Para. 522.) The Court accepted that Ms. Mason had likely not recognized the co-trustee problem because the file was "of such minor importance that she never critically considered the matter." She had adopted a "*laissez faire*" attitude toward the file in 2004 and remained oblivious to the question of Howard's authority to sell the shares. Nonetheless, it had not been shown she had acted with a "want of probity" that would make her personally liable. The plaintiffs' claims against her and her firm were dismissed.

The Distribution — Conclusions

44 The third major chapter in the trial judge's reasons and in this appeal concerns the distribution — or attempted distribution — of the share sale proceeds by Howard as trustee to the beneficiaries of the Trust. The trial judge's conclusions on this topic began at para. 639 of his reasons.

45 He noted first the terms of the Trust with respect to distributions. He found that although the trustees had a discretion as to whether to distribute or accumulate income and principal, once a decision was made to distribute, the trustees were required to do so in equal shares to the beneficiaries. (Para. 643.)

46 It will be recalled that when Howard purported to advise the Lewis children about the sale, he asked each of them to execute a release in his favour, following which he would then forward a cheque. This practice of requiring a release had been followed when Audrey had resigned as a trustee and Ms. Mason had prepared a form of release and indemnity to be signed by each beneficiary: see para. 159. It will also be recalled that Tommy, Lee and Virginia did not sign their

releases and that although Davis signed his and received a cheque, he never cashed it. The Court found at para. 699 that Harold was not entitled to rely on the signed releases that he did receive.

47 The trial judge reviewed the case authority with respect to the right of a trustee to demand a release as a condition to beneficiaries' receipt of a distribution of the trust estate. Although seeking a release in these circumstances was and is a common practice (para. 658), the trial judge found that under the terms of this trust, it was not open to Howard to distribute only to some beneficiaries and not to others. Thus the judge concluded:

> By paying certain beneficiaries and not others, Howard breached the terms of the BNT. As soon as Howard paid certain beneficiaries, he was legally obliged to pay the others, regardless of whether or not they were prepared to sign the Release. Although he may have been entitled to hold all of the funds pending a passing of accounts, what he could not do, given the terms of this trust, was to pay some beneficiaries and not others.
>
> It is a principle of equity that equity will not suffer a wrong to be done without a remedy: John McGhee, *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005). Having paid Jennifer and Julie the proceeds of the BNO Share Transaction, Howard had to pay the balance of the BNO Share Transaction funds to the plaintiff beneficiaries. He was not entitled to use those monies for any other purposes, including the paying of his legal costs. Subject to the question of exoneration, he must pay to those beneficiaries their respective shares of the BNO Share Transaction. In the case of Lee, Virginia and Davis, that sum is $66,000 USD. In the case of Tommy, it is $198,000 USD. Those funds must be paid together with interest from March 3, 2004, being the date that payments were made to Jennifer and Julie. [At paras. 663-64.]

(As will be seen later in these reasons, the Court later changed the currency in which the "Proceeds Award" was payable, to Canadian dollars.)

Exoneration

48 Howard sought to be exonerated from his liability for the consequences of the improvident sale of the Big Nine shares, relying on Article 13 of the Trust Agreement. It stated:

> Exoneration of Trustee — No trustee provided he act in good faith, shall be held liable for any loss occasioned to the trust property except for loss caused by his own dishonesty, gross negligence or willful breach of trust.

Alternatively, Howard relied on s. 96 of the *Trustee Act*, R.S.B.C. 1996, c. 464, which provides:

> If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

(Counsel *in this court* were in agreement that Article 13 "prevails" over s. 96, so that if Howard had met the requirements of the exoneration clause, he would have been properly excused. By this I believe counsel meant that Article 13 is couched in mandatory terms, while s. 96 requires the exercise of the Court's discretion. (See generally *Armitage v. Nurse* (1997), [1998] Ch. 241 (Eng. C.A.).)

49 The trial judge did not find it necessary to choose between the two provisions, observing that both were premised on the trustee's acting in good faith. He endorsed statements in *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302 (S.C.C.) and *Langley v. Brownjohn*, 2007 BCSC 156 (B.C. S.C.), to the effect that the Act requires that the trustee have acted honestly and reasonably and "ought fairly to be excused" — wording not present in Article 13. Then followed what is perhaps the judge's most significant finding for purposes of this appeal. He stated:

> If I had accepted Howard's evidence that he was unaware of Harold's right to become trustee, I would be inclined in the circumstances of this case to excuse Howard for the loss caused by the improvident sale. He entered into the sale in good faith. Tommy, a beneficiary and experienced businessman, had agreed to the method of sale and the sale price.
>
> The difficulty with Howard's submission, however, is that I cannot find that he acted in good faith. For reasons that have been set out, I have found that he knew that Harold had the right to be co-trustee and he embarked on a course of action with Eugene to conceal that information from Harold and the beneficiaries. In such circumstances, I cannot find that Howard acted honestly or in good faith in selling the Big Nine shares. Honesty and good faith are a prerequisite to exoneration under either the terms of the BNT Trust Agreement or s. 96 of the *Act*. Howard's application to be relieved from liability is dismissed. [At paras. 694-95; emphasis added.]

In addition, he ruled that Howard's refusal to distribute to the beneficiaries who did not sign releases was a breach that did not arise "in good faith", but arose because Howard had put his self-interest before the interests of the beneficiaries. Accordingly, the Court declined to exonerate Howard from that breach as well. (Para. 697.)

Claim Against Tommy

50 At para. 701, the Court dismissed a third party claim brought by Howard against Tommy, claiming damages for breach of warranty of authority. Howard asserted that he had relied on Tommy's representations that he, Tommy, had had the authority to act for Harold's children in connection with the share sale. However, the Court found that "to the extent that" Tommy concurred in the sale and "may have indicated that his concurrence was also that of Lee, Virginia and Davis", his actions had been founded on "Tommy's erroneous understanding that Howard had the legal authority as trustee to sell the Big Nine shares." Had Tommy known that Howard did not have the authority to sell the shares without Harold's concurrence as a trustee, Tommy would not have "consented" to the sale, given Harold's opposition thereto. The third party claim was dismissed. (Para. 701.)

Future of the Trust

51 The final substantive topic addressed in the trial judge's main reasons was the plaintiffs' application for the removal of Howard as trustee and the appointment of Virginia in his place. Normally, Howard's removal would follow in light of the Court's findings, but the judge was reluctant to make that order without further submissions. In his analysis:

> ...I note that as a result of the decisions made in these reasons the entire *corpus* of the BNT has been distributed. Whether a trust remains to be administered would appear to be a live question. Further, Howard has been in negotiations with Revenue Canada concerning certain matters. The status of those discussions has not been disclosed to the Court and I do not know whether Howard's removal would prejudice those discussions.
>
> I should say that I am not inclined at this stage to confirm Harold as a trustee. Although I have found that Harold was entitled in 2002 to become a trustee, given the events of the last several years I am not certain that it would now be appropriate for him to take up that mantle. Jennifer and Julie are beneficiaries of this trust, and given the now further exacerbated enmity between Harold and their father, they may have some legitimate concerns concerning that appointment. Virginia's appointment as sole trustee might possibly raise similar concerns. A possible solution might be to appoint Virginia and either Jennifer or Julie as co-trustees.
>
> I will leave it to the parties to consider whether, in light of these reasons, it is necessary to remove Howard as trustee and, if he is removed, who should replace him. [At paras. 703-05; emphasis added.]

Disposition

52 In the result, the trial judge ordered that the Damage Award in respect of the improvident sale of the Big Nine shares, which he had assessed at $350,000 (Cdn), was payable jointly and severally by Howard and Eugene directly to

Tommy, Lee, Virginia and Davis in proportion to their respective interests. With respect to the undistributed share sale proceeds, Howard was ordered to pay $522,000 (Cdn) in total (the "Proceeds Award"), being $66,000 to each of Lee, Virginia and Davis and $198,000 to Tommy, plus prejudgment interest from March 3, 2004. The Court deferred issues regarding costs, the removal of Howard as a trustee, whether a new trustee was required and other matters arising, pending further submissions if they became necessary.

Fresh Evidence Applications: 2010 BCSC 871 (B.C. S.C.)

53 As mentioned earlier, fresh evidence applications were made a few months later by Howard and Eugene, in conjunction with applications to reopen the trial. The fresh evidence (referred to by the Court as "new" evidence) consisted of three affidavits from Mr. White (Eugene's law partner in Florida), an affidavit of a computer consultant, and an affidavit of Eugene himself. Attached to Eugene's affidavit was a copy of an "auto activity report" from his law firm's fax machine that showed that a fax of 17 of 38 pages had been sent to Tommy on October 23, that a fax of one page had been received from his number on October 23, and that a further fax of 23 pages was sent to Tommy on October 24. The trial judge observed:

> Mr. White, in his first affidavit, submits that after he read the reasons for judgment he searched the fax logs of the law firm and found the auto activity report. His second affidavit attaches a copy of the fax machine user manual and his third affidavit sets out that the auto activity report generated from the fax logs was kept in the ordinary course of the law firm's business.
>
> Mr. Lee's affidavit discusses the operation of the fax machine and explains the auto activity report. Based on the report, he opined that the two transmissions were successfully sent to Tommy's fax number. In the first transmission on October 23, 2002 only 17 of 38 pages were transmitted. On October 24, 2002, 23 pages were successfully sent.
>
> Mr. Dives advises that he did not know of the existence of the fax activity report until February 2010. He candidly acknowledges that the report existed and was available before trial. [2010 BCSC 871 at paras. 18-20.]

54 Since the order after trial had not yet been entered, the trial judge observed that he had an "unfettered discretion" to reconsider or revise any aspect of his decision. He noted that in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (S.C.C.), the Supreme Court had impliedly approved a two-part test for the admission of what was variously referred to as "new" evidence and "fresh" evidence. Under that test, new evidence may be admitted only if it would probably have changed the result and if it could not have been obtained by reasonable diligence before trial. (Para. 28.) In *Sagaz*, the Supreme Court disagreed with the Ontario Court of Appeal's reversal of the trial court's ruling that the evidence of a person described as a "recanting liar" would not have changed the result. (Para. 63.) Thus the Court of Appeal had erred in ordering the re-opening of the trial.

55 The trial judge in the case at bar noted that subsequent cases had differed concerning the significance of the due diligence branch of the test, but he took the following principle from the authorities:

> ... new evidence will only be admissible on a reconsideration application if it would likely change the result and, except in exceptional circumstances, the evidence could not have been obtained by reasonable diligence before the trial. In exceptional circumstances, in order to prevent a miscarriage of justice, fairness may dictate that new evidence will be admissible even though the evidence may have been discoverable prior to trial. New evidence will generally not be admissible in situations where the evidence was not called at trial because of tactical considerations. [2010 BCSC 871, at para. 33.]

56 With respect to whether the "new" evidence would probably have changed the result at trial, the judge accepted the submissions of Howard and Eugene that "the only logical inference was that the October 24 fax contained the balance of the documents sent incompletely on October 23", including the Trust Agreement and the Revocation Letters. (Para. 36.) As well, he agreed that the October fax 'undermined' his earlier finding (at para. 398 of the main reasons) that there was no evidence Eugene had forwarded the balance of the documents to Tommy. However, the judge continued:

... It does not, however, affect my finding that Tommy did not receive the BNT Trust Agreement until the summer of 2003. Tommy's April 27 letter confirms that finding. That the October 24 fax did not come to Tommy's attention may not be the fault of either Howard or Eugene. Eugene, however, knew by Tommy's letter of November 4, 2002, that as of that date Tommy did not have all of the information he had sought. Eugene did not follow up to determine what information was missing or confirm with Tommy that he had received the October 24 fax.

Howard and Eugene submit the fact that the BNT Trust Agreement and the Revocation Letters were sent to Tommy on October 24, 2002, means that I must reconsider my conclusion that Howard and Eugene misled the plaintiffs as to Harold's right to be trustee. They submit the fax exchanges of October 23, 2002 were key to that finding and that finding was essential to the subsequent determination that Howard acted in bad faith and was not entitled to be relieved from the consequences of his breach of trust. They submit that if the evidence concerning the October 24 fax had been introduced at trial it probably would have changed the trial result.

I do not agree with that submission. As previously discussed, the October 23 fax was considered in the context of Tommy's knowledge. That section concluded at para. 395 where I said:

> I accept Tommy's evidence that he did not receive the BNT Trust Agreement until sometime in 2003 and that he did not learn until after the closing of the BNO Share Transaction that Harold had the right to be trustee. If it was otherwise, he surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge.

The key disclosure was not the BNT Trust Agreement but Harold's right to be trustee. That is what Howard and Eugene did not disclose. They failed to tell Harold, Tommy or the other beneficiaries of Harold's right to be trustee. Their failures in this regard are set out in detail at paras. 396 to 411 of the judgment and are not limited to the failure to send Tommy the BNT Trust Agreement and Revocation Letters.

As set out at paras. 465 to 467, Howard had a duty to determine whether or not Harold was going to accept his appointment as trustee. He failed to disclose Harold's rights and in those circumstances he did not have the right to act as sole trustee or enter into the BNO Share Transaction. [At paras. 37-41; emphasis added.]

57 Further, in response to Howard's reliance on para. 694 of the Court's earlier reasons (quoted above at para. 49 of these reasons), the trial judge observed:

> That submission misses the point of para. 694. At trial, Howard testified that he did not know that Harold had the right to be trustee. I did not accept that evidence. The point being made in para. 694 was that if I had accepted Howard's evidence that he was not aware of Harold's right to be trustee, I would likely have excused him for the loss caused by the improvident sale. Having, however, not accepted his evidence, I was not prepared to do so.
>
> If the evidence of the October 24, 2002 fax had been before the court, I would not have excused Howard's breach. The fundamental failure remained. Howard knew Harold had the right to be trustee but did not disclose that information to Harold, Tommy or Harold's children. As I noted at para. 411:
>
> > The fact that Tommy and Harold did not see through the deception provides no defence to Howard and Eugene. Howard and Eugene from the outset misled the beneficiaries concerning Harold's right to be co-trustee. It does not lie in their mouth to suggest that Tommy and Harold should have seen through their deception.
>
> For the reasons set out, I cannot find that the new evidence would probably have led to a different result. No miscarriage of justice will result if the evidence is not admitted. On that basis alone, the new evidence is not admissible. [At paras. 43-5.]

58 The Court also ruled that the 'due diligence' requirement had not been met, finding that Howard and Eugene had 'chosen' not to lead evidence that would have bolstered their submissions regarding the sending of the second fax. Eugene, for example, could have testified but (the Court inferred) counsel had chosen for tactical reasons not to call him.

59 In the result, Howard's application for the admission of the fresh evidence was dismissed.

Eugene's Application

60 Eugene's application was broader in scope and not entirely dependent on the admissibility of the fresh evidence. In particular, he suggested that in giving as much emphasis as he had to the plaintiffs' "Liquidation Plan" theory, the trial judge had overlooked evidence that made it unlikely Eugene had deliberately kept from Tommy, Harold and the other plaintiffs the fact that Harold "could become trustee". This evidence included his statement to Ms. Mason that he did not want Harold to become a trustee, the contents of the Resignation Documents, his advice to the beneficiaries on October 2, 2002 to contact Ms. Mason if they had any questions regarding the Documents, and the (re-)sending of the Trust documents to Tommy on October 24, 2003. (Para. 53.) Further, Eugene argued that the Court had failed to differentiate between Howard's role as a trustee and Eugene's role as a stranger to the Trust. In the absence of advice from Ms. Mason that Harold was entitled to be a trustee, Eugene argued, he had had no reason to believe that not advising Harold was a breach of trust. As well, Eugene relied on financial reasons for his failure to appear at trial, such that the adverse inference drawn by the trial judge should not have been drawn.

61 The trial judge rejected all these submissions. Under the heading "Concealment", he said the record did "not disclose why Eugene made the disclosures he did." The judge noted that in fact, Eugene had been told by Ms. Mason in August 2002 that Harold had the right to become a trustee, but Eugene never disclosed that fact to Harold or the beneficiaries, even when it became clear that they opposed the sale of the Big Nine shares.

62 Under the heading "Knowing Assistance", the trial judge then expressed the following key conclusions regarding Eugene's conduct:

> ... He contacted Ms. Mason to confirm the trustee line of succession. He instructed her to prepare the resignation documents and then undertook their execution. He procured Howard's agreement to act as trustee and advised the other beneficiaries of Howard's appointment. What he did not do was tell any of the beneficiaries or Harold of Mason's advice that Harold had the right to act as trustee.
>
> In January 2004, he retained Ms. Mason to act on Howard's behalf in closing the BNO Share Transaction. He advised her that the issue of Harold being co-trustee had not arisen, but he did not tell her that Harold had not been told of his right to be co-trustee. Nor did he seek her advice whether or not in those circumstances Howard had the right to sell the trust property.
>
> Before the BNO Share Transaction closed, Eugene knew that Tommy, Harold and Harold's children all opposed the sale. He redrafted the closing documents to remove the provision requiring Howard's solicitors to provide an opinion that Howard had the full power and authority to sell the Big Nine shares.
>
> On this application, Eugene submits that Ms. Mason was negligent in not advising him that Howard did not have the right to sell the shares. As Ms. Mason's counsel points out, Eugene never asked or sought her advice on Howard's right to sell. More importantly, he never disclosed to Ms. Mason that Harold had not been told that he had the right to act as trustee.
>
> The closing documents as originally drafted contemplated that Ms. Mason would have to opine on Howard's right to sell the shares. Before that opinion could be prepared, Eugene had that provision deleted from the agreement. His removal of that provision leads to the inference that he knew that Howard lacked the authority to sell the shares

> and that a sale would be in breach of trust. Alternatively, it supports an inference of wilful blindness or recklessness. [At paras. 59-63; emphasis added.]

While accepting counsel's statement that the decision not to call Eugene at trial had been made for financial reasons, the trial judge also remained of the view that an adverse inference could nevertheless be drawn against him for the purposes of assessing his credibility. (Para. 65.)

63 Accordingly, Eugene's application for the re-opening of the trial was also dismissed.

Further Reasons: 2010 BCSC 1638 (B.C. S.C.) and 2011 BCSC 102 (B.C. S.C.)

64 In further reasons dated November 19, 2010, the trial judge rejected an application brought by the plaintiffs for relief directly against Eugene's children, Jennifer and Julie — i.e., an order that they pay back to the Trust the share proceeds they had received in March 2004, with interest. This had not been pleaded or sought at trial, and it was now too late to seek such recourse. Other questions were also posed for the Court going to the question of remedies. In the interests of time, they were put over until another scheduled hearing date.

65 There followed two sets of supplementary reasons dealing mainly with costs, which I will address at the close of these reasons. The judgment dated January 28, 2011, however, also dealt with substantive "remedy" issues beginning at para. 55. The "point of departure" here, the trial judge said, was whether the Damage Award and the Proceeds Award should be paid to the Trust or to the individual plaintiff beneficiaries directly. The plaintiffs asserted that Howard should restore to the Trust what it had lost as a result of the improvident sale, while Howard and Eugene submitted that in this instance, there were no future beneficiaries who would be adversely affected and that payment to Harold's children directly would appropriately account to them for the loss they had suffered. (Para. 57.)

66 The trial judge cited a passage from the judgment of Lord Browne-Wilkinson in *Target Holdings Ltd. v. Redferns*, [1995] 3 All E.R. 785 (Eng. H.L.). On this point his Lordship observed that in respect of "traditional trusts" (in which "the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there"), the basic rule is that "a trustee in breach of trust must restore or pay to the trust estate either the assets that have been lost to the estate by reason of the breach or compensation for such loss". In cases on the other hand where the trust has come to an end, he wrote:

> The beneficiary's right is no longer simply to have the trust duty administered: he is, in equity, the sole owner of the trust estate. Nor, for the same reason, is restitution to the trust fund necessary to protect other beneficiaries. Therefore, although I do not wholly rule out the possibility that even in those circumstances an order to reconstitute the fund may be appropriate, in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, i.e., the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust. [At 794; emphasis added.]

67 The trial judge also considered *Potter v. Bank of Canada*, 2007 ONCA 234 (Ont. C.A.) and *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), where both the majority, *per* LaForest J. and the minority *per* McLachlin J. (as she then was) emphasized the "flexibility" of equitable remedies in the modern context. The judge concluded that the question was one of fairness and justice in the specific circumstances before the Court. In his view, the circumstances here militated in favour of the payment of the Proceeds Award directly to the beneficiaries, a result also consistent with what the plaintiffs had sought throughout the trial.

68 Similar considerations led him to conclude that the Damage Award should properly be paid to the plaintiff beneficiaries to compensate them for their loss. The existence of a potential income tax liability with respect to the sale of the Big Nine shares and other matters, did not require the continuation of the Trust: it was open to the Minister of National Revenue under the *Income Tax Act* to collect unpaid tax from a trustee in Howard's position. (Para. 782.)

Further, payment to the beneficiaries directly would avoid the "interminable legal squabbles" among the parties. Such squabbles had already consumed more than 145 days in court and legal costs in excess of $3 million. (Para. 73.)

Further Supplementary Reasons: 2011 BCSC 1115 (B.C. S.C.)

69 The trial judge's final supplementary reasons of August 17, 2011 addressed whether the Trust still existed, or should still exist, and who the trustee(s) thereof should be. The plaintiffs sought Howard's removal as a trustee, an order that he pass his accounts, and an order that Harold and Tommy be "confirmed" as trustees. (Since Howard had been absent from British Columbia for 12 months, it was said that Harold was entitled to appoint Tommy as an additional trustee pursuant to s. 27(1) of the *Trustee Act*.) The defendants opposed these orders, submitting that because the assets of the Trust had been distributed, there was no trust remaining. In the alternative, if the Trust still existed, they argued that none of the parties to the litigation should be appointed as a trustee. (Para. 26.)

Existence of Trust

70 The trial judge noted — correctly — that a trust is not a separate legal entity but a "relationship". He cited the following passage from *Waters*, *supra*:

> A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out. As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by law. But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed. [At 1173-74.]

(See also Underhill and Hayton, *supra*, at 385-6 and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed., 2005) at 85: "A trust cannot exist without trust property ...".)

71 The trial judge reasoned that once Jennifer and Julie had received their share of the Big Nine share proceeds, the remaining proceeds were then held not under the Trust but on a bare trust in favour of the plaintiffs. That bare trust was subsequently "enforced" by the Proceeds Award. He continued:

> As of March 2004 the Trust was without property. This was some 21 months before Harold first indicated an intention to step up and act as trustee. As noted in the passage in Gillese a trust cannot exist without property. By November 2005 the BNT no longer existed. There was no trust for Harold to administer and in the circumstances Harold never became trustee. As Harold never became trustee, his purported appointment of Tommy as co-trustee pursuant to s. 27 of the *TA* is of no force and effect. I need not decide whether the Revocation Letters ousted Harold's right to appoint a trustee. [At para. 37; emphasis added.]

72 Nor did the trial judge accept the plaintiffs' argument that a new trustee was necessary for their pursuit of their action in the Supreme Court of British Columbia against TRL. He noted that it was open to beneficiaries to pursue a proprietary claim to trust property or its proceeds or to sue a third party who knowingly participated in a breach of trust. Further questions regarding the TRL action would have to await the trial thereof.

73 Finally, the Court dealt with certain 'housekeeping' matters. Howard was ordered to pass his accounts as trustee, but the order was stayed until 90 days following the exhaustion of all appeals or other agreement of the parties. (Para. 53.)

On Appeal: Substantive Issues

74 In this part of my reasons, I propose to deal with the substantive issues raised on the appeals of Howard and Eugene and the plaintiffs' cross appeal, leaving to one side non-substantive issues relating to currency and costs.

75 In his factum on appeal, Howard asserts that the trial judge failed to consider his liability "having regard to the terms of the mandatory exoneration clause under the Trust Agreement" and in failing to relieve him of liability for the $350,000 Damage Award, assessed for the improvident sale. Howard emphasizes that the Court's unwillingness to exonerate him was based on the conclusion that he had committed an inexcusable breach of trust by "dishonestly concealing Harold's potential right to be co-trustee." Howard submits that this conclusion resulted from a "series of errors", including:

> (i) Misdirecting himself on the applicable legal duty and thus assessing Mr. Hewitt's conduct against an overly rigorous standard;
>
> (ii) Drawing the inference that Mr. Hewitt took part in a common dishonest scheme with Eugene without evidence from which such an inference could properly be drawn;
>
> (iii) Overlooking material evidence in concluding that Harold's potential right to be co-trustee had been dishonestly concealed;
>
> (iv) Drawing an adverse inference against Mr. Hewitt for failing to call Eugene as a witness; and,
>
> (v) Refusing Mr. Hewitt's application to admit new evidence that the judge found would demonstrate that Harold's potential right to be co-trustee had in fact been disclosed at an early date.

Howard does *not* seek to be relieved from liability for the Proceeds Award, but submits that it should have been payable in U.S. currency as a result of the application of s. 1 of the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155.

76 Eugene asserts overlapping grounds in his factum:

> The learned Trial Judge erred in finding a breach of trust on the part of Howard Hewitt. [Here, the factum refers to both breaches — the "withholding" of information from Harold, and the sale of Big Nine shares.]
>
> In the alternative, the learned Trial Judge erred in finding a knowing assistance in breach of trust on the part of Eugene Lewis.
>
> The learned Trial Judge erred in applying an adverse inference against Eugene Lewis and in using the adverse inference to reverse the onus of proof and to create evidence which did not exist.

77 On their cross appeal, the plaintiffs assert the following grounds:

> The trial judge erred in law and in principle in awarding the Direct Payment of the Proceeds Award and the Damage Award to the Plaintiff Beneficiaries.
>
> The trial judge erred in law in finding the Trust had ceased to exist and then further erred in failing to consider and then confirm Harold as a co-trustee of the trust, to remove Howard as a co-trustee of the Trust, and to confirm the appointment of Tommy as a co-trustee of the Trust.

78 The trial judge's findings of 'collusion' and subterfuge on the part of Howard and Eugene to conceal from Harold his "right to become a trustee" lie at the heart of most, if not all, of these stated grounds of appeal. There are in my respectful view several defects in the reasoning on which this conclusion was based. I will describe some of these below; but even if one accepts what counsel referred to as the 'conspiracy of silence' theory, there is in my opinion also an overarching flaw in the judge's *legal* analysis that cannot stand. Here I refer to the Court's conflating the alleged 'concealment' of Harold's right to be a trustee, with the improvident sale of the Big Nine shares, resulting in the Court's refusal to apply the (mandatory) exoneration clause to the Damage Award — despite the fact that Howard was found to have entered the sale in good faith and with the concurrence of Tommy, the informal representative of Harold and his children.

79 The trial judge said at para. 694 of his main reasons that he would have excused Howard *but for* the fact he had "embarked on a course of action with Eugene to conceal" Harold's right to be a trustee from him. Thus the honesty and good faith required by Article 13 of the Trust Agreement were lacking. This 'coupling' of the "subterfuge" with the improvident sale and the compensation payable therefor constitutes a leap in logic that overlooks the purpose of both the exoneration clause and the Damage Award.

80 Obviously, the purpose of Article 13 was to excuse a trustee, provided he or she had acted in good faith, from loss "occasioned" to trust property, other than loss caused by dishonesty, gross negligence or willful breach. The Damage Award was ordered to make restitution for the shortfall found to exist between the fair market value of the Big Nine shares, as found by the trial judge, and the sale price. Both Article 13 and the Damage Award, then, incorporate the notion of a causal connection between the breach of trust and the loss suffered by the Trust (and indirectly, the plaintiffs). As noted by McLachlin J. in *Canson Enterprises, supra* (quoted by Lord Browne-Wilkinson at pp. 797-8 of *Target Holdings, supra*):

> While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution *in specie* is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect. Thus, Davidson [in "The Equitable Remedy of Compensation' (1982) 3 *Melb ULR* 349 at 345] states "It is imperative to ascertain the loss *resulting from breach of the relevant equitable duty*."...
>
> . . . . .
>
> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, *on a common sense view of causation*, were caused by the breach.' (See 85 DLR (4th) 129 at 160, 162-63; emphasis added.)

81 In a similar vein, the House of Lords in *Target Holdings* stated:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39 *per* Lord Blackburn). Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. [At 792; emphasis added.]

(See also *Nestle v. National Westminster Bank Plc* (1992), [1994] 1 All E.R. 118 (Eng. C.A.), at 132 and 140 ("A breach of duty will not be actionable ... if it does not cause loss."))

82 In this case, the Damage Award was assessed as the amount necessary to make up the "shortfall" resulting from the improvident sale — not to compensate for the 'subterfuge' found on Howard's and Eugene's parts. In respect of that breach, no financial loss was asserted by the beneficiaries or found by the trial judge. It was the sale, not the alleged subterfuge, that the Damage Award was intended to make good. It was the sale that should have been subjected to the test of good faith by the trial judge for purposes of Article 13.

83 Counsel drew our attention to the definition of "good faith" adopted in *Nystad v. Harcrest Apartments Ltd.* (1986), 3 B.C.L.R. (2d) 39 (B.C. S.C.), where McEachern C.J.S.C. (as he then was) stated:

> "Good faith" according to *Black's Law Dictionary*, 5th ed. (1979), has no technical meaning but is a term used "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation", or "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious". [At para. 19.]

More recently, in *Armitage v. Nurse*, *supra*, Millet J. (as he then was) indicated in this context that "good faith" involves an honest belief that a course of action ought to be taken in the beneficiary's interest. (At 252.)

84 As I read the trial judge's reasons, that is what he found in terms of Howard's intentions in carrying out the sale of the Big Nine shares. The judge rejected the "Liquidation Plan" theory and stated that Howard's decision to sell was made "because he believed it was in the best interests of the beneficiaries" — a view apparently shared by Tommy. This being the case, it seems to me that we should accept and apply the Court's statement that it would have excused Howard for the improvident sale 'but for' the subterfuge regarding Harold's position. (Indeed, Article 13 was not discretionary, as noted earlier.) I would allow Howard's appeal and declare that he is entitled to be excused from liability for the Damage Award pursuant to Article 13 of the Trust Agreement, which requires that a trustee who has acted in good faith be excused unless the loss in question was caused by his or her own dishonesty, gross negligence or wilful breach of trust. I infer that the trial judge did not find gross negligence or wilful breach of trust, nor dishonesty relating to the sale.

85 Another error — clearly one of law — that pervaded the trial judge's reasons concerns what he (and counsel) referred to as Harold's "right to become" a trustee. In fact, Harold *became* a trustee, without more, on Audrey's resignation. No authority was cited for the proposition that Eugene, who renounced his own trusteeship, had a duty to "notify" Harold of anything. Howard's situation, on the other hand, was very different: there is no doubt that on his appointment by Eugene, he was under a duty to familiarize himself with the terms of the Trust and that the two trustees together were then required to act in concert. But this was a responsibility of Harold's as much as a "right", and his trusteeship was certainly not an "appointment" that lay in anyone's power to make. Viewed from this perspective, Harold's assertion that he forgot he was "entitled to become" a co-trustee is less relevant than his failure to investigate his position upon Audrey's resignation, and to object to Howard's acting alone as soon as Harold became aware in November 2002 that he was doing so. This responsibility was not discharged by Tommy's apparent and unexplained failure to read the Trust documents sent to him by Eugene on October 24.

86 The trial judge's misapprehension of Harold's position in law was compounded in my view by his failure to consider various possibilities that were alternatives to the "subterfuge" conclusion. Notably, the Court seems to have assumed that Harold was not aware Howard was acting as a trustee and could not have been expected to find out that he was; and that Harold could not have been expected to take action long before the share sale closed in March 2004. Both of these assumptions were, with respect, incorrect.

Harold's Knowledge

87 It appears that Audrey's resignation was signed on or about September 30, 2002 (para. 165). The trial judge did not refer to any evidence as to when Harold became aware that Audrey was unable to continue as trustee, but it is reasonable to assume that Tommy or one of Harold's children would have told Harold. The fax machine episode took place in late October and the trial judge wrote that in early November 2002:

> Tommy wrote a number of letters to Harold enclosing various materials including the Eugene Resignation Document. He suggested that they not sign the Audrey Indemnity and should consider taking steps to void Howard's appointment as trustee, or have Lee or Tommy appointed as co-trustee as a compromise to avoid protracted legal action. He indicated that Eugene was attempting to unilaterally appoint Howard as Audrey's successor relying

entirely on the revocation of July 1979. He told Harold he should read carefully the second paragraph of the Acceptance because it appeared to be in conflict with the first paragraph.

In a second letter to Harold of November 6, 2002, he discussed the forestry potential at GRO. He indicated to Harold that they should "keep the forestry potential to themselves" and suggested ways of getting Eugene's family out of GRO.

Harold was upset when he learned of Howard's appointment. He was angry at Howard because of assistance he had given to Susan during their divorce proceedings. He was also upset that Lee, Virginia and Davis had signed the Audrey Indemnity and Howard Indemnity. [At 181-83; emphasis added.]

88 Harold's anger was apparent in a letter dated December 20, 2002 which he faxed to his children with a copy to Tommy. In it he recited the purposes for the establishment of the Trust, and added in a footnote:

HAL [Harold] stands by above 1975 Purpose with every ounce of energy he has left from his and [Harold's] family B/9 interest/viewpoint. — I do not care how AEL [Eugene] ... chose to portray and/or use control of the B/9 trust against [Harold]. After way AEL/HH Hewitt did me as my power of attorney and chapter 765, F.S. Florida Health Care proxy, no way will I ever consent to AEL/Hewitt being Trustee of B/9 Trust. PERIOD.!!

89 By this time, Harold should clearly have been asking questions about the trusteeship, and could easily have ascertained that he was a trustee. The fact he may not have had a copy of the Trust Agreement at Crying Girl does not mean he could not have contacted various people — including his local lawyer, Mr. McAdam — for the necessary information. Yet he did nothing to inform himself of his legal position or to challenge Howard's authority and was seemingly content for Tommy to represent him and his children in dealing with matters relating to the Trust. On November 5, 2002, Tommy had written to him about Big Nine and advised at para. 12:

I think we should:

a) Not sign Audrey's "blanket" indemnification. I would consider signing an appropriate indemnification i.e., "all lawful acts, no excused gross negligence, malfeasance, misfeasance, or improper wasting of corp. assets."

b) Move to either void Howard's app't or have Lee or me appointed as co-trustees as a compromise to avoid protracted legal action.

. . .

f) Step up the pressure on Howard as to his fiduciary duties.

. . .

We probably should not do all these at once, but in lock step, and not necessarily in the order above, by any means. [Emphasis added.]

(The same items had appeared in another letter in evidence dated November 2.)

90 There is also in evidence a second letter dated November 5, 2002 from Tommy to Harold in which he stated:

You will see that [Eugene] is attempting to unilaterally appoint Howard as Audrey's successor relying entirely on your and Gene's renouncement of July 1997 of any interest in the B-Nine trust. Read carefully the second paragraph since it seems to be in conflict with the first paragraph. I don't know where we are legally on all the questions.

[Emphasis added.]

This is presumably a reference to the Revocation Letters and it is obvious that Harold had a copy — quite apart from the fact he had signed one in 1979 and would, one would have thought, have had some memory of it. Still, he did nothing.

91 The trial judge's finding at para. 378 that Harold "did not know" he was entitled to be a trustee did not refer to any point in time. As we have seen, Harold was aware that Eugene had appointed Howard by late November 2002 — long before a possible sale of the Big Nine shares was raised. If Harold was sufficiently competent to be a trustee, he should, with respect, have been competent enough to read the Trust documents and the Revocation Letters himself or to seek legal advice concerning his own position. The trial judge gave no consideration to Harold's inaction, nor to whether it amounted to a renunciation of his trusteeship.

92 In saying this, I am mindful of a case relied on by the plaintiffs, *Montagu's Settlement Trusts, Re* (1985), [1992] 4 All E.R. 308 (Eng. Ch. Div.), which involved "massive litigation" over a multi-generational family trust, and the state of knowledge of its terms (and their meaning) on the part of the tenth Duke of Manchester. Megarry V.-C. noted that the law was "not clear and something of a muddle" and declined to impute knowledge to the Duke, so as to fix him with a constructive trust over certain chattels he had received. The Vice-Chancellor also said this about "forgetfulness":

> Little was said about this in argument; but in a case in which at one time the true position was known to Mr. Lickfold, and possibly to the duke, I must say something about it. If a person once has clear and distinct knowledge of some fact, is he to be treated as knowing that fact for the rest of his life, even after he has genuinely forgotten all about it? To me, such a question almost answers itself. I suppose that there may be some remarkable beings for whom once known is never forgotten; but, apart from them, the generality of mankind probably forgets far more than is remembered. [At 329.]

93 I regard *Montagu*'s case as very different from this one: what was 'forgotten' by Harold was not an obscure legal point, but the fact he was a trustee under a trust he and his brother had established for the benefit of his children; Harold was a lawyer (unlike the tenth duke); and more than enough information had come to his attention that should have set him on a course of enquiry.

Tommy's Knowledge or Means of Knowledge

94 It will be recalled that the trial judge dismissed the fresh evidence applications regarding the 23 pages faxed to Tommy on October 24, 2002 by Eugene. The Court *accepted* the submission that "the only logical inference is that the October 24 fax contained the balance of the documents sent on October 23" and that the 23 pages included the Trust Agreement and the Revocation Letters. The Court ruled, however, that this did not affect the earlier finding that "Tommy did not receive the BNT Trust Agreement until the summer of 2003" (para. 37). The judge declined to reconsider his conclusion that Howard and Eugene had "misled the plaintiffs as to Harold's right to be trustee." (2010 BCSC 871 (B.C. S.C.), para. 38.) In his analysis:

> ... They submit that if the evidence concerning the October 24 fax had been introduced at trial it probably would have changed the trial result.
>
> I do not agree with that submission. As previously discussed, the October 23 fax was considered in the context of Tommy's knowledge. That section concluded at para. 395 where I said:
>
> > I accept Tommy's evidence that he did not receive the BNT Trust Agreement until sometime in 2003 and that he did not learn until after the closing of the BNO Share Transaction that Harold had the right to be trustee. If it was otherwise, he surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge.
>
> The key disclosure was not the BNT Trust Agreement but Harold's right to be trustee. That is what Howard and Eugene did not disclose. They failed to tell Harold, Tommy or the other beneficiaries of Harold's right to be trustee.

> Their failures in this regard are set out in detail at paras. 396 to 411 of the judgment and are not limited to the failure to send Tommy the BNT Trust Agreement and Revocation Letters. [At paras. 38-40.]

95 With respect, the Trust Agreement and the Revocation Letters were the only information needed to show Harold's "right to be a trustee" or more properly, Harold's position as a trustee. It is difficult to see how it can be said Eugene and Howard "concealed" this from Harold and Tommy when the latter were aware, or should have been aware, no later than November 2002 of the terms of the Trust and the Revocation Letters, which were sent by Eugene to Tommy on October 24, 2002. The trial judge had at para. 392 suggested that if they had been sent, "Tommy surely would have sent them off to Harold with the balance of the documents that he sent on November 5." The fact that Harold was a trustee would have been crystal clear from a simple reading of Article 15 of the Trust Agreement.

96 The conclusion that Howard participated in a "subterfuge" is also difficult to square with the trial judge's findings that Howard's decision to become a trustee was "made with the best of intentions" (para. 433), that he was told by Eugene that "he and Harold had appointed him in 1979 as successor trustee" (para. 433), his lack of any personal interest in the Trust or its property, and his acting out of a sense of "family obligation". (Para. 166.) In hindsight, it is clear that Howard should not have accepted Eugene's word that he and Harold had appointed him as their successor trustee. (This of course was true only in the limited sense each had appointed Howard as his successor *in the event that* either was "unable to act".) Howard testified that he telephoned Ms. Mason to see if his appointment was in order and was told "he would be the sole trustee", but Ms. Mason denied speaking to him about his appointment and had no notes of such a conversation. (Para. 168.) The trial judge disbelieved Howard on this point, even though he found that Ms. Mason told Mr. Long exactly the same thing in early 2004.

97 At the end of the day, it must be said that the trial judge's finding of a scheme between Eugene and Howard to "conceal" what the trial judge erroneously referred to as Harold's right to become a co-trustee, rests on shaky foundations indeed. Again, there is no doubt Howard should have determined that Harold was his co-trustee and that in acting alone, Howard breached the terms of the Trust. But it is also clear from the trial judge's findings that Howard was relying on what he was told by Eugene (if not by Ms. Mason). He took on the trustee's role out of a sense of obligation, and he was found to have been acting in what he saw as the beneficiaries' best interests. There is no finding that he (as opposed to Eugene) concealed anything from Harold or his children. He told Tommy that he valued and wanted his input although, he said, "I might not take your advice, as I try to exercise my fiduciary duties to all members of the trust." (Para. 192.) He consulted with Tommy in connection with the proposed sale of the Big Nine shares (of which Harold was aware by December 2002) and there is no finding that Tommy told him of Harold's opposition to it.

98 I am, of course, aware that we are required to extend a high degree of deference to the trial judge's findings of fact and may interfere only if such a finding has been shown to be clearly and palpably wrong. The Supreme Court of Canada has said that a "palpable" error is one that can be easily seen or known: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para. 5. The finding of a "subterfuge" in the case at bar rested on a set of inferences none of which is easily seen or known: one party to the 'subterfuge' may have been relying on misleading advice (that Harold would have to 'step up') and was under no duty to wake the sleeping dog (Harold); while the other party was under a duty to inform himself of the Trust terms but failed to do so on the advice of his friend (Eugene, a lawyer) and may well have been lulled into the share sale by the apparent approval of Tommy, Harold's proxy. In these circumstances, it was in my opinion incumbent on the trial judge to consider whether the situation was (to borrow a term from *Montagu*'s case) a "muddle" rather than a conspiracy and whether Howard simply stumbled into his role and into the share sale, seeking in good faith to further the interests of all the beneficiaries rather than to accomplish some nefarious purpose.

99 Given the errors of law described above, however, it is not necessary to base my conclusion that Howard's appeal should be allowed, on errors in the Court's findings of fact. I would allow Howard's appeal with respect to the payment of the Damage Award on the bases that no causal connection existed between the "subterfuge" (if one existed) and the improvident sale, and that the Court erred in failing to apply Article 13 to Howard's obligation to pay the Damage Award.

Eugene's Position

100 On the same basis, I would also allow Eugene's appeal from the order that he was liable jointly and severally with Howard to pay the Damage Award. Again, even if one were to accept that there was a conspiracy on the part of Howard and Eugene to prevent Harold from acting as a trustee, and even if Harold was not aware that Howard was acting as trustee and that the shares were going to be sold — which is not the case — no loss to the Trust or the Trust property was shown to have resulted from the "collusion" found by the court below.

101 In his factum, Eugene also advanced the argument that the trial judge had erred in finding that the "manner of sale" of the Big Nine shares by the Trust constituted a breach of the Trust because Howard failed to expose the property (i.e., the shares of Big Nine) to the market. Since I have already allowed Eugene's appeal from the order directing him and Howard to pay the Damage Award to the plaintiffs, it is not necessary to deal with this submission.

The Plaintiffs' Cross Appeal

102 Howard has not appealed his liability to pay the Proceeds Award totalling $522,000, which under the terms of the main reasons was to be paid in Canadian funds to Lee, Virginia, Davis and Tommy. On their cross appeal, however, the plaintiffs submit the Award should have been made to the Trust, which they say continued and continues to exist. Thus they challenge the ruling that the proceeds were held on a bare trust in favour of the plaintiff beneficiaries once Jennifer and Julie received their shares of the proceeds. In support, the trial judge cited the following passage from Underhill and Hayton, *supra*, as follows:

> 27.2 Because a trust of property cannot exist unless there is property held on a trust, once a trust has been duly emptied of all of its assets, there is no trust .... In the case of a discretionary trust to distribute capital amongst a class of beneficiaries alive at the end of the trust period, the trust terminates once all the trust assets have been transferred by the trustee to such beneficiaries as they have selected in their discretion, a temporary bare trust arising of identified property that the trustees have decided to transfer to our particular beneficiaries but have not yet transferred to him. [At 385-6; emphasis added.]

and from Gillese and Milczynski, *The Law of Trusts* (2nd ed., 2005) the following:

> Distribution occurs when all of the trust assets have been paid out or transferred to the beneficiaries. Obviously, once distribution occurs and the required counting takes place, the trust comes to an end. A trust cannot exist without trust property. [At 85.]

103 In the case at bar the trustees did not have a discretion to distribute the Trust property to the beneficiaries in anything other than equal shares. But it cannot be said that the "distribution" was or is completed. The plaintiff beneficiaries' share of the Big Nine sale proceeds remain notionally in the Trust. Howard, purporting to act as a sole trustee, made the decision to distribute those proceeds to the beneficiaries. Although he obviously cannot make decisions in future as the sole trustee, the order of the Court that he pay the Proceeds Award will operate to insulate him from any further challenge from the beneficiaries or settlors in this regard. Following that payment, Howard must pass his accounts in accordance with s. 99 of the *Trustee Act* and will have to ensure that all taxes are properly paid. At that point, the Trust will cease to exist — unless it is entitled to any other property or right.

104 I agree, then, with the plaintiffs that the Trust remains in existence, although in practice it is likely very near the end of its life. At the same time I believe it was open to the trial judge to order that the Proceeds Award be paid to the plaintiff beneficiaries directly rather than to the Trust. This case would seem to fall more clearly in the second group of cases discussed by Lord Browne-Wilkinson in *Target Holdings*, *supra*, rather than the first, given that no future beneficiaries can arise under the Trust. Here, in Lord Browne-Wilkinson's words, it is not the case that "the only way in

which all the beneficiaries' rights can be protected is to restore to the trust what ought to be there." (At 793.) The plaintiff beneficiaries will, upon their receipt of the Proceeds Award, have received what they were entitled to receive from the Trust, just as Jennifer and Julie have done. I also note that in their written argument below, the plaintiffs purported to invoke *Saunders v. Vautier* (1841), 49 E.R. 282 (Eng. Rolls Ct.), *aff'd*, (1841), 41 E.R. 482 (Eng. Ch. Div.) and asserted that they were "absolutely entitled to terminate the Trust and direct the payment by Mr. Hewitt of the Plaintiffs' Funds either to themselves or to whom they may direct." They should not now be permitted to insist on the opposite position.

105 Accordingly, I would not accede to the plaintiffs' first ground of cross appeal. I make no comment on the assertion that the Trust continues to include: (i) the Big Nine *shares* (because, the plaintiffs now assert (in other proceedings), Howard did not have the authority to convey beneficial ownership of those shares to TRL); (ii) a claim against TRL for "knowing receipt of trust property"; (iii) the sale proceeds that were paid by Howard to Jennifer and Julie (because, the plaintiffs now say, Howard did not have the power to convey the beneficial interest in those proceeds to them); and (iv) a claim against Jennifer and Julie for "improper receipt" of those proceeds. I say only that if and when these claims are tried, the court will have to consider whether having received judgment for the proceeds of the share sale, it is open to the plaintiffs to advance a claim *in rem* against other parties in respect of the shares or their proceeds.

106 This brings us to the plaintiffs' second ground of appeal, which is that the trial judge erred in "failing to consider and then confirm Harold as a co-trustee of the Trust, to remove Howard as a co-trustee of the Trust, and to confirm the appointment of Tommy as a co-trustee of the Trust." If nothing else is clear from these proceedings, it is that the two sides of the Lewis family are unlikely, and perhaps unable, to deal with each other on a reasonable basis. The original intention of having one co-trustee from each side would clearly not work in the circumstances that now exist; nor would it be appropriate to appoint Harold or a nominee of his, to act alone. What is needed is one trustee — perhaps a professional trust company — who is untainted by any previous dealings with the parties and who is willing to make prudent decisions in the interests of the beneficiaries.

107 I would therefore ask that counsel for Howard and counsel for the plaintiff beneficiaries attempt to identify such a trustee as soon as possible, and I would direct that in the meantime, Howard proceed with the passing of his accounts. If counsel are unable to agree on a trustee within 60 days of the date of this court's order, I would order them to make written submissions to this court, which will make the appointment.

Remaining Issues on Appeal

108 It will be recalled that the trial judge ordered that the Proceeds Award should be paid to Tommy, Lee, Virginia and Davis in U.S. dollars. In supplementary reasons indexed as 2011 BCSC 102 (B.C. S.C.), the Court addressed the plaintiffs' application that the award instead be made in Canadian currency. Apparently this submission was made because as of March 3, 2004 (the date of the share sale), $396,000 U.S. was equivalent to $533,649.60 Cdn. Howard submitted on the other hand that the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155 applied. Section 1(1) thereof states:

> If, before making an order for the payment of money arising out of a claim or a loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

109 Writing on January 28, 2011, the trial judge noted that the question was "not a matter of little moment", since Canadian and American dollars were then trading almost at par. (The trial judge agreed with previous authority that interpreted the reference in s. 1(1) to "conversion date" to mean as of the date of payment of the judgment: see *Litecubes, L.L.C. v. Northern Light Products Inc.*, 2009 BCSC 427 (B.C. S.C.) and see *Law Reform Commission of British Columbia, Report on Foreign Money Liabilities* (1983) discussed at para. 80 of the trial judge's reasons.)

110 The judge stated that when he had made the Proceeds Award in U.S. dollars in his main reasons, he had not considered whether the plaintiffs would be "most truly and exactly compensated" if paid in American currency and he had overlooked their submissions in favour of an award in Canadian currency. As well, he said:

> ... I did not give any consideration as to whether Howard's decision to pay out in American funds should dictate the currency of the judgment or whether the *FMCA* applied. It is necessary now, however, that I do so.
>
> The BNT was a trust established in British Columbia and governed in all aspects by British Columbia law. Big Nine was a British Columbia incorporated company. Howard entered into an agreement to sell the Big Nine shares for $889,000. The Damage Award was calculated in Canadian dollars.
>
> Schedule A to the Distribution Letter set out the distribution of the proceeds in Canadian dollars and then converted that distribution to American currency based on the exchange rate as of February 12, 2004. The Schedule indicates that Jennifer's and Julie's interest were each valued at $174,000 which was then converted to $132,000 USD. Lee, Virginia and Davis's interest were each shown to be $87,000 which converted to $66,000 USD, while Tommy's interest was $261,000 which converted to $198,000 USD.
>
> The plaintiff beneficiaries did not request or seek that their interest be converted into American dollars. Although the plaintiff beneficiaries are all residents of the United States, residency does not trigger the application of the *FMCA*. If it did, then the Damage Award should also be converted to USD funds. No one has suggested that that would be appropriate.
>
> I find that plaintiff beneficiaries were entitled to receive their proportionate share of the sale of a Canadian asset in Canadian currency. Howard's decision to convert the funds into American dollars does not change that fundamental point or lead to the conclusion that the plaintiffs would be most truly and exactly compensated if the award is measured in USD currency. In the circumstances of this case the *FMCA* does not apply. [At paras. 85-9; emphasis added.]

111 On appeal, Howard asserts that the trial judge here overlooked the evidence as to where the closing of the share sale occurred and the currency in which Julie and Jennifer received their shares of the proceeds; and did not consider the 'windfall' effect of the order on the plaintiff beneficiaries.

112 Normally, the question of whether a statute applies to a given case would be a question of law, but here the question depends on whether the plaintiff beneficiaries would "be most truly and exactly compensated" if another currency were used for the Proceeds Award. I regard this as a question of mixed fact and law.

113 As I understand it, TRL paid the purchase price for the Big Nine shares in U.S. funds. Certainly Howard forwarded cheques to Julie and Jennifer in U.S. funds. I do not read anything sinister into this fact — the children all resided in the United States and if they had received Canadian funds, would likely have made the exchange immediately to U.S. funds. More importantly for our purposes, the Trust Agreement required that the beneficiaries all be treated equally. Thus if Howard had acted properly, he would not have required an indemnity and release and would have made the payments to Tommy, Lee, Virginia and Davis in U.S. funds. The purpose of the Proceeds Award is to require him to complete the distribution and thus restore the equality of the beneficiaries' respective positions. It follows in my view that the court below erred in concluding that an award in Canadian currency would "most truly and exactly compensate" the plaintiff beneficiaries.

114 I would allow the appeal on this point and order that the Proceeds Award be the amount of Canadian currency that is necessary to purchase the following amounts of U.S. currency at a chartered bank in British Columbia at the close of business on the conversion date:

Tommy	$198,000
Lee	66,000

Virginia	66,000
Davis	66,000

and that the Award be paid in Canadian funds to the plaintiff beneficiaries as above.

Interest

115 The trial judge ordered that pre-judgment interest on the Proceeds Award be paid in accordance with the *Court Order Interest Act* from March 3, 2004 to the date of judgment and that post-judgment interest be paid from February 9, 2010 to August 17, 2011 in the amounts set forth in his order and thereafter, to the date of payment.

116 In his oral argument, Mr. DeFilippi on behalf of the plaintiffs acknowledged that the question of compounding interest had not been raised directly by counsel in argument below. However, Mr. DeFilippi submitted in this court his clients are entitled to 'every possible cent' and thus seek an order that compound interest, rather than simple interest as contemplated by the Act, be paid. In this regard, counsel drew our attention to *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650 (Ont. C.A.), where the Court said this in the context of a fraud case:

> At para. 17 of his supplementary endorsement, the motion judge explained why he awarded compound interest:
>
> > Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. [Internal citations omitted.]
>
> I agree. I would simply add that this court has consistently approved of the trial court's exercise of discretion to award compound interest for breach of fiduciary duty or breach of trust: see *Kooner v. Kooner*, 2006 CarswellOnt 5884 (C.A.), at para. 2; *Waxman v. Waxman*, 2008 ONCA 426, at para. 5; and *Brock v. Cole* (1983), 40 O.R. (2d) 97 (Ont. C.A.), at p. 103. [At paras. 56-7.]

117 Consistent with the Ontario Court of Appeal's decision, the Supreme Court of Canada in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 (S.C.C.) cited *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (Eng. C.A.), in which the Court had noted that whenever a wrongdoer deprives a company of money for which it needs for use in its business, interest is awarded in Equity. The Supreme Court in *Air Canada* agreed, stating:

> The provincial liquor authorities deprived the airlines of money that they almost certainly could have used in the conduct of their business. The presumption is hardly unreasonable that if the airlines had had the money, they would have put it to good use. In short, what the airlines lost to the provincial authorities was not just money, but the future value of that money. Therefore compound interest might have been appropriate. [Para. 85.]

118 However, because the awarding of compound interest was discretionary, the Court declined to order compound interest. Iacobucci J. explained:

> Because it cannot be said that the trial judge misdirected himself on any applicable principle of law or that his exercise of discretion was so clearly wrong as to amount to an injustice, his refusal to award punitive damages or compound interest should be allowed to stand. [Para. 86.]

The same circumstances apply here, and in addition, the trial judge below was not even asked to make an exception to the usual court order interest award. Given the result in *Air Canada*, it is not open to us now to interfere in the circumstances of this case.

Special Costs

119 The plaintiffs assert that the trial judge erred in failing to award them special costs against Howard and Eugene. The plaintiffs cited two main reasons why special costs should have been awarded. First, Howard had acted in breach of trust in seeking to "extort" from the plaintiff beneficiaries an indemnity or relief of his duties as a trustee and had been found to be guilty of "subterfuge". The plaintiffs also alleged that Howard had intended to mislead the Court in his testimony to the effect he had been unaware that Harold "had the right to be" a co-trustee and that Howard had only assumed the office based upon Ms. Mason's advice. Overall, the plaintiffs argued, the trial judge erred in principle "in not giving effect to the fiduciary relationship between Howard and the plaintiff beneficiaries" and instead approached the beneficiaries' claim as if it were one in tort or contract.

120 Second, the plaintiffs contend that Howard unreasonably refused to make admissions at trial that he should have and that counsel were unresponsive to Notices to Admit a large number of documents. The trial judge stated in his reasons indexed as 2011 BCSC 102 (B.C. S.C.) that if the admissions had been made before trial, his job would have likely been more difficult than it was because the Court would have had "no context from any of the facts and admissions", and that the extent to which documents could be admitted for their truth in whole or in part often turned out to be a contentious question. Nevertheless, the plaintiffs argue on appeal that to give effect to Howard's reasons for his denials would emasculate R. 7-7 of the *Supreme Court Civil Rules* and run contrary to the object and purposes of the Rules as set forth in R. 1-3(1).

121 The reasonableness or unreasonableness of responses to Notices to Admit and of counsel's conduct generally at trial is something the trial judge is uniquely positioned to assess. Counsel's arguments were considered at length in more than one set of reasons and I am not persuaded that the trial judge erred in the exercise of his discretion by applying a wrong principle or in bringing about an unjust result regarding costs.

122 With respect to the arguments based on the "subterfuge" which the trial judge found had been engaged in by Howard and Eugene, it will be apparent from these reasons that in my view, the finding rests on shaky grounds. But even the trial judge was not convinced that the conduct he had found warranted special costs. Again, I cannot say that he erred in the exercise of his discretion on this issue.

Bullock and Sanderson Orders

123 Finally, the plaintiffs submit that the trial judge erred in declining to make a Bullock order and a Sanderson order in respect of the special costs that they were ordered to pay, and have paid, to Ms. Mason. The trial judge dealt with this issue beginning at para. 130 of his reasons indexed as 2011 BCSC 102 (B.C. S.C.). He stated in part:

> The plaintiffs acknowledge that Howard and Eugene cannot be required to reimburse them for special costs that they are ordered to pay Mason. In the course of oral argument, they submitted that if the plaintiffs were ordered to pay special costs to Mason, the Court could still make a Sanderson or Bullock order against Howard and Eugene, but limit such order to the costs that would have been payable to Mason pursuant to Scale C. The plaintiffs provided no authorities that would justify such an order. I do not believe that it is a proper order to make. In my opinion, if a party is ordered to pay special costs, that party is not entitled to seek indemnity for a portion of those costs from other parties to the litigation. Accordingly, the plaintiffs' application for a Bullock or Sanderson order is dismissed.
>
> I should note that even if I had limited Mason's costs to Scale C, I would not in the circumstances of this case have made either a Bullock or Sanderson order. [At paras. 132-33.]

124 The Court noted that a party seeking a Bullock order must satisfy a two-part test: "It must be reasonable for the plaintiff to have sued the successful defendant and there must be something that the unsuccessful defendant did to warrant being made liable to reimburse the plaintiff for the successful defendant's costs." (Citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 (B.C. C.A.)). The judge stated that the bringing of the claim against Ms. Mason in conjunction with the claims against Howard and Eugene was reasonable, but that Howard and Eugene had not done anything to warrant their being made liable to reimburse the plaintiffs for Ms. Mason's costs. In his analysis:

> ...The plaintiffs acknowledge that at the time they commenced the claim against Mason there was nothing that Howard and Eugene had done to warrant the plaintiffs bringing Mason into the litigation. They submit, however, that this changed when Howard testified at his examination for discovery that Mason had told him in the fall of 2002 that he was entitled to act as the sole trustee. Mason denied this conversation and at trial I did not accept Howard's evidence that such a conversation took place.
>
> The difficulty with the plaintiffs' reliance on the alleged 2002 conversation is that that conversation did not form any part of the plaintiffs' claim against Mason. Its import in the litigation was that if I had held that Mason had so advised Howard, it might well have strengthened Howard's case that he should be exonerated under the *Trustee Act* for his breach of trust.
>
> The plaintiffs did not need to bring an action against Mason or continue their claim against her in order to challenge Howard's assertion. Regardless of whether Mason was a party at the trial, she was clearly going to be a witness.
>
> The question of the 2002 conversation could have been resolved in the context of her giving evidence as a witness. It did not necessitate her being a defendant in the litigation or justify the plaintiffs continuing their claim against Mason once examinations for discovery were complete.
>
> I find that there was nothing that Howard and Eugene did that warrants them being made liable to pay Mason's costs. That finding is fatal to a Bullock or a Sanderson order and I would not have made such an order even if I had limited Mason's costs to Scale C. [At paras. 135-39.]

125 In this court, the plaintiffs contend that the alleged conversation between Howard and Ms. Mason in 2002 had much broader implications than indicated by the trial judge: if he had believed that the conversation actually took place, the plaintiffs would likely have lost their case against Howard and, the plaintiffs say, "[Ms.] Mason would have had a motive for telling '... [Mr.] Long that Howard became trustee in September 2002 upon Harold and Eugene renouncing their appointments ...'."

126 In response, Howard submits that the alleged telephone call in 2002 was never part of the plaintiffs' case against Ms. Mason and indeed that they never accepted that it had occurred. More to the point, Ms. Mason was not required to be a defendant in order to testify as a witness as to whether it had occurred. The question of the telephone call did not necessitate an action against her, or the continuation of the action once discoveries were complete.

127 I agree with Howard's submission on this point and see no error in the trial judge's conclusion that "there was nothing that Howard and Eugene did that warrants [their] being made liable to pay [Ms.] Mason's costs." (Para. 139.) I would dismiss the cross appeal.

Disposition

128 In the result, I would:

- allow the appeals of Howard and Eugene and delete paras. 1 and 2 of the trial judge's Order and replace them with the following:

  > In failing to inform himself of the terms of the Trust and in particular of Harold D. Lewis' position as a co-trustee with him, and in carrying out the sale of the shares in Big Nine Outfitters Ltd. on behalf of the Big Nine Trust without the agreement of Harold Lewis, Howard Hewitt failed in his obligations as a trustee;

- add to the end of para. 3 of the Order the words "by reason of his failure to expose the shares to the market or to obtain an expert evaluation of the shares;"

• declare that Howard is entitled to be exonerated pursuant to Article 13 of the Trust Agreement from his liability for the Damage Award in respect of the improvident sale of the shares and that Eugene is not liable therefor;

• delete paras. 4, 5, 6, 7 and 21 of the Order;

• revise para. 8 of the Order as indicated at para. 114 of these reasons and revise paras. 9 and 10 of the Order to refer to amounts equivalent to those stated in U.S. currency as appropriate;

• delete from para. 28 of the Order the phrase "but reconsideration is refused except that the currency of the Proceeds Award is changed from United States to Canadian dollars";

• delete paras. 36 and 39 of the Order;

• order that if counsel are unable to agree, within 60 days of this court's order, on a trustee of the Trust, they shall apply immediately to this division of the Court for an appointment to be made.

In all other respects, I would dismiss the appeals and cross appeal.

Chiasson J.A.:

I Agree:

MacKenzie J.A.:

I Agree:

Schedule A

WHEREFORE THE PLAINTIFFS, AND EACH OF THEM, CLAIM AGAINST THE DEFENDANTS, HOWARD H. HEWITT, A. EUGENE LEWIS, JENNIFER LEWIS BROWNING, AND JULIE ANNE LEWIS, AND EACH OF THEM, AS FOLLOWS:

(a) an Order that Harold be confirmed as a trustee of the Big Nine Trust;

(b) an Order that Hewitt be removed as a trustee of the Big Nine Trust;

(c) an Order that Virginia be appointed as the or a trustee of the Big Nine Trust; without security, in substitution for Hewitt;

(d) an Order that all assets, real and personal, and all other property of the Big Nine Trust be vested in Virginia, as the or a trustee;

(e) Special Costs;

(f) Such further and other relief as this Honourable Court may determine appropriate.

WHEREFORE THE PLAINTIFFS, THOMAS E. BRONSON, J. TOM BRONSON, LEE B. LEWIS, VIRGINIA L. SHAFFER AND H. DAVIS LEWIS, JR., AND EACH OF THEM, CLAIM AGAINST THE DEFENDANTS, HOWARD H. HEWITT, A. EUGENE LEWIS, MARGARET H. MASON, BULL, HOUSSER, TUPPER AND BULL, HOUSSER AND TUPPER LLP, EACH OF THEM, AS FOLLOWS:

(a) an account of the value of the Trust Property in February of 2004, or such other date as this Honourable Court may determine appropriate, and of the value of the Trust Property as at the date of trial, or such other date as this Honourable Court may determine appropriate;

(b) an account of the value of the proportionate share of beneficial interests in the Trust Property of Lee, Virginia, Davis and Tommy in February of 2004, or such other date as this Honourable Court may determine appropriate, and the value of the proportionate share or beneficial interests in the Trust Property of Lee, Virginia, Davis and Tommy as at the date of trial, or such other date as this Honourable Court may determine appropriate;

(c) an Order directing that Hewitt, Eugene, Mason, BHT and BHT LLP, and each of them, pay to Lee, Virginia, Davis and Tommy, and each of them, Equitable Compensation;

(d) in the alternative, or in addition, Damages;

(e) in the alternative, or in addition, Punitive and Exemplary Damages;

(f) in the alternative, or in addition, Aggravated Damages;

(g) an Order for the disgorgement of the benefits received by Eugene and Hewitt, and each of them, from the Big Nine Trust;

(h) an Order directing that Hewitt, Eugene, Mason, BHT and BHT LLP, and each of them, pay Interest at such rates for such periods as this Honourable Court may determine appropriate;

(i) in the alternative, Interest pursuant to the *Court Order Interest Act* (B.C.);

(j) Special Costs;

(k) Such further and other relief as this Honourable Court may determine appropriate.

Appeal allowed in part.

Footnotes

* A corrigendum issued by the court on November 8, 2013 has been incorporated herein.

** Additional reasons at *Bronson v. Hewitt* (2013), 2013 BCCA 488, 2013 CarswellBC 3448, 50 B.C.L.R. (5th) 368 (B.C. C.A.).

TAB 3

2008 CarswellOnt 1615
Ontario Superior Court of Justice

Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.

2008 CarswellOnt 1615, [2008] W.D.F.L. 2607, [2008] O.J. No. 1114, 165 A.C.W.S. (3d) 1035, 41 C.B.R. (5th) 131

IN THE MATTER OF an Application pursuant to s. 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

CITIZENS BANK OF RHODE ISLAND (Applicant) and PARAMOUNT HOLDINGS CANADA COMPANY, PARAMOUNT HOLDINGS CANADA COMPANY II and IMAGE CRAFT INC. (Respondents)

A. Hoy J.

Heard: March 19, 2008
Judgment: March 26, 2008
Docket: 06-CL-6566

Counsel: Harvey G. Chaiton, Maria Konyukhova for RSM Richter Inc.
Alan J. Butcher for Transcorp Distribution Inc.

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles

Debtor manufactured greeting cards and complementary products — Creditor distributed products — Creditor did not pay for orders but amount was recorded and credit notes were issued and paid against invoice from ultimate customer — Creditor was initially in debt to debtor, because it bought increasing amounts of inventory — Ultimately, creditor reduced inventory levels and returned some inventory, resulting in net amount owing by debtor — Debtor entered bankruptcy owing $283,327 to creditor — Receiver paid $243,177.95 to creditor — Creditor brought motion for declaration that accounts receivable held by debtor were impressed with trust in favour of creditor — Motion dismissed — Parties agreed no express trust existed — Payments to creditor did not create trust arrangements, but merely to eliminate debt — Payments were made out of general funds — Fact that creditor was initially in debt but later became creditor did not create trust arrangement — No constructive trust existed — Juristic reason existed for any enrichment — Amounts owing arouse out of business debt — Security interest of other creditors would be harmed if trust were declared.

Table of Authorities

Cases considered by *A. Hoy J.*:

Brown & Collett Ltd., Re (1996), 11 E.T.R. (2d) 164, 1996 CarswellOnt 619 (Ont. Gen. Div. [Commercial List]) — distinguished

Canada (Attorney General) v. Confederation Life Insurance Co. (1995), 8 C.C.P.B. 1, 1995 CarswellOnt 318, 1995 C.E.B. & P.G.R. 8227 (headnote only), 33 C.B.R. (3d) 161, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717 (Ont. Gen. Div.) — considered

Canada (Attorney General) v. Confederation Life Insurance Co. (1997), 32 O.R. (3d) 102, 14 C.C.P.B. 1, 41 C.C.L.I. (2d) 1, 145 D.L.R. (4th) 747, (sub nom. *Confederation Life Insurance Co. (Liquidation), Re)* 97 O.A.C. 18, 1997 CarswellOnt 62, 1997 C.E.B. & P.G.R. 8308 (headnote only) (Ont. C.A.) — referred to

Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc. (2000), 2000 CarswellOnt 3155, 22 C.C.L.I. (3d) 221 (Ont. S.C.J.) — referred to

Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc. (2002), 217 D.L.R. (4th) 178, 50 C.C.L.I. (3d) 6, 2002 CarswellOnt 2707, 61 O.R. (3d) 296, 162 O.A.C. 203 (Ont. C.A.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — referred to

MOTION by creditor for order that certain assets of debtor were subject to trust.

A. Hoy J.:

1 The issue in this motion by RSM Richter Inc. in its capacity as the court appointed Interim Receiver and Receiver of the assets of Image Craft Inc. ("IC") and its Canadian affiliates, and cross-motion of Transcorp Distribution Inc. ("Transcorp"), is whether accounts receivable in the amount of $243,177.95 collected by the Receiver constitute property of IC or are subject to an implied or constructive trust in favour of Transcorp. It is conceded by Transcorp that there is not an express trust.

2 If the accounts receivable are the property of IC, they will be paid to IC's first ranking secured creditor, Citizen's Bank of Rhode Island (the "Bank"), which has a security interest over the accounts receivable of IC. The Bank will suffer a substantial deficiency on its secured claim; no funds will be available for distribution to unsecured creditors.

3 For the reasons that follow, I have concluded that the accounts receivable in issue are not impressed with an implied or constructive trust in favour of Transcorp.

4 In its cross-motion, Transcorp, in the alternative, sought an order directing a trial of the issue as to the existence of a trust. This relief was not pursued at the hearing, and it was acknowledged at the hearing that there was no dispute at to the material facts. I have assumed that this alternative was abandoned by Transcorp; if not abandoned, the relief would not have been granted, given the absence of dispute as to material facts.

The Facts

5 IC and its affiliates designed, manufactured and distributed greeting cards, gift wrap and complementary products. It had a number of distributors.

6 Transcorp has acted as a distributor of IC's products since at least 1995. Transcorp purchased inventory from IC, in bulk, and sold it to outlets of national retail customers located in Quebec and parts of New Brunswick, and to its own local (as opposed to national) customers.

7 Transcorp billed and collected from its local customers. Those accounts receivable are not at issue on these motions.

8 In the case of sales to outlets of national retail customers, Transcorp delivered the product to the outlet and provided proof of delivery to IC, and IC invoiced the head office of the national customer and was responsible for collection from the national customer.

9 With few exceptions, Transcorp did not pay cash for the inventory it acquired from IC. When the inventory was sold to Transcorp, IC would record an account receivable from Transcorp in its books and records. When IC invoiced the national

customer, it issued a credit note to Transcorp for the amount invoiced to the national customer, and applied the credit note against the account receivable. In turn, on receipt f the credit note, Transcorp recorded a payment in the amount of the credit note. This system was referred to as the credit and rebill program or procedure.

10 The documentary evidence establishes that IC offered volume discounts and early payment discounts to national customers. The invoices it sent to national customers (and the amount of the credit notes it issued to Transcorp) were for the sales price, before reduction on account of volume and early payment discounts. The national customers paid an amount, net of these discounts. IC recorded the amounts it invoiced national customers, net of the applicable discounts, as receivables of IC and included them on the accounts receivable information provided to the Bank to support its borrowings. IC deposited the monies it collected from national customers into its general bank account and did not segregate the payments, or account to Transcorp with respect to the collection of those amounts.

11 The spread between the price at which Transcorp acquired inventory from IC, and the amount invoiced to the national customer, was Transcorp's distribution fee, or gross profit arising from the transaction.

12 While the credit notes for the invoiced price to the customer were greater than the related accounts receivable for the price of the inventory to Transcorp, until December 2005 Transcorp nonetheless consistently constituted a debtor, in relation to IC, because it bought increasing levels of inventory, thereby creating new and ever increasing accounts receivable on the books of IC.

13 In 2005, Transcorp began to reduce the inventory levels it maintained. It returned some of its inventory for a credit from IC. At the same time, its sales to national customers increased. As a result, in December of 2005, Transcorp became a creditor of IC and by January of 2006 Transcorp had a receivable from IC of over $700,000.

14 The evidence of Ms. Miller, IC's Credit Manager during the seven years prior to the bankruptcy, is that arrangements were put into place to reduce the amount that IC owed Transcorp, which evolved into an agreement to pay $40,000 per week, which continued until IC's bankruptcy in July 21, 2006. Her further, undisputed evidence is that the payments were funded from receipts from sales to all customers, and not specifically from the collection of accounts receivable that arose out of sales through Transcorp.

15 The evidence of Mr. Desjardins, Transcorp's principal, is that the amount of payments agreed to was arbitrary, and designed to bring the account balance down to zero within a certain period of time. An April 14, 2006 e-mail to Mr. Desjardins proposes adjusting the $40,000 amount upwards or downwards given the purchases and collections under credit and rebill program, and asks if this is satisfactory.

16 At the time of bankruptcy, IC owed Transcorp $283,327.00.

17 Since that time, the Receiver has collected $243,177.95 from accounts receivable arising out of sales through Transcorp.

18 The parties entered into two written agreements: a Distribution Agreement among IC, Transcorp and Mr. Desjardins dated April 24, 1995 and a letter agreement dated February 21, 2003 among IC, Transcorp and S. Rossy Inc, one of the national customers. The Distribution Agreement contains an "entire agreement" clause. Neither of the two written agreements provides that amounts receivable collected by IC arising out of sales through Transcorp would be held in trust for Transcorp, or requires that such amounts be segregated from other amounts received by IC. Nor was there any evidence of an oral agreement or discussions to such effect.

The Law

Implied Trust

19 A trust, express or implied, has three essential characteristics: (1) certainty of the intention to create the trust; (2) certainty of the subject matter or trust property; and (3) certainty of the objects of the trust. If any one of these does not exist, the trust fails to come into existence.

20 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 to determine if the requisite clear intention to create a trust is present.

21 Factors the Court will consider 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.

22 The presence or absence of a prohibition on the commingling of funds is not necessarily determinative. *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, [2000] O.J. No. 3289 (Ont. S.C.J.), paras. 300-305 (affirmed [2002] O.J. No. 3200 (Ont. C.A.)).

Constructive Trust

23 Constructive trust is an equitable remedy that may be granted in order to prevent an unjust enrichment of a person. In order to impose a constructive trust based on unjust enrichment there must be (1) enrichment; (2) a corresponding deprivation; and (3) no juristic reason for the deprivation.

24 A "juristic reason" means some underlying justification, grounded in a legal or equitable basis, for the circumstances that have arisen. The juristic reason may arise out of a relationship between the person enriched and some other person, and need not by tied to the person who asserts the unjust enrichment. *Canada (Attorney General) v. Confederation Life Insurance Co.*, [1995] O.J. No. 1959 (Ont. Gen. Div.) (affirmed (1997), 32 O.R. (3d) 102 (Ont. C.A.), paras. 176, 193-194).

Analysis

25 As indicated above, Transcorp concedes that there is no agreement, written or oral, that the receivables from national customers arising through the efforts of Transcorp would be held in trust for Transcorp.

26 It argues that from the circumstances, namely that Transcorp had become a creditor of IC, and the conduct of the parties, particularly the payments made by IC in 2006, it should be implied that once Transcorp became a creditor of IC those receivables would be held in trust for Transcorp. Counsel for Transcorp unequivocally indicated that Transcorp no longer takes the position that there was a trust arrangement when Transcorp was a debtor, as opposed to a creditor.

27 The payments in 2006 are not sufficient to imply a trust. Mr. Desjardin's own evidence is that they were arbitrary in amount, and designed to reduce the amounts owing to Transcorp. The April 14, 2006 e-mail, referred to above, that counsel for Transcorp points to as supporting a trust, in my view is consistent with the evidence that the payments were designed to eliminate the indebtedness over a certain time. As also noted above, the payments were made out of IC's general funds; an arrangement whereby the amounts receivable were "passed through" to Transcorp was not put in place, and there was no requirement that a separate account be established and maintained until the credit imbalance was rectified. There was no evidence that the word "trust" was used in the parties' discussions regarding repayment. The payments are in my view consistent with a debtor-creditor relationship.

28 Nor does the fact that Transcorp had, after many years as a debtor, become a creditor provide the requisite clear intention to create a trust.

29 Throughout the arrangement, IC bore the risk of non-payment by national customers. The fact that IC accorded volume and early payment discounts in relation to the receivables is consistent with the accounts receivable constituting IC's property.

30 As the requisite intention to create a trust is not present, there can be no implied trust.

31 Counsel for Transcorp also argued that the Receiver is obligated to continue to pay down the outstanding balance owing to Transcorp, in priority, because the receiving order contains the customary provision restraining suppliers of services from terminating the supply of those services, provided that the normal prices or charges for services received after the date of the order are paid by the receiver in accordance with normal payment practices of the debtor. I understand Transcorp to argue that the normal payment practice of IC was that the accounts receivable were held in trust and paid to Transcorp pending rectification of the credit imbalance, that the Receiver did not do so and is therefore in breach of the receiving order and, by analogy to *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2005] O.J. No. 589 (Ont. C.A.), the fact that the accounts receivable were commingled with IC's general funds should not defeat Transcorp's trust claim. This argument is disposed of by my conclusion that there was no intention that the accounts receivable be held in trust and applied to repay the indebtedness.

32 While IC can be seen as having been enriched by the receipt of the accounts receivable at issue, and Transcorp having suffered a corresponding deprivation because it did not receive the benefit of those accounts receivable, there is in my view juristic reason for the deprivation.

33 Transcorp is an unsecured creditor of IC. The indebtedness arose out of a contractual business relationship. There was no dishonest or underhanded conduct on the part of IC.

34 Moreover, as noted in *Confederation Life*, a juristic reason may arise out of a relationship between the person enriched and some other person and (para. 208), in the context of a constructive trust claim against the assets of an insolvent person who is allegedly a constructive trustee, it is important to be aware of the interests of the insolvent's other creditors as well as those of the constructive trust claimant. The security interest of the Bank is a further juristic reason for the deprivation.

35 This case can be distinguished from *Brown & Collett Ltd., Re*, [1996] O.J. No. 625 (Ont. Gen. Div. [Commercial List]) on which Transcorp relies. In that case, Winkler J. (as he then was) found that there was no implied trust but there was an agreement that funds would be forwarded by the defendant to the plaintiff as soon as they had been received, and the accounts were reconciled, and that the defendant had breached that agreement. He accordingly concluded that the debtor-creditor relationship arising out of the agreement did not amount to juristic reason because the enrichment was in clear breach of the agreement. He did not determine whether or not a constructive trust was an appropriate remedy in the circumstances. In this case, the enrichment did not arise out of the breach of an agreement between the parties.

Motion dismissed.

End of Document

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Jochems v. Jochems | 2014 SKQB 156, 2014 CarswellSask 324, [2014] W.D.F.L. 2782, [2014] W.D.F.L. 2785, [2014] W.D.F.L. 2836, [2014] W.D.F.L. 2854, 447 Sask. R. 83, 242 A.C.W.S. (3d) 872 | (Sask. Q.B., May 26, 2014)

2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

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

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

Michele Vanasse (Appellant) and David Seguin (Respondent)

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

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

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

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

Subject: Restitution; Family; Property; Estates and Trusts

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

III Division of family property
III.4 Determination of ownership of property

III.4.a Application of trust principles
III.4.a.i Resulting and constructive trusts
III.4.a.i.A Resulting trusts generally

Family law

IV Support
IV.1 Spousal support under Divorce Act and provincial statutes
IV.1.g Retroactivity of order

Family law

IV Support
IV.1 Spousal support under Divorce Act and provincial statutes
IV.1.r Miscellaneous

Restitution and unjust enrichment

V Benefits conferred in anticipation of reward
V.5 Family
V.5.d Common law spouses

Restitution and unjust enrichment

V Benefits conferred in anticipation of reward
V.5 Family
V.5.e Miscellaneous

Headnote

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

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

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

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and

spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — Court of Appeal was correct to intervene and conclude that transfer was not gratuitous — Common intention resulting trust has no further role to play in resolution of disputes such as this one — Resulting trust should not have been imposed on property on basis of finding of common intention between parties.

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

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

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

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

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

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Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

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

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

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

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

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

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

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

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

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

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi

accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

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

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

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

Per Cromwell J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein JJ. concurring): The time had come to acknowledge that there was no continuing role for the "common intention" resulting trust. First, the "common intention" resulting trust was doctrinally unsound. It was inconsistent with the underlying principles of resulting trust law. Second, the notion of common intention may be highly artificial, particularly in domestic cases. Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. Finally, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provided a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships.

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

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

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

In the K appeal, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that B's counterclaim be returned to the Supreme Court of British Columbia for hearing. The Court of Appeal was correct to conclude that the transfer was not gratuitous. The trial judge apparently based his conclusions about the resulting trust on his finding of a common intention on the part of K and B to share in the property. The common intention resulting trust had no further role to play in the resolution of such disputes. K's claim for unjust enrichment should be returned for a new trial. The first consideration in support of a new trial was that the Court of Appeal directed a hearing of B's counterclaim. Trying the counterclaim separated from K's claim would be an artificial and potentially unfair way of proceeding. More fundamentally, K's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis

that had been set out. Attempting to resolve K's unjust enrichment claim on its merits, using the record before this Court, involved too much uncertainty and risked injustice. With respect to the date of the spousal support order, the order of the trial judge should be restored. The Court of Appeal made two main errors. First, it erred in finding that the circumstances of K were such that there was no need prior to the trial. Second, the Court of Appeal was wrong to fault K for not bringing an interim application. There was virtually no delay in applying for maintenance nor was there any inordinate delay between the date of application and the date of trial. B had the means to provide support, had prompt notice of K's claim and there was no indication in the Court of Appeal's reasons that indicated that it had considered the trial judge's award a hardship so as to make that award inappropriate.

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

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

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

Cromwell, J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, JJ., souscrivant à son opinion) : Il était temps de reconnaître que la fiducie résultoire fondée sur l'« intention commune » avait perdu sa raison d'être. Premièrement, la fiducie résultoire basée sur l'« intention commune » était mal fondée sur le plan théorique. Elle était incompatible avec les principes sous-jacents du droit des fiducies résultoires. Deuxièmement, la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tirait son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Finalement, les principes de l'enrichissement

injustifié, conjugués au recours possible à la fiducie constructoire, fournissaient un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales.

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

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

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

Dans le pourvoi de K, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B à la Cour suprême de la Colombie-Britannique. La Cour d'appel a eu raison de conclure que le transfert n'avait pas été fait à titre gratuit. Le juge de première instance semblait avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de K et de B, de partager la propriété. La fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. Il convenait de renvoyer la demande de K fondée sur l'enrichissement injustifié pour qu'elle fasse l'objet d'une nouvelle audition. La première considération à l'appui d'une nouvelle audition était que la Cour d'appel avait ordonné l'audition de la demande reconventionnelle de B. Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K. Fondamentalement, la demande de K n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale qui a été exposée. Tenter de trancher sur le fond la demande de K fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présentait trop d'aléas et des risques d'injustice. En ce qui concernait la date d'exécution de l'ordonnance alimentaire, l'ordonnance de première instance devrait être rétablie. La Cour d'appel a commis deux erreurs principales. Premièrement, elle a commis une erreur en concluant que la situation de K était telle qu'elle n'avait pas besoin de soutien avant l'audition. Deuxièmement, la Cour d'appel a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire. K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

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

Cromwell J.:

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

II. Resulting Trusts

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

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

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

15 In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic

partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

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

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

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

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

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

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

22 This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that

a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "a resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another *and where there is evidence of a common intention that the property was to be shared by both parties*" (emphasis added).

23 The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Becker v. Pettkus* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

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

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

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

27 Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by

Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

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

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

III. Unjust Enrichment

A. Introduction

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

B. The Legal Framework for Unjust Enrichment Claims

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

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

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

34 Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should

exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

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

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

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

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

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

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

(2) Absence of Juristic Reason

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

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

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or

services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

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

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

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

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

(3) Remedy

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

(a) Monetary Award

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

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

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

(b) Proprietary Award

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

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

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

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

D. Areas Needing Clarification

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

E. Is a Monetary Award Restricted to Quantum Meruit?

(1) Introduction

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

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

(2) The Remedial Dichotomy

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

(3) Why the Remedial Dichotomy Should Be Rejected

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

(a) Life Experience

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

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

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

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

63 This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were

"consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

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

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

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

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

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

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

(b) Flexibility

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

71 The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for

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

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

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

(c) History

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) Peter v. Beblow

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

76 There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given

that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

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

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

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

(4) The Approach to the Monetary Remedy

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

81 In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though

not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

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

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

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

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

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

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

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

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

fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

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

(a) Mutual Effort

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

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

(b) Economic Integration

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

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

(c) Actual Intent

94 Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point,

however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

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

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

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

(d) Priority of the Family

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

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

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

(6) Summary of Quantum Meruit Versus Constructive Trust

100 I conclude:

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

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

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

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

F. Mutual Benefit Conferral

(1) Introduction

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

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

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

104 In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment

(para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

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

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

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

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

(2) The Correct Approach

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

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

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

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

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

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

115 The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step

in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

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

G. Reasonable or Legitimate Expectations

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

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

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

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

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

122 However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which

"courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

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

124 To summarize:

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

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

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

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

IV. The *Vanasse* Appeal

A. Introduction

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

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

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

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

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

B. Brief Overview of the Facts and Proceedings

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

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

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

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

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

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

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

136 The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the

first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

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

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

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

Again at para. 137, the trial judge found that

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

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

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

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

C. Analysis

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

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

(2) Existence of a Joint Family Venture

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

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

(a) Mutual Effort

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

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

(b) Economic Integration

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

(c) Actual Intent

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

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

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

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

Again, at para. 98:

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

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

(d) Priority of the Family

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

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

at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) Conclusion on Identification of the Joint Family Venture

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

(3) Link to Accumulation of Wealth

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

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

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

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

(4) Calculation of the Award

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

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

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

contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. Disposition

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

V. The *Kerr* Appeal

A. Introduction

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

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

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

(1) a resulting trust arose in her favour;

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

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

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

B. Overview of the Facts

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

at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

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

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

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

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

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

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

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

174 The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between $97,000 and $105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid $350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house ... even after the $32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was $942,500, compared with $205,000 in October

of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

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

C. Analysis

(1) The Resulting Trust Issue

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

(a) Gratuitous Transfer

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

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

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

the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

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

(b) Ms. Kerr's Contributions

181 The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

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

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

(c) Common Intention Resulting Trust

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

(d) Conclusion With Respect to Resulting Trust

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

(2) Unjust Enrichment

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

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

b. the automobile

c. the furnishings

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

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

f. household expenses and insurance paid on both properties

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

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

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

j. a disability tax exemption

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

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

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

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

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

191 I will deal with these submissions in turn.

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

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

(b) Analysis of Offsetting Enrichments

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

(c) The "Family Property Approach"

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

(d) Disposition of the Unjust Enrichment Appeal

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

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

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

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

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

(3) Effective Date of Spousal Support

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

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

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

203 The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that

the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

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

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

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

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

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

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

209 Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which

the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *S. (D.B.)*, at paras. 100-103).

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

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

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

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

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

that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

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

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

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

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

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

D. Disposition

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

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

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

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

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

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

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

End of Document

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2016 ONCA 368
Ontario Court of Appeal

Andrade v. Andrade

2016 CarswellOnt 7727, 2016 ONCA 368, 131 O.R. (3d) 532,
17 E.T.R. (4th) 173, 266 A.C.W.S. (3d) 770, 349 O.A.C. 330

Manuela Estrela Andrade, Plaintiff (Respondent) and Henrique E. Andrade and Leonardo Andrade, Estate Trustee for Luisa Cabral Andrade, Defendants (Appellant)

Janet Simmons, K. van Rensburg, C.W. Hourigan JJ.A.

Heard: November 12, 2015
Judgment: May 16, 2016 *
Docket: CA C59214

Proceedings: reversing *Andrade v. Andrade* (2014), 1 E.T.R. (4th) 140, 2014 CarswellOnt 12946, 2014 ONSC 5525, E.M. Morgan J. (Ont. S.C.J.); additional reasons to *Andrade v. Andrade* (2014), 1 E.T.R. (4th) 123, 2014 ONSC 4473, 2014 CarswellOnt 10280, E.M. Morgan J. (Ont. S.C.J.)

Counsel: Gavin MacKenzie, Patrick T. Summers, for Appellant
John J. Longo, Pamela Miehls, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Property

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

II Trusts
II.4 Resulting trust
II.4.a Creation
II.4.a.vii Miscellaneous

Estates and trusts

II Trusts
II.4 Resulting trust
II.4.b Rebuttal of presumption of resulting trust
II.4.b.vi Miscellaneous

Estates and trusts

II Trusts
II.4 Resulting trust
II.4.c Miscellaneous

Headnote
Estates and trusts --- Trusts — Resulting trust — Creation — Miscellaneous

L was widowed mother of seven children who worked to pay for children's passage to Canada — Children each left school in their teens to begin work and gave earnings to L to support family — L bought house in 1974, borrowing cash deposit from community member and financing rest of purchase with two mortgages — At L's direction, house was put in names of oldest son H and daughter MJ and in 1979 on L's direction, MJ and H transferred house to another brother, J, and H as tenants in common for nominal consideration — Mortgages were renewed in names of J and H — Over time, each of children with exception of youngest child L married, left home, and stopped giving money to L — J died in 2007 and plaintiff, J's wife, transferred his half interest to her name — Plaintiff brought successful action against H and L for declaration that she was beneficial owner of half interest in house, and counterclaim brought by L for declaration that she was beneficial owner of house was dismissed — L died shortly before trial — L's estate and H appealed — Appeal allowed — Trial judge erred in failing to find resulting trust in favour of L and made palpable and overriding error of fact in concluding that, at time of purchase and until she died, L had no money of her own — This error caused him to ignore evidence of L's intention when house was put into her children's names, and five years later when J went on title, that she would remain beneficial owner — H and J held house by way of resulting trust for L, who was beneficial owner at time of her death — L's estate was sole beneficial owner of house and plaintiff was ordered to transfer her legal half interest in house to L's estate — Trial judge incorrectly characterized money given to L by children to pay for house as children's money — Money was, as matter of law, gift to L — Rent generated by house was also L's money, as L advertised for and negotiated with prospective tenants and collected rent — Trial judge did not consider other sources of L's income despite evidence that, for 24 years, L paid all household expenses without any significant financial contribution from any of children except L who continued to live at house — Trial judge erred in concluding that L had no money of her own and that she had contributed no money of her own to purchase of house.

Estates and trusts --- Trusts — Resulting trust — Rebuttal of presumption of resulting trust — Miscellaneous

L was widowed mother of seven children who worked to pay for children's passage to Canada — Children each left school in their teens to begin work and gave earnings to L to support family — L bought house in 1974, borrowing cash deposit from community member and financing rest of purchase with two mortgages — At L's direction, house was put in names of oldest son H and daughter MJ and in 1979 on L's direction, MJ and H transferred house to another brother, J, and H as tenants in common for nominal consideration — Mortgages were renewed in names of J and H — Over time, each of children with exception of youngest child L married, left home, and stopped giving money to L — J died in 2007 and plaintiff, J's wife, transferred his half interest to her name — Plaintiff brought successful action against H and L for declaration that she was beneficial owner of half interest in house, and counterclaim brought by L for declaration that she was beneficial owner of house was dismissed — L died shortly before trial — L's estate and H appealed — Appeal allowed — Trial judge erred in failing to find resulting trust in favour of L and made palpable and overriding error of fact in concluding that, at time of purchase and until she died, L had no money of her own — This error caused him to ignore evidence of L's intention when house was put into her children's names, and five years later when J went on title, that she would remain beneficial owner — H and J held house by way of resulting trust for L, who was beneficial owner at time of her death — L's estate was sole beneficial owner of house and plaintiff was ordered to transfer her legal half interest in house to L's estate — Once it was accepted that L had money of her own, and that it was her money used to purchase house and pay mortgages, purchase money resulting trust could arise — L repaid deposit and paid mortgages using money from her own bank account — There was no evidence that legal title holders considered themselves responsible for making any payments — Relevant question was L's intention and not whether legal title holders intended to create trust for L — There was no evidence that L intended to confer beneficial ownership on any of her children when house was purchased in 1974 and no evidence of gift of half of property to J in 1979 — L conducted herself in relation to house as its owner from time of purchase until time of her death.

Estates and trusts --- Trusts — Resulting trust — Miscellaneous

L was widowed mother of seven children who worked to pay for children's passage to Canada — Children each left school in their teens to begin work and gave earnings to L to support family — L bought house in 1974, borrowing

cash deposit from community member and financing rest of purchase with two mortgages — At L's direction, house was put in names of oldest son H and daughter MJ and in 1979 on L's direction, MJ and H transferred house to another brother, J, and H as tenants in common for nominal consideration — Mortgages were renewed in names of J and H — Over time, each of children with exception of youngest child L married, left home, and stopped giving money to L — J died in 2007 and plaintiff, J's wife, transferred his half interest to her name — Plaintiff brought successful action against H and L for declaration that she was beneficial owner of half interest in house, and counterclaim brought by L for declaration that she was beneficial owner of house was dismissed — L died shortly before trial — L's estate and H appealed — Appeal allowed — Trial judge erred in finding that public policy reasons prevented imposition of any trust with L's estate as beneficiary — Trial judge cast net too broadly in concluding that it would be against public policy to recognize L's estate as beneficial owner of house when she received tax credits on basis that she was not beneficial owner — There was no evidence that L put property into children's names to avoid taxes or to obtain tax benefit, and evidence was to contrary — Evidence was that children took legal title because L did not have paid employment and could not qualify for mortgage — Fact that entire family subsequently treated house for tax purposes in manner consistent with legal title, resultant of which L received some benefit was benefit to be considered when determining L's intention but was not determinative — L's estate did not seek to profit from manner in which her tax filings were arranged, but rather sought equitable relief regarding L's interest in family home — L's tax filings were not fundamental to that cause of action and were not necessary to establish relief sought — Trial judge erred in treating fact that L claimed tax credits as dispositive of her trust claim for public policy reasons alone — While her tax treatment of property, considered alone, was evidence inconsistent with beneficial ownership, her actual intention regarding property was question of fact to be determined based on whole of evidence.

Table of Authorities

Cases considered by *K. van Rensburg J.A.*:

Buist v. Greaves (1997), 1997 CarswellOnt 2243, 11 O.F.L.R. 3, 34 O.T.C. 1 (Ont. Gen. Div.) — referred to

Kerr v. Baranow (2011), 2011 CarswellBC 240, 2011 CarswellBC 241, 14 B.C.L.R. (5th) 203, 411 N.R. 200, 328 D.L.R. (4th) 577, 93 R.F.L. (6th) 1, 274 O.A.C. 1, [2011] 1 S.C.R. 269, (sub nom. *Vanasse v. Seguin*) 108 O.R. (3d) 399, 509 W.A.C. 1, 2011 SCC 10, 64 E.T.R. (3d) 1, 300 B.C.A.C. 1, [2011] 3 W.W.R. 575 (S.C.C.) — considered

Korman v. Korman (2015), 2015 ONCA 578, 2015 CarswellOnt 12612, 63 R.F.L. (7th) 1, 387 D.L.R. (4th) 579, 126 O.R. (3d) 561, 337 O.A.C. 379 (Ont. C.A.) — considered

Nussbaum v. Nussbaum (2004), 2004 CarswellOnt 3731, 10 E.T.R. (3d) 223, 9 R.F.L. (6th) 455, 10 C.B.R. (5th) 54 (Ont. S.C.J.) — considered

Parnell v. Viger (2003), 2003 CarswellOnt 2711, 41 R.F.L. (5th) 327, [2003] O.T.C. 648 (Ont. S.C.J.) — referred to

Parnell v. Viger (2005), 2005 CarswellOnt 1125, 196 O.A.C. 256, 14 R.F.L. (6th) 84 (Ont. C.A.) — referred to

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

Rascal Trucking Ltd. v. Nishi (2013), 2013 SCC 33, 2013 CarswellBC 1716, 2013 CarswellBC 1717, 359 D.L.R. (4th) 575, 45 B.C.L.R. (5th) 1, [2013] 8 W.W.R. 419, 88 E.T.R. (3d) 1, 445 N.R. 293, 336 B.C.A.C. 50, 574

W.A.C. 50, 16 B.L.R. (5th) 1, *(*sub nom. *Nishi v. Rascal Trucking Ltd.)* [2013] 2 S.C.R. 438 (S.C.C.) — considered

Rosenthal v. Rosenthal (1986), 3 R.F.L. (3d) 126, 1986 CarswellOnt 288 (Ont. H.C.) — considered

Schwartz v. Schwartz (2012), 2012 ONCA 239, 2012 CarswellOnt 4362, 290 O.A.C. 30, 349 D.L.R. (4th) 326 (Ont. C.A.) — considered

Tinsley v. Milligan (1993), [1993] 3 All E.R. 65, [1994] 1 A.C. 340, [1993] 3 W.L.R. 126 (U.K. H.L.) — followed

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

s. 14 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

APPEAL by defendants from judgment reported at *Andrade v. Andrade* (2014), 2014 ONSC 4473, 2014 CarswellOnt 10280, 1 E.T.R. (4th) 123 (Ont. S.C.J.), allowing plaintiff's action for declaration that she was beneficial one-half owner of property and dismissing counterclaim to contest plaintiff's beneficial ownership.

***K. van Rensburg J.A.*:**

A. Overview

1 At issue in this appeal is the beneficial ownership of a house that has been in the Andrade family for over 40 years.

2 The house, located on Crawford Street in Toronto, was purchased in 1974. Luisa Andrade lived there until her death in 2014. Legal title was originally taken in the names of two of Luisa's children, Henrique (Henry) and Maria Jesus. Five years later, title was transferred to Henry and his brother Joseph. Henry and Joseph remained on title thereafter as the legal owners of the house.

3 Joseph died in March 2007. In May 2007, Joseph's widow, Manuela Andrade, transferred his half interest in the house into her own name. In 2009, she brought an action against Henry and Luisa seeking a declaration that she was the beneficial owner of a half interest in the house, and an order for partition and sale. Luisa counterclaimed for a declaration that she was the beneficial owner of the house and an order that Manuela and Henry transfer all of their right, title and interest in the house to her. In 2011, Henry transferred his half interest to Luisa. In 2014, a few months before the trial commenced, Luisa died. The action continued against her estate and Henry.

4 Manuela was successful at trial. The trial judge found that she was the beneficial owner of a half interest in the house, and he rejected the counterclaim that the house was held by Joseph and Henry in trust for Luisa. He directed the house to be sold, with half the net proceeds to be paid to Manuela. He awarded costs of $237,396.19 against Luisa's estate. Luisa's estate appeals and seeks leave to appeal the trial judge's costs endorsement.

5 For the reasons that follow I would allow the appeal. In my view, the trial judge erred in failing to find a resulting trust in favour of Luisa. He made a palpable and overriding error of fact when he concluded that, at the time of the purchase and until she died, "Luisa had no money of her own". This error informed his analysis of the parties' legal

rights. It caused him to ignore the evidence of Luisa's intention when the house was put in her children's names, and five years later when Joseph went on title, that she would remain the beneficial owner. Henry and Joseph held the house by way of resulting trust for Luisa who was, at the time of her death, its sole beneficial owner. Accordingly, I would dismiss Manuela's action, declare Luisa's estate to be the sole beneficial owner of the house, and order Manuela to transfer her legal half interest in the house to Luisa's estate.

B. Facts

6 Luisa, a widow and the mother of seven children, immigrated to Canada from Portugal in 1969. She was accompanied by her oldest daughter, Maria Luisa, who was 17. Luisa worked as a cleaner for a number of years, supporting her children in Portugal and saving money for their plane tickets. The rest of the children arrived in 1972. Leonardo (Leo), the youngest, was five years old.

7 Luisa stopped working to care for her children. Each of the children left school and began working when they were teenagers. While they lived at home, they gave their earnings to their mother to support the family. This continued until they got married. Leo never married and he continues to live in the house.

8 The trial judge described the "traditional pattern established by the Andrade family" as follows:

> Everyone who testified at trial ... described a tight-knit family that greatly respected and continuously supported their mother, and that tended to pool resources to an unusual extent. As each child left school and began their working lives, they contributed their paycheques (or a substantial portion thereof) to their mother for her support and for support of the children still too young to work.

9 Initially, the family lived in a series of apartments. In September 1974, Luisa decided to buy a house, and with the help of a real estate agent, found the house on Crawford Street. The house had two upper floors subdivided into apartments that could be rented out.

10 The purchase price was $58,500. Luisa signed the offer to purchase. She borrowed a cash deposit of $1,000 from a member of the community. The bulk of the purchase was financed with two mortgages, and a balance of $1,395.85 was paid on closing.

11 At Luisa's direction, the house was put in the names of her oldest son, Henry, who was 19, and her second daughter, Maria Jesus, who was 18, as joint tenants, and they signed the mortgages. Maria Luisa had married and moved out. Henry, Maria Jesus and Joseph (who was 15) were the children who lived at home, and worked and supported the family at the time.

12 In 1979, on Luisa's direction, Maria Jesus and Henry transferred the house to Joseph and Henry as tenants in common for nominal consideration of $2.00 "brother and sister to brother and brother". The mortgages were renewed in the names of Joseph and Henry. At the time, Joseph and Maria Ludevina were the working children who provided their earnings to their mother.

13 Over time, each of the children (except Leo) married, moved out and stopped giving their earnings to their mother. Maria Jesus did so in 1976. Henry did so in 1978 (although he and his wife lived in a rented apartment in the house for three years). Joseph married Manuela and moved out in 1980. Maria Ludevina started working in 1976 or 1977 and moved out in 1983. Manuel (Manny) started working in 1980 and married and moved out in 1989. Leo contributed his paycheques from 1980 to 1995. Commencing in 1995, Leo stopped giving all of his earnings to his mother and began giving her a biweekly amount, which continued until 2003.

14 At various times between 1974 and 2011, Luisa rented out the upstairs apartments. She advertised for tenants, and negotiated and collected the rents. In 1983, Maria Luisa moved into a flat in the house with her three children and

paid rent to Luisa until 1990. Henry too paid rent to Luisa when he and his wife lived in an apartment in the house from 1978 to 1981.

15 None of the children, with the exception of Henry for a brief period of time before he married, and Leo, many years later, paid any of the expenses associated with the house directly. Luisa repaid the $1,000 loan and paid all expenses in relation to the house with money from her bank account. The expenses included the mortgages (paid off in 2008), utilities, insurance and property taxes.

16 Until 1990, the money in Luisa's bank account consisted of her unmarried, working children's earnings and the rent she collected from tenants. In 1990 Luisa began receiving old age security benefits (eventually about $1,200 per month), and in 2003 she received a $21,000 settlement in a lawsuit.

17 Although they never received rent from the house, or incurred significant expenses without being reimbursed by Luisa, for tax purposes, Joseph and Henry declared the rental income from the house and claimed expenses in relation to the house. They paid taxes on the net rental income. Although Luisa never paid rent, she claimed a rental tax credit.

18 After Joseph's death in 2007, Manuela registered her interest as Joseph's executor on title. By lawyer's letter, in April 2008, Manuela sought to have the house sold, to recover Joseph's alleged interest. The letter also claimed an "accounting of all revenue earned in respect of the property and expenses paid on account thereof since the property was purchased in 1979 [*sic*]". All of the surviving siblings and Luisa resisted the sale, claiming that the house belonged to Luisa as beneficial owner. Manuela brought an action against Henry and Luisa seeking a declaration that she is the beneficial owner of a half interest in the house and an order for partition and sale.

19 Manuela's position in the litigation was that Joseph had been a beneficial owner of half of the house since it was purchased in 1974. All of the other siblings, and Luisa (whose affidavit, cross-examination and discovery evidence were admitted at trial) testified that the house belonged to Luisa.

20 At one point in the litigation, Henry sought to amend his pleading to assert a beneficial interest in the house. The amendment was refused, and in 2011, Henry assigned his legal half interest in the house to Luisa. In January 2014, Luisa died and her interest in the litigation passed to Leo, as estate trustee.

21 The action proceeded to trial in March and April 2014. The trial judge granted judgment in favour of Manuela and ordered the sale of the property at fair market value, with the net proceeds of sale to be divided evenly between Manuela and Luisa's estate.

C. Decision of the Trial Judge

22 The trial judge concluded that Luisa put no money of her own toward the purchase of the house. He said that she had no money of her own when the house was purchased in 1974 and thereafter. She had borrowed the deposit, and it was her children's earnings (along with the rental income) that were used to pay the mortgages and other expenses.

23 The trial judge found that Henry, Maria Jesus and Joseph were working at the time the house was purchased and they gave their earnings to their mother. This pattern was later followed by each of the Andrade children (except, according to the trial judge, Leo).

24 The trial judge rejected the evidence of Albert Miller, the lawyer who acted on the purchase of the house, that he had discussed a trust with the Andrade children and Luisa. Neither Maria Jesus nor Henry recalled any specific discussions about a trust. The trial judge concluded that "no one ever discussed or turned their minds to forming a trust for Luisa's benefit at the time the property was purchased in [1974]".

25 The trial judge found that title to the house was taken in the names of Maria Jesus and Henry "as the two contributors who were old enough to go on title". He did not however make a specific finding that they were beneficial

owners of the house when it was purchased. In fact, his reasons do not disclose any finding as to beneficial ownership of the house at that time.

26 As for the transfer in 1979 from Maria Jesus and Henry as joint tenants to Henry and Joseph as tenants in common, the trial judge again rejected Miller's evidence that the transfer was precipitated by Maria Jesus' impending marriage and that they had discussed a trust. He concluded that the transfer "had far more to do with Joseph's coming of age and his financial responsibility for the [house] than with Maria Jesus' marriage three years previously", and that the mortgages and all other expenses rested largely on Joseph's shoulders at the time.

27 The trial judge referred to certain "subsequent dealings with the house" as evidence that Henry and Joseph were the actual owners.

28 First, in July 1981, Henry and Joseph signed agreements of purchase and sale for the sale of the house and the purchase of a new property on Gilbert Avenue. He noted that the documentation does not refer to Henry and Joseph as "trustees", so "[b]y all appearances" the two were selling one house they owned and buying another.

29 Second, there was the manner in which the house was treated for income tax purposes by Joseph, Henry and Luisa. The trial judge rejected Henry's explanation that he and Joseph were trying to help their mother by declaring the rental income she earned from non-family member tenants. He said it was contrary to what "any tax accountant" would have advised as both the correct and more tax efficient way to go about their filings.

30 The trial judge also rejected the evidence of Ted Ward, Henry and Joseph's accountant, regarding the parties' intentions respecting the property. He concluded that a letter Ward wrote in 2009, which supported the position that Henry and Joseph were trustees for Luisa, was inaccurate in certain respects and that Ward "must have been asked by Henry to play a role in [the] drama, but ... did not quite get his lines right".

31 Turning to the legal arguments, the trial judge rejected the claim that the property was Luisa's by way of resulting trust. He stated that this was not a case where "the child acted as agent for the parent in purchasing the house", nor was it one in which "the parent claims to be beneficial owner because she remains in control of a property after transferring it to a child", because Luisa never owned the house and never paid for it in the first place.

32 In his constructive trust analysis, the trial judge rejected the contention that this was a case where property had been purchased with the money of one person but the conveyance was taken in the name of another, on the basis that Luisa had no money of her own. [1] He stated that it was Luisa's children who worked and earned the money and it was her children, as well as the rental income from the property, that over time paid the mortgages. In his opinion, Luisa did not have a legal right to her children's paycheques. Disposing of the constructive trust claim, the trial judge concluded that there was no "causal connection" between Luisa and the "acquisition, maintenance, improvement, etc. of the [house]. Having made no financial or other legally cognizable contribution of her own, there is no equity in favour of Luisa."

33 The trial judge also stated that he found no real evidence of a "commonly shared intention" to purchase and hold the house in trust for Luisa. He referred to the fact that Henry, at one stage in the litigation, described Luisa as having what amounted to a "life interest" in the house, and the evidence of some of the children that the house was their mother's until she died.

34 The trial judge found that there was insufficient evidence that a trust for Luisa's benefit was intended. He also concluded that it would be contrary to public policy to give credence to Luisa's ownership claim because of how the property was treated for tax purposes.

D. Issues

35 The appellant asserts that the trial judge erred in failing to find that Luisa, at the time of her death, was the beneficial owner of the house by way of resulting trust, or alternatively that her estate is entitled to the house by way of constructive

trust. The appellant's primary argument is that the trial judge made a palpable and overriding error in concluding that Luisa had no money of her own, and in holding that, without a financial or other legally cognizable contribution of her own, there was no equity in favour of Luisa. The appellant contends that, contrary to the trial judge's conclusion, this was a case where property was purchased in the name of another with money provided by the beneficiary. The appellant asserts that the trial judge overlooked certain important and uncontroverted evidence with respect to intention. Finally, the appellant argues that the trial judge erred in invoking public policy as a further reason to reject Luisa's ownership claim.

36 The respondent asserts that the trial judge made no such errors, and that the result was fully supported by his findings of fact. Luisa contributed no money of her own to the purchase and her estate failed to prove that her money (and not that of her children) was used in the purchase and maintenance of the house. The respondent also contends that the appeal attacks a key finding of fact by the trial judge - that Henry and Joseph were the legal and beneficial owners of the property from the date of the purchase in 1974, and that this finding is fully supported by the evidence. The respondent says that all of the alleged errors raised by the appellant are factual errors or errors of mixed fact and law, and the applicable standard of review is palpable and overriding error.

E. Analysis

37 I will address each of the issues raised in turn. Since I have concluded that Luisa was the beneficial owner of the house by way of resulting trust, it is unnecessary to address the constructive trust claim.

38 As a preliminary point, the respondent is wrong to say that the trial judge found that Joseph acquired beneficial ownership in the property when it was purchased in 1974. Manuela's position at trial was that in 1974 Maria Jesus took title as bare trustee for Joseph, and that she agreed to transfer title to the property to him when he reached the age of majority. There was however no evidence to support that claim. The trial judge concluded only that Joseph "acquired his one-half interest" in the house in 1979. He did not find that Joseph was a beneficial owner of the house in 1974 or that Maria Jesus was a trustee. As I have already noted, he made no finding at all as to the beneficial ownership of the property when it was purchased.

39 Manuela also took the position at trial that while Joseph lived at the house his earnings were used to pay the mortgages and other household expenses, and that after he moved out the rents were sufficient to pay these expenses. The evidence respecting when the apartments were rented and the rental income that was generated was contradictory. In any event, the trial judge did not accept that only the rents were used to carry the house, after Joseph moved out, or at any time. Rather, he found that the Andrade children (except Leo) continued to give their paycheques to their mother until they married and it was their money, as well as the rent, that was used to pay the mortgages.

(1) Luisa did in fact pay for the house

40 The cornerstone of the trial judge's reasoning is not, as Manuela contends, that Joseph acquired beneficial ownership of the house because of his direct financial contributions. Rather, it is his finding that Luisa had no money of her own to purchase the house, and to pay the mortgages, and as such that she could not have been the beneficial owner of the house. That finding permeates his reasons, and is the basis for his rejection of the resulting and constructive trust claims advanced on Luisa's behalf.

41 Luisa did not have paid employment from the time her children arrived in Canada until her death. From this, the trial judge concluded that "[f]rom 1972 until her death in 2014, she earned no income and was entirely supported by her children who worked". He noted Luisa's admission in her examination for discovery, that in 1974 "she had no money of her own to put toward the purchase." He found that Luisa "had no funds of her own and did not advance anything in respect of the purchase of the [house]", that "she never contributed any money of her own to the purchase", and that all of the witnesses agreed that "Luisa put no money of her own toward the purchase of the [house]". He explained

that "[Luisa] had not worked for a number of years prior to 1974, and had no income to contribute to the purchase or financing of the [house]."

42 With respect to the argument that Luisa always paid the mortgages, the trial judge stated:

> Luisa may have paid the mortgages on the [house] in the sense that the mortgage payments went to the mortgagees from her bank account. But she made those payments with her children's money, not her own; she had no money of her own. ... [I]t was Luisa's children (along with the rental income that the [house] generated) who over time paid the mortgages.

43 He stated that the purchase funds were borrowed and the loans were serviced by Luisa's unmarried working children.

44 In finding that Luisa contributed no money of her own to the acquisition of the house, both at the time of purchase and in paying down the mortgages, the trial judge made a number of errors.

(a) Confusing Luisa's money with its source

45 First, the trial judge erred in characterizing the money given to Luisa by her children and used by Luisa to pay for the house as the children's money. The money her children earned, once given to Luisa, became her money, even if it was expected to be used, and was in fact used, for the support of the family, including to pay the mortgages.

46 In finding that Luisa had no money of her own the trial judge conflated "income from paid employment" and "money". He confused the question of whether Luisa had money with the *source* of her money, which at least in the early years was the paid employment of her adult children. He did not explain why or how, once the working children gave their paycheques to Luisa, the money remained "their" money. It was no longer their money because they made a gift of it to their mother, knowing she would use it to support the family. Luisa's bank account was not a trust account. There was no evidence that the money was earmarked for specific purposes. Once the money was given to Luisa, it became "Luisa's money".

47 The trial judge observed that Luisa had no "legal right" to her children's paycheques. Whether she had a legal right is not the issue. Rather, the question is whether the paycheques were a legal gift, or were transferred to Luisa to acquire an interest in the house.

48 There was no evidence that any of the title holders provided their paycheques to their mother intending to acquire a property interest in the house. To the contrary, all of Luisa's children, whether they were on title or not, behaved in the same manner. They provided their paycheques to their mother while they lived in the house and stopped doing so when they moved out. And the testimony of the children who testified at trial was unanimous. When they gave their mother their earnings, the money was for her to use "as she saw fit". That is, the money was, as a matter of law, a gift to Luisa.

(b) The rent belonged to Luisa

49 The trial judge referred to the fact that expenses in relation to the house were paid from rent generated by the house. He did not make any finding as to who the rent belonged to, but implicit in his decision is that the rent did not belong to Luisa.

50 Yet the evidence shows that Luisa was the only person (except in later years when she was assisted by Leo) who advertised for and negotiated with prospective tenants and collected their rent. Where rent was paid by cheque, the tenants' cheques were made out to Luisa and deposited into her bank account. The legal title holders never collected rent from tenants or demanded an accounting from their mother.

51 Other than declaring the rent as their income for tax purposes, there is no evidence that Henry and Joseph made any claim to the rent. Henry specifically denied the rent was his, and only after Joseph's death did his widow Manuela claim an accounting of rent from Luisa (going back to 1974). Maria Luisa paid rent to her mother, not to her brothers,

when she lived in the house with her children for some eight years. Leo lived in the house from the age of four, and paid amounts to his mother, but not to his brothers.

52 In all of these circumstances, including those in the foregoing section, the rent generated by the house was also Luisa's money.

(c) Luisa had other sources of money

53 The trial judge erred in finding that Luisa's children supplied all the money for the house and in saying that "[f]rom 1972 until her death in 2014, [Luisa] earned no income and was entirely supported by her children who worked." This is incorrect. Luisa's children did not support their mother financially after they married and moved out of the house. Joseph, for example, stopped supporting her and his siblings in 1980 when he married Manuela. The last of the Andrade children to marry (Manny) moved out in 1989.

54 In addition to rent, Luisa received old age security benefits commencing in 1990 (ultimately about $1,200 per month) and, in 2003, she received a settlement of $21,000. The trial judge did not consider these sources of Luisa's money. Yet the evidence showed that for a period of 24 years Luisa paid all household expenses without *any* significant financial contribution from any of her children, except for Leo, who continued to live at the house.

55 Accordingly, the trial judge erred in concluding that Luisa had no money of her own and that she had contributed no money of her own to the purchase of the house. He was wrong to conclude that "the loans [to purchase the house] were serviced by Luisa's unmarried children - Maria Jesus, Henry, and Joseph." The loans were serviced by Luisa from money in her bank account. This included money given to her by her children, the rent she collected from tenants and, after 1990, her pension and settlement monies.

56 The trial judge concluded that the house was not held in resulting trust for Luisa. His rejection of the resulting trust claim was explained on the basis that Luisa never owned the house and never paid for it in the first place, and the fact that "Luisa had no money of her own". In my view this was a palpable and overriding error that informed the balance of the trial judge's analysis and ultimately his rejection of the resulting trust claim. I turn now to consider Luisa's resulting trust claim.

(2) The resulting trust claim

(a) The relevant legal principles

57 "A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner": *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at para. 20.

58 A purchase money resulting trust can occur "where a person advances a contribution to the purchase price of property without taking legal title": *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33, [2013] 2 S.C.R. 438 (S.C.C.), at para. 21. It is one of the "classic resulting trust situations" and can arise when a party contributes directly to the purchase price or the mortgage: Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014) at pp. 113-15. In *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), at para. 12, Cromwell J. noted that it has 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".

59 Except where title is taken in the name of a minor child, where property is acquired with one person's money and title is put in the name of another, there is a presumption of resulting trust. While some authorities refer to a presumption of resulting trust arising when a gratuitous transfer is made between *unrelated* persons, the presumption of advancement between spouses was abolished by statute in Ontario (see *Family Law Act*, R.S.O. 1990, c. F.3, s. 14) and between parents and adult children by the Supreme Court in *Pecore*: see para. 36.

60 In this case the respondent argued both at trial and on appeal that the appellant had not overcome the presumption that the legal title holders owned the house. Given the evidence of Luisa's contributions to the purchase price and mortgages, however, the presumption here was one of resulting trust.

61 The decision in this case however does not turn on the application of a presumption. A presumption is of greatest value in cases where evidence concerning the transferor's intention may be lacking (for example where the transferor is deceased). "[T]he focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer ... "[T]he presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities": *Pecore*, at paras. 5 and 44.

62 The trial judge referred on multiple occasions to "the parties' intentions", stating that he could find "no real evidence of a commonly shared intention to purchase and hold the [house] in trust for Luisa." Common intention, however, is not the issue. The intention of the grantor or contributor alone counts, as the point of the resulting trust is that the claimant is asking for his or her own property back: *Kerr v. Baranow*, at para. 25.

63 The relevant time for ascertaining intention is the time of the acquisition of the property, when the funds were advanced: *Rascal Trucking Ltd. v. Nishi*, at paras. 30 and 41; *Pecore*, at para. 59. Evidence of intention that arises subsequent to a transfer must be relevant to the intention of the transferor at the time of the transfer. The court must assess the reliability of such evidence and determine what weight it should be given, guarding against evidence that is self-serving or tends to reflect a change in intention: *Pecore*, at para. 59.

(b) The principles applied

64 Once it is accepted that Luisa had money of her own, and that it was her money that was used to purchase the house and to pay down the mortgages, then a purchase money resulting trust could arise. Luisa borrowed the deposit and paid it back, and she serviced the mortgages using money from her own bank account. Although they signed the mortgages, there was no evidence that the legal title holders considered themselves responsible for making any of the payments. Luisa borrowed their "names", not their money. All of this is consistent with Luisa having advanced the purchase price of the property.

65 Having concluded that Luisa had not made a contribution to the acquisition of the house, the trial judge did not direct himself to the question of her intention. Rather, he looked at the intentions of Luisa's children, and concluded that they did not intend to set up a trust for Luisa. The trial judge reasoned that, if Luisa had not put money of her own into the purchase of the house, then she had no resulting trust claim against those who were on title.

66 The trial judge mischaracterized the claim when he said that Luisa's estate was not trying to recover something that Luisa once had. That is in fact how the claim was advanced. Luisa's estate argued that Luisa's money was used to purchase the house in that she borrowed the deposit and paid it back, paid the lawyers' fees and other expenses in relation to the purchase, and paid the mortgages, using her money (consisting of the money she received from her children, the rent she collected, and later her old age pension and monies she received from a settlement).

67 The question was not whether the legal title holders intended to create a trust for Luisa (hence the trial judge's focus on the fact that there was no "trust" document, that the parties did not understand the concept of a trust, and that the tax and other documents did not refer to Luisa as the beneficial owner). Rather, the question was Luisa's intention. Having contributed the money toward the purchase of the property, did *she* intend to confer beneficial ownership of the property on the legal title holders, to the exclusion of herself and her other children?

68 Evidence of Luisa's intention at two points is important — in 1974 when the property was first acquired, and in 1979, when Joseph went on title.

69 It was Luisa who, in 1974, decided to buy a house where she and her children would live. As the trial judge noted, both Maria Jesus and Henry testified that the reason title was taken in their names was that, with the exception of Maria Luisa who was already married, they were the only two family members of age who had sufficient income to potentially qualify for a mortgage. Henry said, "[t]he discussion was simple. [Luisa] couldn't get a mortgage and we [had] to put our names on it because we [were] working." Neither Henry nor Maria Jesus asserted that their mother intended to give them property rights. To the contrary, they claimed to be her nominees and regarded the house as her property.

70 Luisa's evidence, although not mentioned by the trial judge, was to the same effect.[2] In her examination for discovery she said, "[i]f the house had been purchased in cash, I wouldn't have needed their names." While there was some difficulty with Luisa's evidence, which was given through an interpreter, on this point she was clear. She considered herself the owner of the house.

71 Manuela testified that, in 1974 (when she was 12 years old), Joseph told her that he "bought a house", and that he referred to the house on Crawford Street as "his house". Although the trial judge did not make a specific finding about beneficial ownership of the house when it was purchased, there was no evidence to support this theory, and there is nothing in his reasons to suggest that the trial judge accepted that Joseph was a beneficial owner in 1974, and that Maria Jesus was holding his interest as a bare trustee. Rather, he found that Joseph acquired his interest in 1979.

72 There was no evidence at all that Luisa intended to confer beneficial ownership on any of her children when the house was purchased in 1974.

73 As for the circumstances in 1979, there is no dispute that Joseph went on title at the time of a mortgage renewal, and at his mother's direction. Maria Jesus testified that she did what her mother directed, as it was her mother's house. This of course is inconsistent with Maria Jesus transferring a beneficial interest to her brother. And, if Maria Jesus was Luisa's nominee, there was no evidence to suggest a *change* in Luisa's intention — that is, to give Joseph a beneficial interest in the property when Maria Jesus had no such interest.

74 Luisa, in her examination for discovery, said that Joseph was unhappy that Henry was "the boss" and that she wanted to keep Joseph happy by putting him on title. She denied that he was the owner; she continued to deal with the house in the same way. The transfer to Joseph occurred without any consideration. Joseph paid nothing to Maria Jesus or his mother for the transfer. Luisa paid the legal fees then, as she had in 1974. The trial judge explained the transfer to Joseph's name as occurring because, at the time, he was "the senior working sibling, and was providing funds for the entire household."

75 All of these circumstances are consistent with a change in legal title, but not with a gift of half the property to Joseph. The fact that Joseph (as well as his sister Maria Ludevina) was providing his earnings to Luisa was consistent with the family's pattern. His contributions were no more "consideration" for a transfer of beneficial ownership than the contributions of his siblings.

76 Not only was there no direct evidence that Luisa intended to favour Joseph in 1979 when he went on title, the rationale for a gift was missing. There was no reason for Luisa to have made a gift of her house to two of her children to the exclusion of the others. After they married, neither Henry nor Joseph paid any of the household expenses directly. Rather, their younger siblings continued the family pattern of pooling their earnings and providing them to their mother. There is no basis for an inference that Joseph was to be favoured with beneficial ownership of half of the house because of his contribution, which was no greater than, and in fact less than, that of some of his siblings.

77 The respondent argues that the transfer of the house from Henry and Maria Jesus as joint owners to Joseph and Henry as tenants in common is consistent with an intention to confer beneficial ownership. However, there was no evidence to explain why this happened. The trial judge, quite properly, drew no inference of Joseph and Henry's beneficial ownership from the way title was taken in 1979.

78 As for subsequent conduct, there are several aspects of what occurred that are inconsistent with Luisa having an intention in 1979 to gift the house to Henry and Joseph.

79 Luisa continued to live in the house where she raised her other children, while Henry and Joseph purchased houses for their own families in the 1980s. Luisa collected and kept the rent. Luisa paid all the bills in relation to the house, including the mortgages, property taxes, insurance and the cost of a number of repairs.

80 In 1990, Luisa sourced new lenders for a replacement mortgage which was renewed until it was paid off in 2008. It was Luisa who decided what repairs and renovations were needed and who directed and paid for work, including roof repairs, new flooring, and replacement of the furnace. She paid for materials but not labour that her children supplied. While Henry and Joseph did some work on the house, the other children also made contributions over the years. As the trial judge observed, "the motivation for all of the Andrade siblings' contributions to the household had more to do with family loyalty than with property rights."

81 Luisa was not simply a "resident" of the house (as the trial judge described her). She conducted herself in relation to the house as its owner from the time the house was purchased until she passed away.

82 The appellant relies on certain other evidence said to be supportive of the fact that Luisa was the beneficial owner of the house. Maria Jesus, Henry, Manny and Leo all testified that Joseph had complained about being on title and had asked his brothers to go on title for him. While it is true that the trial judge did not mention this evidence, much like the evidence of Manuela, her son, sister and nephew, that Joseph talked about the house as "his house", which was also not mentioned, it is self-serving and of doubtful reliability. It is in any event of little assistance in resolving the issue of Luisa's intention.

83 I turn now to two aspects of the evidence that the trial judge relied upon as "subsequent conduct" that was inconsistent with Luisa's ownership of the house. Again, I emphasize that the trial judge considered this evidence in the context of whether there was a "commonly shared intention" or an intention by the children to "[form] a trust for Luisa's benefit".

84 First, the trial judge relied on the fact that in 1981 Henry and Joseph entered into two agreements of purchase and sale, one to sell the house and another to buy a new property. He noted that there was no reference to them being "trustees" and "[b]y all appearances ... Henry and Joseph were selling one house they owned and were buying another."

85 What the trial judge did not mention was the evidence of how the proposed transaction came about. Henry testified that Luisa was having trouble paying the mortgages, and she thought she could get by with a smaller house. Manuela, who was already married to Joseph at the time, did not testify otherwise. The fact that Henry and Joseph signed all the documents reflected what was already in place. Luisa could not go on title because she did not qualify for a mortgage. The fact that Henry and Joseph's names were on the agreements was equally consistent with their position as Luisa's nominees.

86 I note here that the appellant contends that the trial judge ignored evidence of a note from Miller's file that stated "no need for a trust agreement, wait to sell", which was contemporaneous with the proposed 1981 transactions. This evidence is corroborative of Miller's evidence that he understood the house was held in trust for Luisa and that he had discussed a trust with someone in the Andrade family, at least when the note was made (the note is undated). Miller identified the note in his testimony. Although the trial judge did not mention this evidence, there is no reason to doubt that he considered it. He rejected Miller's evidence which was proven wrong on certain details. There is no reason to interfere with that assessment. I disagree with the appellant's contention that the note was important evidence that the trial judge overlooked.

87 Second, the trial judge placed significant emphasis on how the parties dealt with the house for income tax purposes — with Henry and Joseph paying tax on the net rental income, including a deemed rent for Luisa, and Luisa taking

a tax credit for rent "paid" to her sons. He regarded the tax treatment as evidence that Henry and Joseph were in fact the "real, beneficial owners" of the house, and, as discussed below, as the foundation for a public policy reason not to recognize Luisa's beneficial interest in the house.

88 The way the parties dealt with the property for tax purposes was consistent with legal title, but did not reflect what was actually occurring. Luisa received the rents: her sons did not. Luisa never paid rent to her sons, and a fictional amount was used as the rent she "paid" in the parties' returns. Luisa did not account to her sons for the rent received and expenses on the house. They included as expenses property taxes, mortgage payments and payments for repairs and maintenance which were paid by Luisa (and not only expenses they incurred themselves).

89 There was no evidence that Luisa was involved in any decisions about her taxes or her sons' taxes. To the contrary, Luisa, who did not speak, read or write English, had her tax returns prepared first by a local travel agent, then by her daughter Maria Ludevina, who simply followed the pattern that had been established. Henry and Joseph's returns were prepared by their accountant with figures provided by Henry, which were divided equally to attribute income and expenses to each brother.

90 The only evidence about why the tax returns were prepared that way came from Henry. He testified about a meeting in 1998 with the Canada Revenue Agency ("CRA") who told him that Luisa had to pay rent because she lived in the house and that he and Joseph had to claim income on the property because they each owned and lived in other properties. Henry also said that he and Joseph were trying to help out their mother by paying the tax on the rental income.

91 While the trial judge did not reject Henry's explanation outright, he observed that it "raises more questions than it answers." He did not resolve the question of what the tax treatment said about intention, and in particular, Luisa's intention. Instead he moved directly to the conclusion that the tax returns accurately reflected the beneficial ownership of the property.

92 The issue here however is to determine Luisa's intention. The fact that a party represents or deals with property in a certain way that is inconsistent with beneficial ownership does not preclude a claim of beneficial ownership in litigation. The tax reporting issue in this case raises concerns similar to those in a line of cases referred to by the appellant — cases where a party transfers property to a spouse to defeat creditors and then claims to be the beneficial owner of that property. In each case, the trust claimant makes a claim that is inconsistent with how the property was dealt with at another stage and for another purpose.

93 In *Schwartz v. Schwartz*, 2012 ONCA 239 (Ont. C.A.), title to a matrimonial home was transferred from the wife to the husband. There were competing claims to the house by the wife and the husband's judgment creditor. The central issue was whether the wife had conveyed her entire interest in the matrimonial home to her husband. Simmons J.A. held that the fact that the transfer may have been for the purpose of insulating the wife from claims by her own potential creditors did not in itself rebut the statutory presumption of resulting trust between spouses. She stated, at paras. 42-43:

> In *Kerr*, the Supreme Court of Canada also confirmed the view expressed in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44, that where there is a gratuitous transfer, the actual intention of the transferor is the governing consideration. At para. 44 of *Pecore*, Rothstein J. noted that 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."
>
> Further, as Karakatsanis J. observed in *Nussbaum v. Nussbaum* (2004), 9 R.F.L. (6th) 455 (Ont. S.C.), at paras. 20 and 32, while the "intention to gift property trumps the presumption of resulting trust", a party's intention at the time of a conveyance is a question of fact. Further, as she stated, at para. 32, "[w]hile evidence that someone intended to fully evade creditors can be evidence that they intended to gift their entire interest in the property", a party's actual intention remains a question of fact to be determined based on the whole of the evidence.

94 See also *Korman v. Korman*, 2015 ONCA 578 (Ont. C.A.), at para. 38, where, citing the same passage from *Nussbaum v. Nussbaum* [2004 CarswellOnt 3731 (Ont. S.C.J.)], and the *Schwartz* decision, this court confirmed that the motivation to shield property from a transferring spouse's potential creditors does not in itself rebut the presumption of a resulting trust in a gratuitous transfer of property between spouses.

95 Similarly, in the present case, the analysis cannot not begin and end with the tax treatment of the house. The court was entitled to consider the fact that Luisa's tax filings are contrary to her estate's argument that she was a beneficial owner of the property, as well as all of the evidence as to how this came to be. The tax treatment is some evidence of intention, but Luisa's actual intention at the time of the transaction remains a question of fact to be determined on the whole of the evidence.

96 The fact that Luisa had no part in deciding how the house would be treated for tax purposes is inconsistent with any admission by her respecting her intention. Certainly the tax treatment can be explained other than as an acknowledgment by Luisa that her sons were the beneficial owners of the house. As such, what was in her tax returns sheds little light on whether it was Luisa's intention to confer beneficial ownership of the property on her sons.

(c) Conclusion respecting resulting trust

97 I have concluded that the money used in the purchase of the Crawford St. property was Luisa's money. Although its source was in part money given to her by her working children, Luisa was the person who took on the responsibility to pay for the house at the time of the purchase, in 1979, and during the next 35 years until she died. Although the house was in her children's names, her intention was not to benefit the title holders to the exclusion of her other children by giving them a property interest in the house. The evidence is inconsistent in particular with Manuela's claim that Luisa intended to give Joseph a beneficial interest in the house from the time it was purchased in 1974. While the parties' income tax returns treated the house in a way that was consistent with legal title, they did not reflect the reality of how the property was handled — that Luisa, and not Henry and Joseph, collected and kept the rents, that Luisa, and not Henry and Joseph, paid the expenses in relation to the house, and that Luisa treated the house as its owner, and not as a tenant.

98 In these circumstances, I find that Luisa was the beneficial owner of the house by way of resulting trust.

(3) The "public policy" issue

99 In addition to holding that there was insufficient evidence that a trust for Luisa's benefit was intended, the trial judge concluded that "for public policy reasons this is not an appropriate case in which to impose any trust" with Luisa's estate as a beneficiary. In my view, the trial judge cast the net too broadly in concluding that it would be against public policy to recognize Luisa's estate as the beneficial owner of the house when she had received tax credits on the basis that she was not the beneficial owner.

100 *Rosenthal v. Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.), the case relied upon by the trial judge, was a matrimonial case. There was an issue about whether certain shares owned by the husband had been purchased by him (in which case they were part of his net family property) or received as a gift (and thus excluded from net family property). There was evidence that while an initial transfer of shares from a third party was by way of gift, two subsequent transfers of shares by the same party were made in exchange for demand notes bearing no interest. The third party testified that his intention was to gift all of the shares to the husband and that the demand notes were forgiven over time. He said the reason for structuring the latter two transfers in this manner was to avoid payment of gift tax, which was in operation at the time.

101 The trial judge in *Rosenthal* held that the initial transfer of shares was a gift but the latter two transfers were not and thus the value of those latter shares should be included in the husband's net family property. He stated, at para. 51, that "it is being argued that for the purpose of the Income Tax Act in 1969, the transfer of shares was not a gift, but for

the purpose of the Family Law Act in 1986, the transfer of shares was a gift. Such a result should not be condoned by the court on the grounds of public policy alone."

102 His logical conclusion was that, having structured a transaction as a purchase specifically to avoid taxes that would be payable if it were a gift, the husband could not subsequently claim that the transaction was in fact a gift. While he did not explain the public policy concern in any detail, it appears to be that a party should not be permitted to structure a transaction in one way to avoid the payment of taxes, and then to subsequently disclaim that very structure.

103 In the present case, there was no evidence that Luisa put the property into the names of her children so as to avoid taxes or to obtain a tax benefit. The evidence was to the contrary — the children took legal title because Luisa did not have paid employment and could not qualify for a mortgage. The fact that subsequently the Andrade family treated the house for tax purposes in a manner that was consistent with the legal title, as a result of which Luisa received some benefit (and her sons some detriment), is, as noted earlier, evidence to be considered when determining Luisa's intention but is not determinative.

104 *Rosenthal* does not stand for any general public policy principle that would prevent a party from taking one position for tax purposes, and another in respect of a claim in litigation. In cases where a party must rely on fraudulent documents to prove a claim, the "clean hands" doctrine and considerations of illegal purpose may bar the claim: see e.g. *Buist v. Greaves* (1997), 11 O.F.L.R. 3 (Ont. Gen. Div.). However actions unrelated to one's claim will not necessarily bar a plaintiff from her remedy: see e.g. *Parnell v. Viger* (2003), 41 R.F.L. (5th) 327 (Ont. S.C.J.), rev'd in part on other grounds (2005), 14 R.F.L. (6th) 84 (Ont. C.A.), at paras. 20-23 (fraudulent documents filed with Revenue Canada did not disentitle a plaintiff from an equitable remedy where she did not have to rely on the documents to prove her claim). The governing principle was stated by Lord Browne-Wilkinson of the House of Lords in *Tinsley v. Milligan*, [1994] 1 A.C. 340 (U.K. H.L.), at p. 375: "A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality."

105 In the present case, Luisa's estate does not seek to profit from the manner in which her tax filings were arranged. Rather, it seeks equitable relief in relation to Luisa's interest in the family home. Her tax filings are not fundamental to that cause of action. They are not necessary to establish the relief that she seeks. They are relevant evidence, but are not in any way dispositive of her claim.

106 And, the *Schwartz* and *Korman* cases referred to earlier confirm that even if a party has transferred ownership of property in one way for one purpose (such as to defeat creditors) a resulting trust claim is not precluded. The question remains one of the transferor's intention at the time of the transfer.

107 The trial judge erred in treating the fact that Luisa claimed tax credits as dispositive of her trust claim for public policy reasons alone. While her tax treatment of the property, considered in isolation, was evidence inconsistent with her beneficial ownership, her actual intention in relation to the property was a question of fact to be determined based on the whole of the evidence.

F. Disposition

108 For these reasons, I would allow the appeal and set aside the judgment in the court below (including the award of costs). I would dismiss the claims of Manuela Andrade; order and declare that the Estate of Luisa Andrade is the sole beneficial owner of 510 Crawford St., Toronto (the "Property"); order and declare that Manuela Andrade holds registered title in the Property as trustee for the Estate of Luisa Andrade; and order Manuela Andrade to forthwith transfer all of her right, title and interest in the Property to the Estate of Luisa Andrade.

109 If the parties are unable to agree on costs in the court below, they shall provide their written submissions to this court within 20 days, limited to five pages each, exclusive of any bill of costs or offer to settle. The respondent shall pay the appellant's costs of the appeal fixed at $30,000, the amount agreed between the parties, which is inclusive of HST and disbursements.

Janet Simmons J.A.:

I agree

C.W. Hourigan J.A.:

I agree

Appeal allowed.

Footnotes

* Additional reasons at *Andrade v. Andrade* (2016), 2016 ONCA 507, 2016 CarswellOnt 10237 (Ont. C.A.).

1 As explained below, such a trust is properly termed a purchase money resulting trust, however the trial judge appears to have considered this argument in the context of his constructive trust and unjust enrichment analysis.

2 Except for her concession that she had no money of her own, there is no reference in the trial judge's reasons to Luisa's evidence.

TAB 6

2013 SCC 33
Supreme Court of Canada

Rascal Trucking Ltd. v. Nishi

2013 CarswellBC 1716, 2013 CarswellBC 1717, 2013 SCC 33, [2013] 2 S.C.R. 438, [2013] 8 W.W.R. 419, [2013] B.C.W.L.D. 4573, [2013] S.C.J. No. 33, 16 B.L.R. (5th) 1, 228 A.C.W.S. (3d) 276, 336 B.C.A.C. 50, 359 D.L.R. (4th) 575, 445 N.R. 293, 45 B.C.L.R. (5th) 1, 574 W.A.C. 50, 88 E.T.R. (3d) 1, J.E. 2013-1066

Edward Sumio Nishi, Appellant and Rascal Trucking Ltd., Respondent

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: January 16, 2013
Judgment: June 13, 2013
Docket: 34510

Proceedings: reversing *Rascal Trucking Ltd. v. Nishi* (2011), 340 D.L.R. (4th) 284, 523 W.A.C. 182, 309 B.C.A.C. 182, 21 B.C.L.R. (5th) 330, 2011 CarswellBC 2154, 2011 BCCA 348 (B.C. C.A.); reversing *Rascal Trucking Ltd. v. Nishi* (2010), 2010 CarswellBC 1454, 2010 BCSC 649 (B.C. S.C.)

Counsel: D. Geoffrey G. Cowper, Q.C., Joel Payne, for Appellant
Craig P. Dennis, Owen J. James, for Respondent

Subject: Estates and Trusts; Contracts; Property

Headnote

Estates and trusts --- Trusts — Resulting trust — Rebuttal of presumption of resulting trust — Miscellaneous

Where advance in exact amount of plaintiff's debt to related non-party — Plaintiff was tenant of non-party K, and agreed in lease to save K harmless from costs associated with plaintiff's conduct — Plaintiff caused nuisance on property, which municipality remediated, charging K for associated costs — Plaintiff did not indemnify K for costs, and property went into foreclosure — Plaintiff advanced funds, in exact amount of costs, to defendant "without conditions", in order to assist defendant to acquire property — Defendant then declined to transfer any interest in property to plaintiff, and plaintiff brought action for, inter alia, declaration that defendant held title to property subject to trust in favour of plaintiff — Trial judge held that presumption of "commercial purchase money" resulting trust in favour of plaintiff — However, trial judge held that, given that advance was in exact amount of municipal costs, plaintiff intended that advance be gift in recognition of amount plaintiff owed to K in respect of property — Action was accordingly dismissed on finding that presumption of resulting trust had been rebutted — Plaintiff's appeal was allowed, action was allowed and defendant appealed to Supreme Court of Canada — Appeal allowed and action dismissed — Trial judge correctly held that presumption of commercial purchase money resulting trust existed in present case — To rebut this presumption, party resisting trust must prove that advance made was intended to be legal gift — As plaintiff had expressly stated that advance to defendant was made without conditions and as amount of advance exactly equalled amount of municipal costs, trial judge's finding that advance was gift rebutting presumption was reasonable and appeal was accordingly properly allowed.

Successions et fiducies --- Fiducies — Fiducie résultoire — Réfutation de la présomption relative à une fiducie résultoire — Divers

Lorsqu'une avance d'argent correspond au montant exact de la dette du demandeur envers un tiers — Demandeur était le locataire du tiers K et avait signé un bail comportant une clause exonérant K de toute responsabilité à l'égard des frais découlant de ses activités — Activités du demandeur ont entraîné une nuisance, à laquelle la municipalité a mis fin, tenant K responsable des frais encourus — Demandeur n'a pas remboursé K, et la propriété a fait l'objet d'une forclusion —

Demandeur a avancé des fonds au défendeur [TRADUCTION] « sans condition », à la hauteur du montant desdits frais, afin de permettre à ce dernier de faire l'acquisition de la propriété — Défendeur a, par la suite, refusé de transférer tout intérêt dans la propriété au demandeur, et ce dernier a déposé une action pour faire déclarer, entre autres choses, que le défendeur détenait un titre sur la propriété assujetti à une fiducie résultoire ou par interprétation en faveur du demandeur — Juge de première instance a estimé qu'il existait une présomption selon laquelle une fiducie résultoire découlant des circonstances d'un achat commercial existait en faveur du demandeur — Toutefois, le juge de première instance a conclu que le demandeur avait eu l'intention que l'avance prenne la forme d'une donation en reconnaissance du montant qu'il devait à K relativement à la propriété, puisque l'avance correspondait au montant des frais encourus par la municipalité — Aussi, le juge a conclu que la présomption d'une fiducie résultoire avait été réfutée et l'action a été rejetée — Appel interjeté par le demandeur a été accueilli, l'action a été accueillie et le défendeur a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli et action rejetée — Juge de première instance a eu raison de conclure qu'une fiducie résultoire découlant des circonstances d'un achat commercial existait en l'espèce — Cette présomption pouvait être réfutée si la partie contestant la fiducie résultoire prouvait que l'avance avait été consentie avec l'intention qu'elle prenne la forme d'une donation — Comme le demandeur avait clairement affirmé qu'il avait consenti l'avance au défendeur sans condition et étant donné que le montant de l'avance correspondait parfaitement au montant des frais encourus par la municipalité, il était raisonnable que le juge de première instance conclue que la présomption avait été réfutée, étant donné que l'avance était une donation, et c'était pourquoi le pourvoi a été accueilli.

A non-party, K, held certain real property, and K leased the property to the plaintiff. The lease indicated that the plaintiff would "save harmless" K from any costs associated with plaintiff's conduct upon the property. The plaintiff's conduct caused a nuisance, and the municipality in which the property was located ordered K to remediate the nuisance. The municipality ultimately took steps to remediate the nuisance itself, and the municipality placed a charge on the property for its remediation costs. The plaintiff did not indemnify K for the charge notwithstanding the lease "save harmless" clause. Subsequently K determined that the charge, together with an outstanding mortgage, rendered the property valueless, and K defaulted on the mortgage.

In foreclosure proceedings, the defendant purchased the property from the mortgagee. The plaintiff contributed to the defendant's purchase price in the exact amount of the municipality's charge. Prior to the plaintiff's advance, the plaintiff and defendant had negotiated various possible ways for the plaintiff to acquire an interest in the property, but after the parties were unable to reach an agreement the plaintiff agreed to advance the monies without conditions. The defendant subsequently declined to transfer any interest in the property to the plaintiff, and the plaintiff brought an action for, inter alia, a declaration that the defendant held title upon a partial express, resulting or constructive trust in favour of the plaintiff.

The trial judge held that, in the circumstances, a presumption existed that a partial "commercial purchase money" resulting trust existed in favour of the plaintiff. However, the trial judge held that the presumption was rebutted, as given that the amount of the plaintiff's contribution to the purchase price was the exact same amount as the municipal charge, the plaintiff's advance to the defendant was in fact a gift in recognition of the plaintiff's responsibility for the nuisance the plaintiff created which had ultimately caused K to lose the property in the first place. The action was accordingly dismissed and the plaintiff appealed.

The appeal was allowed, the Court of Appeal holding that, as the plaintiff's obligation under the lease's "save harmless" clause was to K qua landlord and not to the defendant as a subsequent purchaser, that to consider the plaintiff's contribution to the purchase price a gift to the defendant would unjustly enrich the defendant, not a party to the lease. Accordingly, the court held that the presumption of commercial purchase money resulting trust was not rebutted and the action was properly allowed. The defendant appealed, with leave, to the Supreme Court of Canada.

Held: The appeal was allowed and the trial judgment restored.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Cromwell, Karakatsanis, Wagner JJ. concurring): It was not necessary to import unjust enrichment principles into the law of commercial purchase money resulting trust. The law was clear, that absent an express legal relationship between the parties "the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution". In order to rebut this presumption, a party resisting the resulting trust must prove to a civil standard that, at the time of the advance, the proposed trust beneficiary intended that the advance be a legal gift.

In the present case, the trial judge's finding as to the rebuttal of the presumption of commercial purchase money resulting trust was reasonable. This was so particularly as the plaintiff had in fact expressly stated that the advance made to the defendant was being made unconditionally, and as the advance was in the exact amount of the municipal charge. The amount of the advance and the plaintiff's expressed intention, taken together, were sufficient to found a finding of legal gift, and the appeal was accordingly properly allowed and the action dismissed for the reasons of the trial judge.

Un tiers, K, détenait certaines propriétés et en a loué une au demandeur. Le bail indiquait que le demandeur [TRADUCTION] « exonérerait » K à l'égard des frais découlant de ses activités sur la propriété. Les activités du demandeur ont entraîné une nuisance, et la municipalité où était située la propriété a ordonné à K de mettre fin à la nuisance. La municipalité a ultimement pris les moyens pour mettre elle-même fin à la nuisance et a grevé la propriété d'une sûreté garantissant le remboursement des frais encourus pour mettre fin à la nuisance. Le demandeur n'a pas dédommagé K relativement à la sûreté, malgré la présence de la clause d'[TRADUCTION] « exonération » Par la suite, K a déterminé que la sûreté, de même qu'une hypothèque grevant la propriété, faisait perdre toute sa valeur à la propriété, et K a fait défaut d'honorer l'hypothèque.

Au cours des procédures de forclusion, le défendeur a acheté la propriété détenue par le créancier hypothécaire. Le demandeur a contribué au prix d'achat déboursé par le défendeur à la hauteur de la sûreté grevée par la municipalité. Avant que le demandeur ne fasse l'avance, lui et le défendeur ont négocié afin de trouver un moyen lui permettant d'acquérir un intérêt dans la propriété, mais lorsque les parties ont constaté qu'elles ne parviendraient pas à s'entendre, le demandeur a accepté d'avancer l'argent sans poser de condition. Le défendeur a, par la suite, refusé de transférer tout intérêt dans la propriété au demandeur, et ce dernier a déposé une action pour faire déclarer, entre autres choses, que le défendeur détenait un titre spécifiquement sur une fraction de la propriété assujetti à une fiducie résultoire ou par interprétation en faveur du demandeur.

Le juge de première instance a estimé que, dans les circonstances, il existait une présomption selon laquelle une fiducie résultoire sur une fraction de la propriété découlant des circonstances d'un achat commercial existait en faveur du demandeur. Toutefois, le juge de première instance a conclu que la présomption avait été réfutée, puisque le montant de la contribution du demandeur au prix d'achat correspondait au montant de la sûreté municipale, et que l'avance versée par le demandeur au défendeur constituait dans les faits une donation en reconnaissance de la responsabilité du demandeur relativement à la nuisance que le demandeur avait créée et qui avait fait en sorte que K perde la propriété à l'origine. L'action a ainsi été rejetée et le demandeur a interjeté appel.

L'appel a été accueilli, la Cour d'appel estimant, comme l'obligation du demandeur en vertu de la clause d'[TRADUCTION] « exonération » prévue au bail était en faveur de K en sa qualité de locateur et non en faveur du défendeur en tant qu'acheteur subséquent, que le fait de qualifier la contribution du demandeur au prix d'achat de donation faite en faveur du défendeur constituerait un enrichissement injustifié à son égard, lequel était un tiers par rapport au bail. Aussi, la Cour a conclu que la présomption selon laquelle une fiducie résultoire découlant des circonstances d'un achat commercial n'avait pas été réfutée et l'action a été accueillie. Le défendeur a formé un pourvoi, avec autorisation, devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli et le jugement de première instance rétabli.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Cromwell, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Il n'était pas nécessaire d'avoir recours aux principes applicables en matière d'enrichissement injustifié pour déterminer une affaire portant sur une fiducie résultoire découlant des circonstances d'un achat commercial. Il était clairement établi en droit qu'en l'absence d'une relation juridique spécifique entre les parties, [TRADUCTION] « il faut présumer en droit que les parties voulaient que l'auteur de l'avance des fonds détienne un intérêt bénéficiaire dans le bien au prorata de sa contribution ». Cette présomption pouvait être réfutée si la partie contestant la fiducie résultoire prouvait, selon la norme de preuve applicable en matière civile, qu'au moment où l'avance a été versée, le bénéficiaire potentiel de la fiducie avait l'intention que l'avance soit en fait une donation.

En l'espèce, le juge de première instance pouvait raisonnablement conclure que la présomption selon laquelle une fiducie résultoire sur une fraction de la propriété découlant des circonstances d'un achat commercial avait été réfutée. Cela était particulièrement juste étant donné que le demandeur avait, dans les faits, clairement affirmé qu'il avait consenti l'avance au défendeur sans condition et étant donné que le montant de l'avance correspondait parfaitement au montant que représentait la sûreté municipale. Considérant le montant de l'avance et l'intention exprimée par le demandeur, il était loisible de conclure à une donation, et le pourvoi a été accueilli et l'action a été rejetée pour les motifs du juge de première instance.

Table of Authorities

Cases considered by *Rothstein J.*:

Craig v. R. (2012), (sub nom. *Craig v. Canada)* 347 D.L.R. (4th) 385, [2012] 5 C.T.C. 205, 2012 SCC 43, 2012 CarswellNat 2737, 2012 CarswellNat 2738, (sub nom. *Canada v. Craig)* [2012] 2 S.C.R. 489, (sub nom. *R. v. Craig)* 2012 D.T.C. 5115 (Eng.), (sub nom. *R. v. Craig)* 2012 D.T.C. 5116 (Fr.), (sub nom. *Minister of National Revenue v. Craig)* 433 N.R. 111 (S.C.C.) — referred to

Fraser v. Ontario (Attorney General) (2011), D.T.E. 2011T-294, 331 D.L.R. (4th) 64, (sub nom. *A.G. (Ontario) v. Fraser)* 2011 C.L.L.C. 220-029, 275 O.A.C. 205, 415 N.R. 200, 91 C.C.E.L. (3d) 1, (sub nom. *Ontario (Attorney General) v. Fraser)* [2011] 2 S.C.R. 3, 233 C.R.R. (2d) 237, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, 2011 SCC 20 (S.C.C.) — considered

Kerr v. Baranow (2011), 14 B.C.L.R. (5th) 203, [2011] 3 W.W.R. 575, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, 300 B.C.A.C. 1, 509 W.A.C. 1, 274 O.A.C. 1, [2011] 1 S.C.R. 269, 2011 SCC 10, 2011 CarswellBC 240, 2011 CarswellBC 241, 328 D.L.R. (4th) 577, 411 N.R. 200, (sub nom. *Vanasse v. Seguin)* 108 O.R. (3d) 399 (S.C.C.) — followed

Nanaimo (City) v. Rascal Trucking Ltd. (2000), 20 Admin. L.R. (3d) 1, 183 D.L.R. (4th) 1, 2000 CarswellBC 392, 2000 CarswellBC 393, 2000 SCC 13, 251 N.R. 42, 132 B.C.A.C. 298, 215 W.A.C. 298, [2000] 1 S.C.R. 342, [2000] 6 W.W.R. 403, 76 B.C.L.R. (3d) 201, 9 M.P.L.R. (3d) 1 (S.C.C.) — referred to

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R. v. B. (K.G.) (1993), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257, 1993 CarswellOnt 76, 1993 CarswellOnt 975 (S.C.C.) — considered

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 260 D.L.R. (4th) 411, 342 N.R. 259, (sub nom. *R. c. Henry)* [2005] 3 S.C.R. 609, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, [2006] 4 W.W.R. 605, 136 C.R.R. (2d) 121 (S.C.C.) — considered

Authorities considered:

Oosterhoff on Trusts: Text, Commentary and Materials, 7th ed., by A.H. Oosterhoff et al. (Toronto: Carswell, 2009)

Snell's Equity, 32nd ed., by John McGhee (London: Sweet & Maxwell, 2010)

Waters' Law of Trusts in Canada, 4th ed., by Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith (Toronto: Carswell, 2012)

APPEAL by defendant from judgment reported at *Rascal Trucking Ltd. v. Nishi* (2011), 340 D.L.R. (4th) 284, 523 W.A.C. 182, 309 B.C.A.C. 182, 21 B.C.L.R. (5th) 330, 2011 CarswellBC 2154, 2011 BCCA 348 (B.C. C.A.), allowing plaintiff's appeal from judgment dismissing action for, *inter alia*, declaration that defendant held certain realty under partial express, resulting or constructive trust in favour of plaintiff.

POURVOI formé par le défendeur à l'encontre d'une décision publiée à *Rascal Trucking Ltd. v. Nishi* (2011), 340 D.L.R. (4th) 284, 523 W.A.C. 182, 309 B.C.A.C. 182, 21 B.C.L.R. (5th) 330, 2011 CarswellBC 2154, 2011 BCCA 348 (B.C. C.A.), ayant accueilli l'appel interjeté par le demandeur à l'encontre d'un jugement ayant rejeté une action visant, entre autres choses, à faire déclarer que le défendeur détenait une propriété en vertu d'une fiducie résultoire ou par interprétation portant spécifiquement sur une fraction d'un bien immobilier en faveur du demandeur.

***Rothstein J.* (McLachlin C.J.C. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.

2 The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.

3 Edward Sumio Nishi has legal title to property. Rascal Trucking Ltd., which advanced funds to assist in the purchase of the property, claims a beneficial interest in that property. The trial judge found that the presumption of resulting trust had been rebutted. That finding was overturned on appeal.

4 Mr. Nishi now asks this Court to restore the decision of the trial judge by replacing the doctrine of purchase money resulting trust with the doctrine of unjust enrichment and finding that Mr. Nishi was not unjustly enriched. Alternatively, Mr. Nishi says that the presumption of resulting trust was rebutted. I see no reason to disturb the long settled doctrine of resulting trust in favour of unjust enrichment. Rather, I would allow the appeal based on the factual findings of the trial judge that no resulting trust was created in this case.

II. Facts

5 In 1996, Kismet Enterprises Ltd. owned approximately two acres of land in Nanaimo, British Columbia. In April 1996, Kismet leased the property to Rascal. Rascal began operating a topsoil processing facility on the property.

6 Rascal's topsoil operation generated significant complaints from the neighbourhood. As a result, the City of Nanaimo (the "City") passed resolutions, declaring that the facility was a nuisance and authorizing the City to remove the topsoil in the event that neither Kismet nor Rascal did so. The City subsequently removed the topsoil and lodged the costs incurred,

amounting to $110,679.74, against the property as tax arrears. Rascal brought an action challenging the City's authority to pass these resolutions, but this Court ruled in favour of the City in 2000: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 (S.C.C.).

7 Rascal's lease included provisions which required it to "hold harmless" Kismet for "any and all liabilities resulting from Rascal's operations on the property", but at no point did Rascal reimburse Kismet or the City for the costs of the removal of the topsoil.

8 Kismet determined that, as a result of the tax arrears and the existing mortgage to CIBC, there was no equity left in the property. It stopped making mortgage payments and in December 1997, CIBC began foreclosure proceedings. Throughout the foreclosure proceedings, Hans Heringa, the principal of Rascal, tried in a number of ways to acquire the property, but was rebuffed or ignored by CIBC.

9 Upon completion of the foreclosure proceedings, in May 2001, the property was sold to Mr. Nishi for $237,500. Before selling the property to Mr. Nishi, CIBC paid the tax arrears owing to the City.

10 Mr. Nishi was assisted in the purchase by Rascal who provided $85,000 in cash and assumed responsibility for paying $25,000 on the mortgage. Mr. Heringa acted as guarantor on the mortgage. Subsequent to the purchase of the property, Mr. Heringa instructed his staff that the total contribution to the mortgage should be $25,679.74. As a result, Rascal's total contribution towards the purchase of the property was $110,679.74, the exact amount of the tax arrears lodged on the property due to Rascal's topsoil activities.

11 With respect to this financial support, Mr. Heringa sent Mr. Nishi's lawyer several faxes containing offers with different terms. On May 25, 2001, Mr. Heringa made an offer to contribute $85,000 in cash and to assume $25,000 in mortgage payments in exchange for a second mortgage to secure Rascal's interest in the property and for the bottom half of the property. Part of the text of the May 25, 2001 fax is reproduced below:

> 1) To advise that $85,000.00 can be applied to a purchase of this property for $232,500.00 plus Legal and Land Title costs, to be in the name of Edward Nishi.
>
> 2) Royal Bank (Colleen Tourout) is to advance a First Mortgage. We are taking a 25 year amortization, 5 yr Term, with payments to include Taxes. H. Heringa will act as a guarantor.
>
> 3) Rascal Trucking Ltd. will be responsible for payments on $25,000.00 of the Mortgage.
>
> 4) We would like Edward Nishi to sign "Registrable Form documentation for a Second Mortgage for $110,000, no interest, to secure Rascal's interest in this land. This Second will *not* be Registered as yet, and only at some later date perhaps, with the consent of both of us.
>
> 5) There should be an Agreement that Edward Nishi will apply for, transfer & convey the bottom 1/2 of the property to Rascal Trucking Ltd., after completion of the Sale, and that it is the intent that Rascal can use, and later *own* the bottom portion of the property, commencing at the halfway point of the upper driveway, as per the attached Plan. [Emphasis in original; A.R., at pp. 113-14.]

12 There is no evidence that Mr. Nishi accepted this offer.

13 On May 28, 2001, Mr. Heringa sent a fax modifying his earlier offer and stating that "the $85,000.00 is to be applied to the purchase without any conditions or requirements, and these instructions are irrevocable" (A.R., at p. 117). He stated that the request for a second mortgage and for the bottom half of the property to be conveyed to Rascal were "just possibilities, for future reference & consideration, and that's all" (*ibid.* (emphasis in the original)). The text of this second fax is reproduced below:

1) So there is no confusion, Instruction #1, is a stand alone instruction, and the $85,000.00 is to be applied to the purchase without any conditions or requirements, and these instructions are irrevocable. The sale must complete, in the name of Edward Nishi. Items 2 & 3 are only to confirm what is to occur.

2) The rest (Items 4 & 5) are just possibilities, for future reference & consideration, and that's *all*.

3) However, if you think that a Second Mortgage or anything else makes sense, to properly protect Nishi, Kismet & Rascal, in the future, from demands from the City or from future Nuisance charges, *etc.*, please advise .... Also, Rascal doesn't want to lose its legal non-conforming status in regard to topsoil processing at this site. [Emphasis in original; A.R., at p. 117.]

14 In November 2008, Rascal began this action claiming a one-half undivided interest in the property.

15 For reasons that will become apparent, it is relevant that Mr. Heringa and Cidalia Plavetic, the principal of Kismet, had had a longstanding business and personal relationship. It is also relevant that Ms. Plavetic and Mr. Nishi are common law partners and have lived on the property since 1997.

III. Judicial History

A. Supreme Court of British Columbia

16 Rascal advanced three arguments before the trial judge. First, Rascal argued that there was an agreement between the parties that half of the property would belong to Rascal. The trial judge rejected this argument but noted that "[Mr. Heringa's] intention and desire to secure an interest was obvious, but Mr. Nishi would not agree" (para. 39).

17 Second, Rascal argued that since it had contributed to the purchase price of the property but did not take title, a resulting trust arose such that Rascal was entitled to a share of the property in proportion to its contribution to the purchase price. The trial judge rejected this argument, finding that while there was "no issue of a gift", Mr. Nishi's evidence was that there was no intention for Rascal to have an interest in the land (paras. 42 and 47). The trial judge found that the purpose of the payment was to satisfy the debt from Rascal to Kismet as a result of the tax arrears for which Rascal acknowledged responsibility due to the "hold harmless" undertaking by Rascal in its lease with Kismet. The trial judge also relied on the fact that the amount of the contribution ($110,679.74) was equal to the tax arrears caused by Rascal.

18 Third, the trial judge rejected Rascal's claim for a constructive trust on the basis of unjust enrichment, finding that the purpose of the contribution was simply to place Ms. Plavetic, Mr. Nishi and Kismet in the same position as if the nuisance and resulting tax arrears had never been caused by Rascal.

B. Court of Appeal for British Columbia

19 The Court of Appeal allowed Rascal's appeal. That court held that a presumption of resulting trust arose because of a gratuitous transfer between unrelated parties. This presumption was not rebutted because the trial judge had found that there was "no issue of a gift". The trial judge had erred in finding that the presumption had been rebutted because that finding was based on Mr. Nishi's intention and not Rascal's intention. The Court of Appeal observed that it is the intention of the person who advances the funds and not the intention of the recipient that is relevant. The trial judge had concluded that "[Mr. Heringa's] intention and desire to secure an interest was obvious" (para. 39). The fact that Rascal had an obligation to indemnify Kismet for the tax arrears could not serve to rebut the presumption because Mr. Nishi, to whom the payment was made, was a legal stranger to Kismet.

IV. Analysis

20 Mr. Nishi appealed to this Court on two grounds. First, he argued that the purchase money resulting trust doctrine should be abandoned in favour of an approach based on unjust enrichment and that no unjust enrichment occurred here. Alternatively, he argued that if the purchase money resulting trust is to be retained, it would not apply in this case. I would not give effect

to the first ground of appeal. In my view, there is no reason to depart from the longstanding doctrine of the purchase money resulting trust. However, I would allow Mr. Nishi's appeal because there was no resulting trust arising on the facts as found by the trial judge.

A. Should the Purchase Money Resulting Trust Be Abandoned?

21 The purchase money resulting trust is a species of gratuitous transfer resulting trust, where a person advances a contribution to the purchase price of property without taking legal title. Gratuitous transfer resulting trusts presumptively arise any time a person voluntarily transfers property to another unrelated person or purchases property in another person's name: D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 397.

22 As Cromwell J. noted in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), at para. 12, it has 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". Despite this recent endorsement of the purchase money resulting trust, Mr. Nishi argues that it should be abandoned in favour of the doctrine of unjust enrichment. The purchase money resulting trust provides certainty and predictability. Mr. Nishi has not advanced arguments that would support overruling the Court's jurisprudence in this area.

23 This Court has recently considered under what circumstances it should overrule a prior decision of the Court: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.); *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.); *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.). It is best not to depart from precedent unless there are compelling reasons to do so: *Henry*, at para. 44. The Court will exercise caution in overturning decisions of firm majorities, particularly when those decisions are recent: *Fraser*, at para. 57.

24 In this case, Mr. Nishi is asking this Court to depart from both *Kerr* and *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), two recent appeals decided unanimously or by firm majorities. These decisions represent just the most recent endorsements of longstanding doctrine. There is no concrete evidence that the purchase money resulting trust is unworkable or has lead to untenable results: *Fraser*, at para. 83. Nor has Mr. Nishi shown that the purchase money resulting trust has been "attenuated or undermined by other decisions of this or other appellate courts" (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at p. 778).

25 Mr. Nishi advances four reasons for abandoning the purchase money resulting trust and gratuitous transfer resulting trusts more generally: overlap with the doctrine of unjust enrichment in terms of purpose; overly restrictive framework for the types of intention that motivate transactions; absence of remedial flexibility; and overall lack of flexibility in terms of what can be considered relative to unjust enrichment.

26 Mr. Nishi's first argument is that since the purchase money resulting trust essentially responds to unjust enrichment, it is unnecessary to retain it as a separate doctrine. Even if the purchase money resulting trust is considered to be an inherently restitutionary concept, I would still not give effect to this argument. The argument appears to have been summarily made and in the absence of harm, confusion or other disadvantage, I am not satisfied that conceptual overlap is a sufficient reason to abandon the purchase money resulting trust. This is particularly true in light of the fact that the purchase money resulting trust has been a feature of the common law since at least 1788 and provides certainty and predictability in situations where a person has made a gratuitous advance.

27 Mr. Nishi's second argument — that purchase money resulting trusts provide an overly restrictive framework for the types of intention that motivate transactions — must fail because it is based on too narrow an understanding of the scope of gifts in law. The concerns that Mr. Nishi raised in how the Court of Appeal applied this test to the facts here can be resolved more appropriately by considering the legal meaning of the word gift. As will be discussed in more detail below, the legal concept of a gift is broad enough to include the type of advance made in this case. Legal gifts do not require philanthropic motivations. The trust-gift dichotomy, as Mr. Nishi describes it, is not restrictive. Rather it reflects the fact that when making

a gratuitous transfer of property, the person who makes the transfer must have intended either to pass the beneficial interest (a gift) or retain it (a trust).

28 Mr. Nishi's third and fourth arguments can be considered together. In essence, Mr. Nishi argues that the doctrine of unjust enrichment is preferable because of its flexibility in terms of factors to be considered, overall focus on justice between the parties and broader remedial options. However, desire for flexibility does not constitute a compelling reason for departing from the unanimous decision of this Court in *Kerr*, which was issued just two years ago. While flexibility is no doubt desirable in certain areas of the law, the purchase money resulting trust provides certainty and predictability because it relies on a clear rule for determining who holds the beneficial interest in a property. Absent strong dissenting opinions in this Court, contrary decisions in provincial appellate courts or significant negative academic commentary that would justify disturbing such a settled area of the law, there is no reason to abandon the purchase money resulting trust.

B. Did a Resulting Trust Arise for the Benefit of Rascal?

29 Rascal's contribution to the purchase of the property was made without consideration and Rascal and Mr. Nishi are not related. Therefore, the legal presumption of resulting trust applies: *Pecore* at paras. 24 and 27. This is because in such circumstances equity presumes bargains rather than gifts: *Pecore*, at para. 24. In the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price: see *Waters' Law of Trusts in Canada*, at p. 401.

30 However, the presumption of resulting trust can be rebutted if the recipient of the property proves, on a balance of probabilities, that the person who advanced the funds intended a gift: *Pecore*, at paras. 24 and 44. The relevant intention is the intention of the person who advanced the funds at the time of the contribution to the purchase price: *Pecore*, at para. 59. Therefore, for Mr. Nishi to rebut the presumption in this case, he must prove that Rascal intended to make a gift at the time that Rascal made a contribution to the purchase price, in May 2001.

31 In my view, the trial judge was correct to conclude that the presumption was rebutted in this case. In his May 28, 2001 fax, Mr. Heringa indicated that the contribution to the purchase price and his intention to pay $25,000 of the mortgage was made "without any conditions or requirements, and these instructions are irrevocable" (A.R., at p. 117). As will be discussed below, a contribution to the purchase price without any intention to impose conditions or requirements is a legal gift. While Mr. Heringa argued that there was either an agreement to transfer a portion of the land to him or an intention for him to hold a beneficial interest, the trial judge preferred the evidence of Mr. Nishi (para. 40).

32 The Court of Appeal held that the trial judge's findings (1) that there was no issue of a gift and (2) that Mr. Heringa's intention to obtain an interest in the property was obvious, meant that the presumption of resulting trust had not been rebutted. In my view, the Court of Appeal erred in the inferences it drew from the trial judge's reasons on these two key issues.

(1) The Meaning of "Gift"

33 The trial judge found that there was "no issue of a gift" (para. 42). The Court of Appeal took this statement to mean that the presumption of resulting trust was therefore not rebutted, because to rebut it would require Mr. Nishi to prove that the contribution was a gift. In my respectful view, the Court of Appeal erred by taking this statement in isolation as conclusive of the trial judge's reasoning.

34 In the trial judge's reasons, immediately following his statement about there being "no issue of a gift", he states: "[t]he presumption of a resulting trust is rebuttable by the title holder showing that the payment was not intended to create a beneficial interest" (para. 42). This demonstrates that the trial judge understood the test for rebutting the presumption to be based on the absence of intention to create a beneficial interest for the transferor. There would have been no need for the trial judge to continue his analysis beyond his statement about there being no issue of a gift, if the trial judge had not been of the opinion that an intention to create a beneficial interest in the transferor was the test for determining whether the presumption of resulting trust had not been rebutted.

35 The conclusion of the trial judge was that Mr. Nishi had satisfied the burden on him of rebutting the presumption of resulting trust. In so concluding, the reasons of the trial judge appear to suggest that he distinguished between a gift and absence of an intention by the transferor to hold a beneficial interest after the advance. Although he made such a distinction, his conclusion that there was no intention to create a beneficial interest in the property for Rascal is legally the same as saying that there was an intention to make a gift to Nishi. The trial judge erred in distinguishing between a gift and intention to create a beneficial interest for the transferee but that error was inconsequential.

36 Indeed, the trial judge's error may well be explained by reference to the academic authorities as some authorities have phrased the test for rebutting the presumption of resulting trust using language about intention not to hold the beneficial interest in the property. For example, *Snell's Equity* describes the type of evidence required to rebut the presumption as "any evidence tending to indicate that A's intention was that B should take the beneficial interest in the property acquired with A's purchase money" (J. McGhee, ed., *Snell's Equity* (32nd ed. 2010), at para. 25-012). Similarly, *Oosterhoff on Trusts* describes the presumption of resulting trust as "a presumption that the apparent donor did not intend to give the beneficial ownership of the assets to the recipient" (A. H. Oosterhoff et al., eds., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at p. 640).

37 In my view, these formulations are simply another way of describing whether the transferor's intention was to create a legal gift. There is no second category of intention that rebuts the presumption. *Pecore* and *Kerr* did not recognize a different category of intention, other than intention to make a gift, that would rebut the presumption. This is consistent with other authorities such as *Waters' Law of Trusts* where the proof required to rebut the presumption is intention "to make a gift of the property" (p. 401; see also pp. 406 and 409). In Canada, our jurisprudence is that there is no difference between the intention to make a gift and the intention that the transferor not hold a beneficial interest. In other words, in the case of a gratuitous transfer, there is a gift at law when the evidence demonstrates that, at the time of the transfer, the transferor intended the transferee to hold the beneficial interest in the property being purchased.

38 Reviewing the trial judge's reasons in their full context confirms that he understood that Rascal's intention at the time of the advance was to make a legal gift — i.e. to contribute to the purchase price without taking a beneficial interest in the property. As the trial judge found, Rascal's contribution to the purchase price was motivated by recognition of the costs that it had imposed on Kismet, the company owned by Ms. Plavetic, his friend. As I will explain, this intention, to make good on Rascal's obligations to Kismet by way of a payment to Mr. Nishi, is not inconsistent with a finding of a legal gift. Moreover, as was clear from the May 28, 2001 fax, Rascal's stated intention was to make the advance without any conditions such as obtaining a beneficial interest in any portion of the land.

39 The trial judge's comment that the there was "no issue of a gift" was made in the context of reviewing Mr. Nishi and Ms. Plavetic's perspective on the purpose of the payment:

> In this case, there is no issue of a gift. Neither Mr. Nishi nor Ms. Plavetic considered the plaintiff's contribution to be a gift. [para. 42]

Mr. Nishi and Ms. Plavetic did not see the payment as a gift, because as the trial judge went on to describe, Rascal acknowledged its responsibility for a debt to Kismet related to the tax arrears arising from Rascal's topsoil operation. However, it made no sense for Rascal to make that payment directly to Kismet since Kismet was subject to other liabilities and was essentially defunct. If Rascal had made the payment to Kismet, it would not have assisted Mr. Heringa's friends to obtain title to the property. Making the contribution to the purchase price, therefore, enabled Rascal to live up to its moral commitment in a way that practically benefited Mr. Heringa's friends. It also left open the possibility that in the future they might agree to a second mortgage or a transfer of a portion of the property to Rascal.

40 Indeed, Mr. Heringa's instructions to his staff on payment of his contribution towards the mortgage on the property refer to the amount of the tax arrears ($110,679.74) down to the penny. The necessary implication is that Mr. Heringa viewed the payments as connected with that moral obligation. If Mr. Heringa's intention at that time was for Rascal to take a beneficial

interest in the property, the moral obligation would not have been fulfilled since Rascal would have used the payment to obtain a corresponding interest in the land and not to make good on its moral obligation. In other words, for these parties, one payment cannot be used both to discharge the moral obligation and to obtain a beneficial interest in the land. The two intentions are incompatible.

(2) Evidence of Rascal's Intention

41 Evidence that arises subsequent to a gratuitous transfer can be admissible to show the true intention of the transferor: *Pecore*, at para. 59. However, it is the intention of the transferor *at the time of transfer* that is determinative. The difficulty with subsequent evidence is that it may well be self-serving or the product of a change in intention on the part of the transferor: *Pecore*, at para. 59.

42 The trial judge commented on Rascal's intention twice in his reasons. When discussing whether there was an agreement between Rascal and Mr. Nishi to convey part of the property to Rascal, the trial judge stated that "[Mr. Heringa's] intention and desire to secure an interest was obvious, but Mr. Nishi would not agree" (para. 39). Later in his reasons, the trial judge stated that he "specifically accepted the evidence of Mr. Nishi that there was no intention to have any interest in favour of Rascal created in the land" (para. 47). In my view, neither of these statements is inconsistent with the trial judge's conclusion that the presumption of resulting trust was rebutted.

43 The trial judge's first statement was made in the context of discussing whether Mr. Heringa and Mr. Nishi had formed a contract that conveyed an interest in the land to Mr. Heringa. The trial judge stated:

> His intention and desire to secure an interest was obvious, but Mr. Nishi would not agree. As a result, I conclude that there was no agreement whereby Mr. Heringa was to be given an interest or ownership position in the land.
>
> [Emphasis added; para. 39.]

Mr. Heringa's desire to obtain an agreement whereby half of the property would be conveyed to him was clear from the content of the May 25, 2001 fax in which he asked for an agreement to transfer and convey the bottom portion of the land to Rascal. However, Mr. Heringa withdrew this request in his May 28, 2001 fax by stating that there were to be no conditions or requirements attached to the financial support.

44 Rascal argued before this Court that the trial judge's finding that Mr. Heringa's "intention and desire to secure an interest was obvious" constitutes a finding of fact as to Rascal's intention to hold a beneficial interest in the property as a result of the advance. However, the trial judge's findings with respect to the presence of an intention and desire to enter a contract should not be applied to the issue of resulting trust, when the trial judge did not choose to do so. The trial judge obviously did not consider his finding of an intention to contract to be determinative of intention for the purpose of the resulting trust analysis. Mr. Heringa withdrew this request in his May 28, 2001 fax by stating that there were to be no conditions or requirements attached to the financial support. It was open for the trial judge to organize his factual findings in this manner.

45 With respect to the trial judge's second statement — that he "accepted the evidence of Mr. Nishi that there was no intention to have any interest in favour of Rascal created in the land" — the trial judge was speaking not just of Mr. Nishi's evidence as to his own intention at the time but also Mr. Nishi's evidence as to Mr. Heringa and Rascal's intention at that time. This follows from his discussion of Rascal's acknowledgement of its responsibility for the debt (para. 45).

46 At trial, it was Rascal's position that at the time of the contribution to the purchase price, Mr. Heringa and Rascal's intention was for Rascal to retain the beneficial interest in proportion to that contribution. The trial judge essentially concluded that Mr. Heringa's evidence at trial about Rascal's intention at the time of the transfer could not be relied upon. Consistent with the caution of this Court in *Pecore*, this is a quintessential example of why after-the-fact evidence should be viewed with skepticism, because it often demonstrates a change in intention, not the intention at the time of the advance. It was open to the trial judge to reach this conclusion and it was well supported by the evidence, particularly Mr. Heringa's May 28, 2001 fax. The trial judge's decision is not in error and ought to be restored.

V. Disposition

47 The finding of the trial judge that the presumption of resulting trust was rebutted is sound. I would allow the appeal and restore the decision of the trial judge with costs to Mr. Nishi throughout.

Appeal allowed.

Pourvoi accueilli.

TAB 7

2010 ONSC 5657
Ontario Superior Court of Justice

Colangelo v. Amore

2010 CarswellOnt 7950, 2010 ONSC 5657, 193 A.C.W.S. (3d) 1152, 61 E.T.R. (3d) 46

Rocco Colangelo (Plaintiff) and Margaret Amore (Defendant)

D.M. Brown J.

Heard: June 1-3, 2010
Judgment: October 21, 2010
Docket: CV-09-377682-0000

Counsel: M. Maltz for Plaintiff
S. Markle for Defendant

Subject: Estates and Trusts; Corporate and Commercial

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

IV Gifts
IV.7 Miscellaneous

Headnote

Estates and trusts --- Gifts — Miscellaneous issues

Between March, 2008 and December, 2008, plaintiff, RC, provided cheques and made bank transfers totalling $16,000 to then girlfriend, defendant, MA — Parties broke up in late 2008 — RC thereupon demanded repayment of advances; MA refused, taking position that RC had gifted those sums to her — RC brought action demanding return of money — Action allowed — Amount of $16,000 constituted loans of money by RC to MA on understanding that she would repay monies once she secured a job — She regained employment in second half of 2008, but had not made any repayments — As a result, $16,000 transferred by RC was due and payable by MA.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Burns Estate v. Mellon (2000), 188 D.L.R. (4th) 665, 2000 CarswellOnt 1990, 34 E.T.R. (2d) 175, 133 O.A.C. 83, 48 O.R. (3d) 641 (Ont. C.A.) — considered

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall)* 380 N.R. 82, (sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, (sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74 (S.C.C.) — followed

Johnstone v. Johnstone (1913), 12 D.L.R. 537, 28 O.L.R. 334 (Ont. C.A.) — considered

Simmons v. Clarke (1983), 40 Nfld. & P.E.I.R. 446, 115 A.P.R. 446, 1983 CarswellNfld 195 (Nfld. Dist. Ct.) — considered

Veitch (Trustee of) v. Rankin (1997), 41 O.T.C. 14, 1997 CarswellOnt 4361 (Ont. Gen. Div.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

ACTION by RC for return of transfer of cheques and bank transfers totalling $16,000 to then girlfriend MA.

D.M. Brown J.:

I. Overview

1 Loan or gift? That is the question requiring determination in this trial. There is no dispute that between March, 2008 and December, 2008, the plaintiff, Rocco Colangelo, provided cheques and made bank transfers totaling $16,000.00 to his then girlfriend, the defendant, Margaret Amore. (Although Mr. Colangelo contended that he also made cash advances to Ms. Amore, he was not able to prove those transactions at trial, so his claim is confined to the cheques and bank transfers.) The relationship between Mr. Colangelo and Ms. Amore broke up in late 2008. Mr. Colangelo thereupon demanded repayment of the advances; Ms. Amore refused, taking the position that Mr. Colangelo had gifted those sums to her.

2 I find that the $16,000.00 constituted loans, not gifts, of money to Ms. Amore and I grant judgment in that amount in favour of Mr. Colangelo.

II. History of events

3 Mr. Colangelo had a relationship with Ms. Amore from October, 2006, until December, 2008. At times the relationship was intimate; at times the relationship went through some rough patches. I propose to examine the relationship during three periods of time: (i) October, 2006, until October/November, 2007, when Ms. Amore initiated a move from Milton, Ontario, to Meaford, Ontario; (ii) from December, 2007, until August, 2008, the period when Mr. Colangelo provided Ms. Amore with most of the cheques; and, (iii) finally, from September, 2008 until the relationship broke down at the end of 2008.

A. October, 2006 until October/November, 2007

Mr. Colangelo's evidence

4 In October, 2006, Mr. Colangelo was 55 years old and lived alone in Markham, having been separated from his wife. He had operated a successful masonry construction company for many years.

5 Mr. Colangelo suffered from several ailments. A friend suggested that he visit Ms. Kim Shallcross, who operated a lifestyle consultant business in which she offered alternative health services, including nutritional medication. At the time Ms. Shallcross was based in Milton, Ontario.

6 On his second visit to Ms. Shallcross' clinic Mr. Colangelo met Ms. Amore, who was a friend of Ms. Shallcross and worked part-time at the clinic. They exchanged phone numbers and Mr. Colangelo invited Ms. Amore to a dinner dance in November, 2006. In the result, they went out for dinner.

7 Mr. Colangelo testified that in late 2006 he went to Ms. Shallcross' clinics two or three times a week for treatment, usually on Saturdays when he was not working. He described the primary treatment he received at the clinic as a SCAR treatment, in which a needle with an attached wire was used to place a liquid inside his belly. He said Ms. Amore often administered the treatment to him, which involved sessions of an hour or two.

8 According to Mr. Colangelo, after their first dinner he began to see Ms. Amore three or four times a month, usually after her Saturday shift at the clinic. Sometimes he would stay over at Ms. Amore's home. Occasionally, Ms. Shallcross and her boyfriend would join Mr. Colangelo and Ms. Amore for dinner.

9 This routine continued until August, 2007, when Mr. Colangelo began to suffer from an eye illness which impaired his vision and prevented him from driving. Mr. Colangelo stated that Ms. Shallcross suggested that he stay at her clinic, contending that he should not leave the house because of possible exposure to radiation which would not be good for his eye. So, Mr. Colangelo lived in Ms. Shallcross' Milton clinic from August, 2007 until about October or November, 2007, where he continued to receive the SCAR treatment and natural medications.

10 While he lived at the clinic, Mr. Colangelo turned to Ms. Amore for assistance. He gave her money each week to buy food for him, and she cooked the food and brought it to the clinic. Ms. Amore slept over at the clinic a few nights a week, sometimes upstairs in Ms. Shallcross' living area, and sometimes downstairs in the clinic area with Mr. Colangelo and other patients.

11 Mr. Colangelo testified that during his stay in the clinic he was often placed by a large magnet which he understood from Ms. Shallcross would extract radiation out of his system, thereby improving his health.

12 Occasionally during his stay Mr. Colangelo would go out to a restaurant with Ms. Amore; she would drive. However, on cross-examination Mr. Colangelo acknowledged that he also went on longer trips with Ms. Amore in August and mid-September, 2007, up to the Gravenhurst/Port Carling area. Around mid-November Mr. Colangelo moved back into his Markham house.

Ms. Amore's evidence

13 In many respects Ms. Amore confirmed key elements of Mr. Colangelo's narrative. They met in October, 2006 at Kim Shallcross' office. At the time Ms. Amore worked full-time at the TD Canada Trust in Milton, where she owned a town-house. Ms. Amore had known Ms. Shallcross for about 14 years before she met the plaintiff.

14 Ms. Amore testified that she and Mr. Colangelo initially saw each other on weekends in 2006 - he would stay over at her place following his treatment by Ms. Shallcross. They became intimate in January, 2007, and would eat out monthly during that time. (Indeed, Mr. Colangelo's Visa records for the January to July, 2007 period of time do record at least monthly meals at Milton restaurants.) Ms. Amore stated that Mr. Colangelo would spend about three weekends a month at her Milton place, and periodically she would stay the weekend at his home in Markham.

15 Ms. Amore also confirmed that while Mr. Colangelo stayed at Ms. Shallcross' clinic he gave her money to buy food for him and she prepared his meals, although occasionally they would go out to restaurants.

Kim Shallcross

16 Kim Shallcross, a long-time friend of Ms. Amore, runs a lifestyle consultant business which includes providing natural medicine services. She appeared voluntarily at the trial on behalf of the defendant; she was not summonsed.

17 Ms. Shallcross confirmed that the parties met at her clinic in around October, 2006. From her observations she thought Mr. Colangelo and Ms. Amore had a great relationship and they became inseparable.

B. November, 2007 until August, 2008

Mr. Colangelo's evidence

18 According to Mr. Colangelo disagreements arose between Ms. Amore and himself around October or November, 2007, while he was still at the clinic, resulting in a period of several weeks where they did not see or talk to each other. He described their relationship at that point as "kind of cold".

19 Around this time Ms. Shallcross suggested to Mr. Colangelo that he should consider spending time in Meaford. She had concluded that radiation levels were lower in Meaford, and she was considering moving her business there. Ms. Shallcross suggested that Mr. Colangelo spend some time in Meaford each week to get out of the radiation.

20 According to Mr. Colangelo in October, 2007, Ms. Shallcross drove him up to Meaford to help her in looking for a new location for her business. Then, during his period of estrangement from Ms. Amore, Mr. Colangelo went up to Meaford to look for an apartment, and ended up entering into a lease which ran until May, 2008.

21 A reconciliation of Mr. Colangelo and Ms. Amore occurred in early December, 2007. Mr. Colangelo testified that when he was at Ms. Shallcross' house on Christmas Day he learned that Ms. Amore would be moving to Meaford in January, 2008 and that she would need help in moving. Mr. Colangelo stated that he did not assist Ms. Amore in finding a place to live in Meaford; she had decided on her own to sell her Milton townhouse and move to Meaford. He also contended that she had decided on her own to quit her bank teller's job in Milton. Mr. Colangelo said he helped Ms. Amore move her household goods from Milton to Meaford in January, 2008 and that Ms. Shallcross moved her clinic up to Meaford around the same time.

22 At that point - early 2008 - Mr. Colangelo was living in Markham, with an apartment in Meaford. Initially in his evidence-in-chief he testified that in 2008 he would see Ms. Amore in Meaford about three times a month, usually on a Friday or Saturday, although sometimes he might stay over until Monday morning. According to him, that pattern of visitation continued until August, 2008, interspersed with infrequent visits by Ms. Amore to his Markham house. Later in his evidence he testified that while he leased the apartment in Meaford he went there every two weeks, "a couple of times a month", but he did not tell Ms. Amore about his visits to Meaford.

23 On cross-examination Mr. Colangelo stated that after his apartment lease ended in May, 2008, he would stay with Ms. Amore when he went up to Meaford. He thought he stayed three or four days with her in June, 2008. When his lease ended he also moved some of his furnishings to Ms. Amore's Meaford house simply to store them; he denied any intention to move in with her.

24 Mr. Colangelo described his relationship with Ms. Amore during this period of time as a "close friendship", "girlfriend, boyfriend", one in which they enjoyed each other's company, but not one in which they discussed living together.

25 Mr. Colangelo stated that in April, 2008, he bought a cottage in Meaford, but since it required a lot of repairs he could not move into it. In late 2007 he also bought two empty lots in Meaford in conjunction with his sister who owned a building company; he intended to build a couple of houses in Meaford. He placed the value of the three properties at $60,000, $70,000 and $250,000.

Ms. Amore's evidence

26 Ms. Amore concurred that their relationship broke up for about three weeks starting at the end of October, 2007 and during that time they did not talk to each other. However, she recounted a different story about her move to Meaford. Ms. Amore testified that she felt ill in Milton due to environmental conditions and she believed fully in Ms. Shallcross' view that Meaford would provide healthier living conditions. Ms. Amore took a leave of absence from her Milton job towards the end of October, 2007 to prepare for her move to Milton.

27 Ms. Amore contended that she discussed her move to Meaford with Mr. Colangelo and they planned to find a place where they could be together when he went up to Meaford for treatments from Ms. Shallcross. Ms. Amore stated she looked at possible homes in Meaford with Mr. Colangelo, but she testified that she actually bought her Meaford home during the time that she had broken up with Mr. Colangelo. On cross-examination Ms. Amore became somewhat evasive when asked whether her decision to move to Meaford was one mutually made with Mr. Colangelo; she conceded that she bought her Meaford house at the time she was not speaking to Mr. Colangelo.

28 Ms. Amore confirmed that Mr. Colangelo helped her move into the Meaford house in mid-January, 2008.

29 Ms. Amore testified that Mr. Colangelo found his Meaford apartment unsuitable, so from January through to April, 2008, Mr. Colangelo "was with me every weekend except for weekends I went over to his place."

Ms. Shallcross

30 Ms. Shallcross testified that Mr. Colangelo stayed at her house for treatment for about two months in the August to October, 2007, time frame and that Ms. Amore cooked for him during that time.

31 Ms. Shallcross confirmed that Mr. Colangelo and Ms. Amore had a falling out just before "we all came to Meaford". That said, Ms. Shallcross also stated that the two parties were planning to get married and move to Meaford and that they looked for houses together in Meaford. Ms. Shallcross did not remember Mr. Colangelo ever buying Ms. Amore an engagement ring. I should note that neither Mr. Colangelo nor Ms. Amore testified that they had planned to marry. Ms. Shallcross read more into the parties' relationship than was actually present.

32 Ms. Shallcross testified that she wanted Ms. Amore to work for her in Meaford. She had a conversation with Mr. Colangelo in which he stated that he would supplement Ms. Amore's income so that she would not have to work weekends. According to Ms. Shallcross, Mr. Colangelo told her that he would take of Ms. Amore financially because he wanted her with him on weekends.

C. September, 2008 until December, 2008

Mr. Colangelo's evidence

33 Mr. Colangelo testified that his frequency of visits to Ms. Amore changed after August, and he would only go to Meaford a couple of times a month, and some weeks he would not go at all.

Ms. Amore's evidence

34 Ms. Amore was not asked detailed questions about the last portion of her relationship with Mr. Colangelo, but on cross-examination she maintained that Mr. Colangelo visited her in Meaford almost every weekend until December, 2008, except for the times she went to his place in Markham.

35 She stated that by October, 2008, she had found a job at the TD Bank in Meaford. Since 2009 she has also worked at the Thornbury TD branch, as well as at a supermarket.

III. Payments by Mr. Colangelo to Ms. Amore

Mr. Colangelo's evidence

36 Mr. Colangelo testified that Ms. Amore approached him on March 26 or 27, 2008, following her move to Meaford, saying that she had not yet found a local job and needed money for that month's mortgage payment, property taxes and Visa bill. Ms. Amore asked if Mr. Colangelo could help her out. According to Mr. Colangelo, he replied that he could, but asked her how the money would be repaid. Ms. Amore said she would slowly repay him after she got a job. Mr. Colangelo went to his truck and wrote her a cheque for $3,000.00. Mr. Colangelo testified that he provided the cheque

to Ms. Amore on the clear understanding that she would pay him back once she found a job. He acknowledged that the two of them had no specific discussion about the precise time when Ms. Amore should repay the money, but according to Mr. Colangelo it was understood that she would repay him when she found a job.

37 Mr. Colangelo wrote further cheques to Ms. Amore, and the table below sets out all cheques he provided to her:

DATE	AMOUNT
March 27, 2008	$3,000.00
April 26, 2008	$2,000.00
May 29, 2008	$2,000.00
June 22, 2008	$1,100.00
June 30, 2008	$1,600.00
July 28, 2008	$2,000.00
September 1, 2008	$2,000.00
TOTAL	$13,700.00

38 Mr. Colangelo testified that their conversation around the cheques was generally the same: Ms. Amore told him she needed money to pay her monthly bills; Mr. Colagelo wrote a cheque and reiterated that she would have to pay him back once she found a job; and, Ms. Amore confirmed that she was still looking for a job, but one was hard to find in Meaford.

39 When it came to the September 1, 2008 cheque, Mr. Colangelo testified that he told Ms. Amore he hoped her requests would stop, that he was running low on money himself, and reminded her of her promise to pay him back when she found a job. At that time Ms. Amore had found a part-time job at the TD Bank. Mr. Colangelo said that Ms. Amore pretended not to hear him and really did not provide him with an answer.

40 Mr. Colangelo proved that he made two further payments to Ms. Amore following the September 1, 2008 cheque. First, at her request he arranged a transfer of funds into her bank account on November 3, 2008 in the amount of $1,500.00. Mr. Colangelo testified that he told Ms. Amore that was the last payment because he did not have any more resources and that she better do something to pay him back.

41 It was not the last payment. According to Mr. Colangelo, Ms. Amore approached him in early December for more money. On December 1, 2008, he transferred $800.00 into her bank account. He told her he could not afford any more and asked her to get a job to pay him back.

42 Ms. Amore admitted receipt of both the November and December bank transfers.

43 I am satisfied that Mr. Colangelo has proved that he provided Ms. Amore with $16,000.00 by way of cheques and direct deposits into her bank accounts. Mr. Colangelo contended that he also advanced her about $11,000.00 in cash at various times, but he could not recall the specific dates nor most of the occasions. Mr. Colangelo provided no documentary evidence of those cash advances. I find that he has not discharged his burden of proving, on a balance of probabilities, the advance of any of those cash amounts to Ms. Amore.

44 When asked on cross-examination why he did not ask Ms. Amore to sign promissory notes for the amounts advanced, Mr. Colangelo replied that because of their friendship he trusted her and saw no need for promissory notes. Nor did he feel he ever had to document the loans, even when he began to have concerns in August, 2008, about whether Ms. Amore would repay the monies. Mr. Colangelo testified that he never discussed with Ms. Shallcross the payments which he made to Ms. Amore.

45 Mr. Colangelo acknowledged that over the course of their relationship he presented Ms. Amore with some gifts, such a jewellery, clothing, flowers, food and natural medicine. He also confirmed that Ms. Amore, in turn, had given him a sweater and "little things".

Ms. Amore's evidence

46 Ms. Amore denied initiating requests for money to Mr. Colangelo. On the contrary, she stated that he asked her in February, 2008 whether she needed money because he was concerned she did not have a job. She refused his offer. However, she stated that in March she told him she would take up his offer because she needed money to pay the April mortgage and bills. Up to that point she had been living off the proceeds of the sale of her Milton house, which she estimated had totaled $10,000.00. Ms. Amore testified that when the money from the Milton house ran out, "I was forced to accept money" from Mr. Colangelo. Ms. Amore explained that most of the cheques Mr. Colangelo provided to her were dated at the end of a month because her mortgage payment would be coming due at that time.

47 In chief Ms. Amore testified that it was an emotional matter for her to ask Mr. Colangelo for money because she had been independent all of her life. She testified that Mr. Colangelo swore to her that he would take care of her because he loved her; that was why she even allowed the payments to happen, because she found it a bit degrading to allow him to give her money. She also stated that he did not want her working on weekends when he had time to see her.

48 On cross-examination Ms. Amore testified that Mr. Colangelo offered to help her in the first part of 2008 because he knew she was not working. He asked about her financial situation and ultimately she told him she was encountering some financial problems. She stated that around the same time she looked to her mother for some financial assistance because the amounts she was receiving from Mr. Colangelo were not sufficient to meet her needs. Ms. Amore regarded the money she obtained from her mother as a loan, not a gift. Why? Because her mother did not have much money, so Ms. Amore did not regard her advances as a gift.

Ms. Shallcross' evidence

49 Ms. Shallcross stated that she was never present when Mr. Colangelo gave Ms. Amore any of the cheques.

IV. Analysis

A. Credibility of the witnesses

50 Let me start my analysis by saying that I was not impressed with the credibility of any of the witnesses. In terms of Mr. Colangelo's evidence, he clearly tried to downplay the amount of time he spent during the first half of 2008 with Ms. Amore in Meaford. During his evidence he was taken to his cell-phone records which recorded his location when he originated a call. My review of those records for 2008 shows the following frequency of attendances by Mr. Colangelo in Meaford:

2008	ATTENDANCES IN MEAFORD CALLING AREA	NO. DAYS IN MONTH	NO. DAYS (PART-DAYS) SPENT IN MEAFORD	DATE OF CHEQUE	AMOUNT OF CHEQUE
January	January 10 -15; 17-18; 26-27	31	10		
February	February 18; 20-25; 28-29	28	9		
March	March 1-2; 6-9; 11-15; March 16/17 (overnight); March 19-20 (overnight); March 23/24 (overnight); March 26/27 (overnight); March 28-31	31	23	March 27	$3,000
April	April 3-5; 6-7; April 9-10 (overnight); April 14-15 (overnight); April 17-18 (overnight); April 19-21; April 24-28	30	19	April 26	$2,000
May	May 3-5; May 8-9 (overnight); May 11-12; 16-19; 30-31	31	12	May 27	$2,000

June	June 1-2; 5-7; 13-15; 20-23	30	11	June 22 June 30	$1,100 $1,600
July	July 4-6; 14-15; 19-20	31	7	July 28	$2,000
August	August 23-25; 30-31	31	5		
September	September 6-7 (overnight); September 21	30	3	Sept. 1	$2,000
October	October 4-6; 25-27	31	6		
November	November 8/9 (overnight);	30	2		
December	December 4-5; 24-25	31	4		

51 Even making allowance for the fact that the cell phone records showed that on some days Mr. Colangelo arrived in Meaford in the evening and on others departed in the early morning, the records disclosed a frequency of visitation greater than what he tried to paint in his evidence. Although Mr. Colangelo stated that on many of his trips he did not visit Ms. Amore, he did not lead evidence of any other real reason why he would go to Meaford, apart from sessions at the clinic of Ms. Shallcross, who remained a close friend of Ms. Amore at that time. The centre of his business clearly remained in Markham. Although he talked about buying other properties in Meaford for development, he made no suggestion that he was engaged in developing those properties in 2008. I find that Mr. Colangelo attempted to understate the amount of time he spent in Meaford, at least in the first half of 2008, in order to portray his relationship with Ms. Amore as less intense than it in fact was.

52 At the same time, I find that Ms. Amore overstated the frequency of Mr. Colangelo's visits to him in Meaford during the first half of 2008. The plaintiff's phone records do not disclose a frequency of attendance coming close to Ms. Amore's "almost every weekend", and certainly by July, 2008 the overall frequency of Mr. Colangelo's visits had dropped materially. Ms. Amore also became quite argumentative with opposing counsel when she was questioned about the frequency of Mr. Colangelo's visits.

53 As to Ms. Shallcross, she had been a friend of Ms. Amore for over 14 years and had employed Ms. Amore at her clinic at various points of time. I found some of her answers too clever, rather than straight-forward recountings of what she had observed of the relationship between Mr. Colangelo and Ms. Amore. Also, she tried to paint the parties' relationship as something greater than the parties stated it was, suggesting that they had talked about marriage, when neither party went that far in their evidence.

54 In sum, on a case that turns on the understanding formed between Mr. Colangelo and Ms. Amore about the nature of the payments he made to her, I cannot prefer clearly the evidence of one party over that of the other.

B. The applicable law

55 I turn, then, to the law for guidance in characterizing the nature of the payments made by the plaintiff to the defendant.

The elements of a valid gift inter vivos

56 Where one person transfers money to another in circumstances where the payor is not indebted to the payee or where no presumption of advancement arises, once the transfer is proved, the burden then falls on the recipient of the money to show that it was not repayable. [1] As I have found, Mr. Colangelo has established, and Ms. Amore concedes, that he transferred $16,000.00 to her in 2008 by way of cheques and direct bank transfers.

57 Ms. Amore contends the transfers were gifts to her. An *inter vivos* gift consists of a voluntary transfer of property from the true possessor to another with the full intention on the part of both donor and donee that the thing shall not be returned to the donor, but shall be retained by the donee as his or her own. [2] Three requirements are necessary to establish a valid gift *inter vivos*: (i) an intention to donate; (ii) a sufficient act of delivery; and, (iii) acceptance of the

gift. Of the three modes by which to make an *inter vivos* gift, only one is engaged by this case - actual delivery of the thing to the donee.

58 In the present case the money in question obviously was delivered by Mr. Colangelo to Ms. Amore and accepted by her. The sole issue, then, is whether the transfers of money were intended as gifts.

59 *Halsbury's Laws of Canada* nicely summarizes the principles of law applicable to the issue of donative intent:

> **Donative Intent**
>
> To establish the requisite intention to donate, or *animus donandi*, it must be shown that the donor intended to part with the property and did not intend to reserve to himself or herself the ultimate right of disposal. The evidence should be inconsistent with any other intention or purpose than that the donor intended to divest himself or herself of the possession of the property. The intention of a donor may be inferred from an examination of that person's acts along with various extrinsic factors, including the nature of the relationship between the parties to the transaction, the size of the gift as measured against the total of the donor's property, and the importance of the gifted item in relation to the donor's overall property. There must be some evidence that a gift was intended other than a self-serving affidavit by the alleged donee.
>
> **Gift or loan**
>
> In considering whether a gift or a loan was intended, the court may look at the surrounding circumstances, as well as the evidence of the alleged donor. If it is proven that the payment of money was made, the burden is on the recipient of the money to show that both parties knew and intended that the money not be repaid. It is not sufficient that the recipient of the property assumed that a gift was being made: a donative intent must be clearly fastened upon the donor. [3]

The onus on the donee to prove a gift

60 The onus of proof to establish a valid gift rests on the donee. [4] The cases reveal two schools of thought about the standard of proof a donee must meet in order to prove a gift. In *Johnstone v. Johnstone*, a 1913 decision which is frequently quoted in current cases, the Court of Appeal stated that "the preponderance [of evidence] must be such as to leave no reasonable room for doubt as to the donor's intention." [5] More recently, however, in *Burns Estate v. Mellon* [6] the Court of Appeal disapproved of the notion that some standard of proof approaching the criminal one should apply:

> Admittedly, both *Bayley* and *Johnstone* have been followed in subsequent cases and neither has been expressly overruled by this court. In my view, however, a gift may be established under s. 13 [of the Ontario *Evidence Act*] and a presumption of resulting trust may be rebutted by proof on a balance of probabilities, recognizing that proof within the civil standard may vary depending on gravity of the issues. When a claim of gift is asserted against a deceased's estate, a trial judge is justified in carefully scrutinizing the cogency of the supporting evidence. A "healthy scepticism" may be appropriate. But it is the civil standard not the criminal standard that should be applied. The passage from *Bayley* relied on for applying the criminal standard has been taken out of context. Moreover, both principle and recent case law support the application of the civil standard.

61 In *C. (R.) v. McDougall* [7] the Supreme Court of Canada definitively settled the law about the standard of proof applicable in all civil cases:

> ...I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or

> consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.
>
> . . . . .
>
> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. [8]

62 In light of the Supreme Court's decision in *C. (R.) v. McDougall*, the standard of proof which the recipient of a thing must meet to establish that the transfer of the thing was an *inter vivos* gift is the general standard of proof on the balance of probabilities applicable to all civil cases.

C. Conclusion

63 Mr. Colangelo has proved the transfer of $16,000.00 to Ms. Amore. Has Ms. Amore established, on a balance of probabilities, that the transfers were gifts to her? In particular, has Ms. Amore proved that Mr. Colangelo made the transfers with the intent to gift the funds to Ms. Amore?

64 For the reasons I have stated above, I have reservations about the credibility about both parties. In this "he said/ she said" kind of case, I find it difficult to ascertain which party's evidence to prefer. I therefore turn to other factors for guidance.

65 First, the relationship that developed between Mr. Colangelo and Ms. Amore obviously was one of some warmth and intimacy. But the evidence as a whole supports Mr. Colangelo's description of their relationship as one of "boyfriend/ girlfriend". The parties usually saw each other on weekends, and then not every weekend each month. They did not move into together on any sort of permanent basis. Neither party intimated that marriage was a topic they discussed. Accordingly, this is not a situation where the transfers of money were made by partners engaged in lengthy co-habitation or in contemplation of marriage.

66 Second, Mr. Colangelo did not make any payments to Ms. Amore in 2007 when she was employed full-time with the TD Bank. The payments only started in March, 2008 after Ms. Amore had moved to Meaford and at a time when she had not yet found work there. It was Ms. Amore's need that prompted the commencement of the payments. While that fact could support a characterization of the payments as either a loan or a gift, I consider it important that the relationship between the parties was not one throughout which Mr. Colangelo provided on-going financial support to Ms. Amore. It was her temporary need, resulting from the difficulty in finding a job in a new town, which prompted the payments.

67 Third, Ms. Amore's own description of the words that passed between the parties at the time the initial payments were made does not provide clear, cogent evidence of a donative intent by Mr. Colangelo. According to her account, Mr. Colangelo offered her money to meet her needs when she did not have a job and he swore to her that he would take care of her because he loved her. Ms. Amore did not testify that Mr. Colangelo used any words of gift on those occasions. His language she recounted could be consistent equally with a loan or with a gift.

68 Fourth, during her cross-examination Ms. Amore strongly suggested that she treated Mr. Colangelo's payments as gifts, rather than loans, because she thought he was well off, whereas she characterized advances made to her by her mother during the same period of time as loans because her mother had modest financial resources. As was stated in *Veitch (Trustee of) v. Rankin*: "It is not enough that the recipient intended to receive the money as a gift, but rather that both parties knew and intended the money to be in the form of a gift rather than a loan." [9]

69 Fifth, I give little weight to the defendant's suggestion that Mr. Colangelo's failure to record on the cheques that they were loans indicated that they were intended as gifts. Mr. Colangelo testified, and Ms. Amore confirmed, that in the

case of several of the cheques Mr. Colangelo left it to Ms. Amore to fill in some of the relevant information. Accordingly, it was equally open to her to note on the cheques that they were gifts, yet she did not. [10]

70 Finally, Mr. Colangelo readily admitted that he made many gifts of various items to Ms. Amore, the return of which he was not seeking. He only took the position that the monetary transfers were not gifts, but loans.

71 Ms. Amore bore the obligation to establish, on a balance of probabilities, that the payments made to her by Mr. Colangelo were gifts. As Riche, D.C.J. stated in *Simmons v. Clarke*: "It is very easy in cases such as this for a boyfriend or girlfriend to assert that monies received during a relationship were gifts and not loans." [11] Although some of the factors I have reviewed above could be consistent equally with a gift or a loan, when considered together, I conclude that they fall short of establishing, on the balance of probabilities, that Mr. Colangelo intended to gift those monies to Ms. Amore. I conclude that Ms. Amore has failed to discharge her burden of proving that the $16,000.00 transferred to her constituted gifts. I echo the words of Riche, D.C.J. in the *Simmons* case:

> Persons who obtain substantial sums of money from friends should be careful to ensure that if there is no intention to repay the money that this is evidenced satisfactorily so that there can be no doubt. Public policy demands that such casual passing of monies should be repayable unless there is satisfactory evidence to show that it was not intended by both parties to be repaid. [12]

72 I find that the $16,000.00 constituted loans of money by Mr. Colangelo to Ms. Amore on the understanding that she would repay the monies once she secured a job. She regained employment in the second half of 2008, but has not made any repayments. As a result, I conclude that the $16,000.00 transferred by Mr. Colangelo is due and payable by Ms. Amore.

V. Summary

73 For these reasons, I grant judgment in the amount of $16,000.00 in favour of Mr. Colangelo against Ms. Amore, together with pre-judgment interest thereon from January 1, 2009, until this date, in accordance with the provisions of the *Courts of Justice Act*.

74 I would encourage the parties to attempt to settle the costs of this action. If they cannot, the plaintiff may serve and file with my office written cost submissions, together with a Bill of Costs, on or before November 5, 2010. The defendant may serve and file with my office responding cost submissions, together with a Bill of Costs, on or before November 19, 2010.

Action allowed.

Footnotes

1 *Simmons v. Clarke* (1983), 40 Nfld. & P.E.I.R. 446 (Nfld. Dist. Ct.), at para. 10.

2 *Halsbury's Laws of Canada*, First Edition, *Gifts*, §HGF-1.

3 Halsbury's, *supra.*, §§HGF-9 and HGF-10.

4 *Ibid.*, §HGF-12.

5 (1913), 28 O.L.R. 334 (C.A.), at p. 337.

6 (2000), 48 O.R. (3d) 641 (Ont. C.A.), para. 9.

7 [2008] 3 S.C.R. 41 (S.C.C.).

8 *Ibid.*, paras. 40 and 49.

9 [1997] O.J. No. 4642 (Ont. Gen. Div.), para. 33.

10 *Veitch, supra.*, para. 36.

11 *Simmons, supra.*, para. 12.

12 *Ibid.*, para. 15.

TAB 8

2016 ABQB 238, 2016 CarswellAlta 764

2016 ABQB 238
Alberta Court of Queen's Bench

Lor v. Lor

2016 CarswellAlta 764, 2016 ABQB 238

Eric Ming Kwong Lor, Applicant Freda Yuet Ching Lor Nathan Anson Lor (Minor) The Public Trustee for the Province of Alberta, Respondents

P.R. Jeffrey J.

Heard: April 27, 2016
Judgment: April 27, 2016
Docket: Calgary ES03-144100

Counsel: Michael Klaray, for Applicant
Chi-Kun Shi, for Respondent, Freda Yuet Ching Lor

Subject: Corporate and Commercial; Estates and Trusts

Headnote
Estates and trusts

Table of Authorities

Cases considered by *P.R. Jeffrey J.*:

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

Statutes considered:

Alberta Evidence Act, R.S.A. 2000, c. A-18
s. 11 — considered

***P.R. Jeffrey J.*:**

1 This dispute is between siblings, who are beneficiaries to the estate (the "*Estate*") of their mother, Wai Hing Lor ("*Wai*"). Wai died June 13, 2015. The personal representative of the Estate is the applicant, one of Wai's sons, Eric Ming Kwong Lor ("*Eric*").

2 Wai held legal title to her personal residence (the "*Property*") jointly with one of her daughters, Freda Yuet Ching Lor ("*Freda*"), who was also one of Eric's sisters. Freda says the Property became hers entirely, by right of survivorship. Following Wai's death, therefore, Freda had the Property registered in her name alone and then sold.

3 Eric asks the Court to find that the Estate is entitled to the net proceeds of sale of the Property. Eric says that Freda held her interest in the house in trust for Wai and then in trust for the Estate after Wai's death. In the alternative, Eric asks for an order that Freda pay half of it to the Estate. Freda says the proceeds of sale do not form part of the Estate. She says the joint interest in the Property, with right of survivorship, was a gift to her.

4 By Consent Order the net proceeds of sale of the house, in the amount of $331,066.24 (the "*Net Proceeds*"), are being held pending the outcome of this application.

Facts

5 Wai purchased the Property in 1989 and lived in it throughout the years until her death. She had it registered in her name jointly with her husband Chuk Wah Lor ("*Chuk*"), with rights of survivorship.

6 Wai and Chuk separated very soon after; in 1990 Chuk returned to Hong Kong to stay. They never divorced.

7 Wai paid all owning and operating costs of the Property until her death. Freda lived in the Property until 2004. Eric continued to live in the Property with their mother, rent-free, until a month after Wai's death. Eric was the last of Wai's children living with her and he was caring for her through her fight with the cancer that took her life.

8 In 2006, Wai arranged with an Edmonton lawyer for she and Chuk to transfer the Property from their names jointly to the names of Wai and Freda jointly, for the stated consideration of $1 and love and affection. Chuk signed the transfer in Hong Kong and Wai signed in Edmonton. The lawyer used standard forms for the conveyance, which state that the Property was transferred to Wai and Freda jointly, with a right of survivorship. The Property was registered jointly in the names of Wai and Freda on May 13, 2006.

9 Three of Wai's children suggested that Wai asked Freda many times to transfer the Property back to Wai alone, that Freda refused and that Wai was upset by Freda's refusal. I accept that evidence as true. Two of those children have no interest in the Estate (the third is a parent to the third beneficiary).

10 Freda says the joint interest in the Property was a gift to her. She says it was common for Wai and Chuk, or either of them, to gift significant assets to just one of their children and cited other examples of them having done so. Eric says Freda was unable to corroborate independently any of the cited examples and, in any event, he says the examples were quite different in that they related to Hong Kong assets going in entirety *inter vivos* to children living in Hong Kong, not jointly with rights of survivorship.

11 Eric says it was not a gift and that Freda's interest was subject to a resulting trust. He says a sister "Tennie" pressed Chuk to move the Property out of his name because debts from his gambling might put it at risk. Eric adduced evidence to that effect from two other siblings, Dylan who resides in Toronto and Janet who resides in Vancouver. I accept that this was Wai's motivation for the change to registered ownership of the Property.

12 Freda says Chuk wanted to give his interest to her and that Olivia Gee ("*Olivia*"), one of her sisters who has no interest in the Estate, confirmed this was Chuk's wish, purportedly because of concerns over Freda's financial security. Eric says Olivia's evidence should not be accepted, or at least it should be ascribed reduced weight, because of her lack of credibility. She had looked after Wai's finances for many of Wai's last years, until it was found Wai's funds were being used for Olivia's family's expenses. Olivia said that was her husband's doing, that she was unaware he was doing it and that she apologized and reconciled with Wai before Wai's death. Their reconciliation does not mean Wai believed Olivia was unaware of the thefts, only that she accepted Olivia's apology. That is hardly surprising from Wai, a mother with cancer facing the finality of her life. Even though Wai earlier selected Olivia to assist with her finances, she did not appoint her in her Will as personal representative. She appointed Eric, despite his limitations. I therefore infer Wai no longer trusted Olivia. Also, she admitted to having reason to apologize to her mother in respect of thefts from her mother. I am unable to accept as reliable all Olivia's evidence.

13 The fact that Wai depended on Olivia or her husband, or both, to assist with routine household financial affairs suggests, however, that Wai did not understand the nuances of property interests and ownership, including when she spoke to a lawyer about conveying the Property and later about preparing a will. She also struggled with the English language.

14 On March 18, 2015, Wai executed that will (the "*Will*"). The Will says nothing about the Property. In her Will Wai left one third of the residue of her estate to each of Freda, Eric and a minor grandson named Nathan Anson Lor ("*Nathan*").

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15 Wai had 5 other surviving children who were not named in her Will. Chuk was still her husband, still separated, and still alive at the time she made her Will, but also was not named as a beneficiary. He died in Hong Kong just two weeks before her on May 31, 2015, but that is of no consequence to this application.

16 I infer from her choice of residual beneficiaries in her Will that any differences she may have had with each of them at the time were not so great as to cause her to exclude the three descendants that she felt most in need of a portion of her Estate.

17 Wai died less than 3 months after signing her Will. At the time, it appeared that the Estate had less than $400 in it. Freda paid all the funeral costs.

18 I find that Wai's assets the day she signed her Will were not materially different than they were on the day of her death. On the day of her death she owned:

a) the Property jointly with Freda,

b) some of the possessions within the Property (the rest belonging to Eric),

c) the contents of a safe deposit box, and

d) a bank account containing $338.73.

19 The items of monetary value in Wai's safe deposit box were jewelry, estimated to be worth $4,000 in aggregate, $12,000 cash and proof of cemetery rights. The box also contained documentary evidence demonstrating that Wai paid all owning and operating costs of the Property and various other papers. The contents of the safe deposit box were not known until very recently, some 9 months after Wai's death.

20 Following Wai's death Eric paid no rent to either Freda or the Estate. Eric asked Freda to pay the utilities for the Property, which she did. Freda is a Buddhist nun living in Toronto, Ontario.

21 Within 3 weeks of Wai's death, Freda evicted her brother Eric from the Property and on less than 72 hours' notice.

22 Without Eric's knowledge or consent, Freda disposed of all the contents of the house. She said dismissively that there was "nothing of value" among them. She says she gave Eric an opportunity to retrieve his belongings. He says this came later, after she already destroyed all of Wai's and some of his belongings.

23 Freda takes offence to Eric making any mention of these events, since her version of them is not before the Court. It could have been, she says; her lawyer requested particulars of them within this Application if Eric intended to place the events before the Court. She says no particulars were received. Understandably she concluded he would not be referring to those events. Yet he has, repeatedly. Freda's counsel says "there is much more evidence from third parties [...] that will dispute [Eric's] allegations of Freda's misconduct on this issue."

24 Having not heard the evidence both sides would have placed before the Court on this issue, and there not being opportunity for each party to test that evidence or respond to it, I do not consider any of it or the events as alleged by Eric in my analysis.

25 An Edmonton lawyer acted for Wai and Chuk in their conveyance of the Property to Wai and Freda. Regrettably, he has no notes from that retainer.

26 The same Edmonton lawyer acted for Wai in taking her instructions and preparing her will. He still has some notes from that engagement but, regrettably and surprisingly, they say nothing about the Property.

27 Freda says I should infer from there being no mention in his notes of any comment by Wai about the Property, that she made no mention of it because it would not form part of her Estate. But his notes said nothing about most of the matters a prudent counsel would address or satisfy herself on, and record, when taking instructions for preparing the Will, particularly given:

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a) Wai's age and state of health,

b) Wai excluding some of her children from inheriting,

c) Wai's separation but not divorce,

d) Wai's co-habitation with an adult child beneficiary, and

e) Wai's sharing her most significant asset with a non-resident adult child beneficiary.

28 Therefore, I cannot reliably infer anything about what Wai may or may not have asked about or said or wanted to achieve or been advised when meeting with the lawyer about preparing her Will, beyond the words in her signed Will to a limited extent, given her difficulty with English.

29 The same lawyer later acted for Freda alone in becoming sole owner of the Property by her purported right of survivorship. He then acted again for Freda on the subsequent quick sale of the Property.

30 Freda asks me to infer that the lawyer would not have acted on those subsequent retainers, if they were accomplishing an outcome contrary to Wai's intentions. That might be a reasonable inference in respect of a counsel who followed best practices and demonstrated diligence in performing his duties, from which such a demonstrated requisite level of competence might compel the inference, but that did not characterize this particular lawyer's practice.

31 Further, on questioning in respect of this application, not that long after having met with Wai to prepare her Will, the lawyer had no useful recollection of any of his interactions with Wai. He was either intentionally feigning no recollection, perhaps thinking that approach to be in his own best interests, or genuinely had no recollection. Either cause of his recollection deficit undermines the inferences Freda asks me to draw.

Analysis

32 The issue for the Court to determine, therefore, is what the nature was of Freda's interest in the Property at the time of Wai's death. This is a function of what Wai and Chuk intended to convey to her in 2006.

33 There is no dispute that Freda owned half of the legal interest. The question is whether she also owned half the beneficial interest, with the right to all the Property upon Wai's passing, or instead held that beneficial interest on resulting trust. For the reasons that follow, I find that she held the beneficial interest on resulting trust for Wai and thereafter for Wai's Estate. That is, she ever only owned a joint legal interest.

34 Freda received her interest in the Property from her parents for nominal consideration. That nominal consideration was, in effect, no consideration. This triggers the presumption of resulting trust, according to the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at para 20:

> A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner.

35 The Court also said in *Pecore*, at paras 24 and 53 respectively:

> [W]here a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended.
>
> [...] the presumption of a resulting trust means that it will fall to the surviving joint [interest] holder to prove that the transferor intended to gift the right of survivorship to [...] the survivor. Otherwise the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

36 Thus, the presumption of resulting trust is rebuttable. Unless Freda demonstrates a gift was intended, she will be found to hold the beneficial interest in resulting trust for Wai and her Estate.

37 The Supreme Court in *Pecore*, at para 44, dictates that in such circumstances:

> The 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 intention. ...the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

38 The onus to demonstrate that a gift was intended may be satisfied by the presumption of advancement. The Court in *Pecore*, at para 21 said:

> Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor.

39 But the presumption of advancement is not triggered in this case since Freda was not a minor child at the time of the transfer. *Pecore* states, at para 40:

> [T]he rebuttable presumption of advancement with regard to gratuitous transfers from parent to child ... [is] ... limited in application to transfers by mothers and fathers to minor children.

40 Freda argues that the presumption of resulting trust in favour of Wai cannot arise here because the Estate has not proven there was any transfer from Wai to Freda. She says, "the gift was from Chuk to his daughter Freda."

41 I disagree. The transfer to Freda was by both Wai and Chuk, to Wai and Freda jointly. It is Chuk and Wai's joint intent that determines what was the extent of the interest they conveyed to Freda, not Chuk's intent alone. In that regard, by all accounts Chuk was not the driver behind the conveyance; he acquiesced to Wai's wishes. She initiated the cessation of Chuk's interest, by reason of his gambling, and she initiated the creation of Freda's interest. She arranged it with the lawyer. Chuk readily relinquished his joint interest, I find, at Wai's request. Chuk signed the transfer document in Hong Kong and sent it back. The interest Freda received was not necessarily the same interest Chuk had; it was open to Wai and Chuk to convey to Freda a different interest than Chuk enjoyed. Whatever was Chuk's interest is not determinative of Freda's interest. This was not an assignment by Chuk to Freda.

42 The wording of the document Wai and Chuk signed to effect the conveyance to Wai and Freda is not dispositive of the issue of their intent. Normally it would be given at least considerable weight in the analysis. I am unable to do so in this case. I have no confidence that the wording on a standard form document used by this particular lawyer in any way reflects Wai's actual intention, for the reasons earlier mentioned.

43 Freda did not receive her interest in the Property in 2006 in order to help Wai administer it (see *Pecore*, at para 47). She lived thousands of kilometers away, plus Olivia had been doing that for the most part. If the Property had been conveyed for that reason, then it is very likely would not be found to be a gift. The converse does not follow, however. Her receiving the Property not to help administer or manage it does not mean that therefore it was a gift.

44 Freda argued that it was a gift to her because that is what her parents did from time to time. They gave entire significant assets to a single child. The examples offered were of Chuk giving assets, not Chuk and Wai, and, as Eric pointed out, Freda could not support any of the examples by way of evidence. This falls short of the requirements of section 11 of the *Alberta Evidence Act*, RSA 2000, c. A-18. Section 11 states:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

45 Chuk's purported conduct on those occasions is not evidence of Chuk's and Wai's intent on the different occasion of the conveyance of a joint interest in the Property to Freda.

46 The wording of Wai's Will is relevant only to the extent it reveals Wai's intent at the time of the transfer years earlier from Wai and Chuk to Wai and Freda. The out of court statements before and after the transfer that have been attributed to Wai and Chuk are only relevant to the extent they reveal their intent at the time of the transfer from Wai and Chuk to Wai and Freda. The evidence of Wai's and Chuk's conduct before and after the transfer to Wai and Freda are only relevant to the extent they reveal their intent at the time of the transfer (see *Pecore*, at para 59).

47 There is evidence from a non-beneficiary daughter that Wai told her she wanted Nathan to have "part of her house". Other evidence indicates Wai wanted Eric to be helped financially also. The only way this could happen under the terms of her Will is if Wai believed her Property would form part of her Estate and dealt with in accordance with her Will.

48 Freda says the evidence of Wai's intentions from Eric and from others supporting Eric "cannot stand" because it is inconsistent with Wai including Freda as a beneficiary in her Will. An example is the evidence of Wai's frustration over Freda not relinquishing back her interest upon request from Wai.

49 I disagree. The evidence persuades me Wai intended to name as beneficiaries those of her descendants that she thought would benefit the most from her financial help. Those were Eric, Freda and Nathan. I find that she included Freda as a one-third beneficiary because she thought Freda needed the help. Freda not returning the title to the Property when requested, the evidence of which I accepted, frustrated Wai because it thwarted whatever it was she wished to do with the Property at the time. I have no evidence as to just what that was at that time. It does not compel the conclusion that she acquiesced to Freda continuing to hold some beneficial interest earlier given. The fact she did nothing further in respect of the Property and then included Freda as a beneficiary in her Will, implies more strongly that Wai's intent at the time of the conveyance, and her continued understanding at the time of her Will, was that upon her death the entire value of the Property would form part of her Estate.

50 I consider Wai's request of Freda to relinquish her interest quite telling. I find it most unlikely that Wai would approach Freda for return of the interest in her name, as I have accepted occurred, if Wai had earlier intended to give to Freda the beneficial interest. Furthermore, if she had given Freda the beneficial interest earlier and Wai nevertheless asked for it back, Wai would not have been frustrated at Freda's resistance. Resistance would have been the expected response and so, at most, Wai would have been disappointed, but not "infuriated", "frustrated" and "upset", as two witnesses testified. Wai's making the request and her reaction after Freda's resistance are most consistent with her owning all the beneficial interest and wanting to do something different with her Property. They are most consistent, therefore, with Wai having intended Freda receive nothing more than the legal interest.

51 Freda argues that the "only reasonable conclusion to draw from [Wai's] conduct is that she acknowledged and approved of Freda's right of survivorship" to the Property when she "chose to bequeath to Freda the same gift from her estate as Eric." Frankly, that does not follow. In any event, in light of Wai's limited understanding of such matters and my inability to conclude anything from events that involved her lawyer, this was not the only reasonable conclusion. Had Wai or her lawyer been more astute, she may have cleaned this up before her death, for example as Freda now suggests she could have, by severing and perhaps also writing a different will. But they were not. Again, I am unable to reliably infer anything from what was or was not possibly done involving Wai's (and later Freda's) lawyer (to be clear, this was a different lawyer than now represents Freda on this Application).

52 All the reliable evidence persuades me on a balance of probabilities that Wai at all times thought the Property was all hers, regardless of title registration. Wai probably did not understand it in these words, but Wai understood Freda held the interest in the Property that Wai intended her to have at the time of the transfer in 2006 - only a joint interest in the legal title. I find that Wai always believed that upon her death the house would be sold and the proceeds divided among the 3 beneficiaries (after payment of her debts and probate costs). More importantly, I find that Wai and Chuk intended Freda to have her name on the

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title to the Property only, not to receive any beneficial interest. Freda received no beneficial interest other than on resulting trust for Wai. In so finding, I am satisfied that Eric has met the requirements of section 11 of the *Alberta Evidence Act*.

53 Freda says the other assets in the Estate were all that Wai intended would be divided among she, Eric and Nathan. She says the existence of these assets undermines Eric's argument that the Wai would never have left Freda one third of her residual estate if she believed Freda already had the entire value of the Property. I agree instead with Eric, that Wai having so few other assets in her Estate implies that, at the time of her Will, she thought Freda did not have any beneficial interest in the Property. This is some evidence that at the time of the transfer Wai believed and intended only a legal interest was being transferred.

54 Freda's view is implausible, in all the circumstances. It is implausible that Wai intended to give Freda all the Property by right of survivorship, knew at the time she wrote her Will that Freda would get it all, and then over and above that bequeathed to her a third of everything else, when she knew that everything else trifled in comparison. Everything else amounted to the relatively nominal amounts in the safe deposit box. Doing so would not help Eric or Nathan at all, as the evidence demonstrates she intended, especially after typical end of life costs and estate administration expenses are covered.

55 Freda has not discharged her onus of proof that Wai, or that Wai and Chuk, gifted to her the beneficial joint interest. There is no evidence that Wai intended, or that Wai and Chuk intended, to gift the beneficial interest to Freda. In this case, there is insufficient evidence to rebut on a balance of probabilities the presumption of resulting trust.

56 In light of this conclusion I need not consider Eric's request in the alternative, that I order Freda to pay over to the Estate half of the net proceeds of sale on the grounds that the joint tenancy had been severed, into tenants in common, at the time the property was transferred to Wai and Freda.

Conclusion

57 I therefore grant the application, declare that Freda held the Property on resulting trust for the Estate and order that the Net Proceeds plus interest thereon be paid to the Estate forthwith.

58 The parties may speak to me regarding costs. If they do, Freda may wish to place before the Court the additional evidence she referred to regarding the alleged destruction of Estate property and of Eric's property without their consent.

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TAB 9

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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Library and Archives Canada Cataloguing in Publication

Waters' law of trusts in Canada / editor-in-chief, Donovan W.M. Waters; contributing editors, Lionel D. Smith, Mark R. Gillen.—4th ed.

Previously published under title: Law of trusts in Canada / by D.W.M. Waters
Includes bibliographical references and index.
ISBN 978-0-7798-5165-2 (bound).—ISBN 978-0-7798-5166-9 (pbk.)

1. Trusts and trustees—Canada. I. Waters, D. W. M. II. Smith, Lionel D. III. Gillen, Mark R., 1957- IV. Waters, D. W. M. Law of trusts in Canada.

KE787.W38 2005 346.7105'9
C2005-901583-7
KF730.W38 2005

Composition: Computer Composition of Canada Inc.

Printed in the United States by Thomson Reuters

THOMSON REUTERS

CARSWELL, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza, 2075 Kennedy Road, Toronto, Ontario M1T 3V4
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2

Types of Trust

I. EXPRESS, IMPLIED, RESULTING, AND CONSTRUCTIVE TRUSTS

A trust can come into existence in one of two ways. It is either clear from a person's words or acts that there is an intention to settle property by way of a trust, or the law imposes trust machinery in a given situation to ensure that property passes from one party to another. What we are therefore concerned with is discovering the intention of a person, or the circumstances under which the law will deem a trust to arise in order to secure some result the law considers equitable. If we are looking for such an intention, we may find that oral or written words state quite clearly that certain property is to be subject to a trust. The words, however, may not be clear; we then have to examine them carefully in order to determine whether there is indeed an intention to make property subject to a trust. We have to infer intention. On the other hand, if we wish to know whether the law requires A to hold certain property for B, regardless of intention, we have to discover what the circumstances are in which the law imposes this requirement, and then whether A and B come within one of those circumstances.

Since the seventeenth century, common law courts have employed various terms to describe those distinct situations and the terms which have become familiar are "express trusts," "implied trusts," "resulting trusts" and "constructive trusts." But the courts have differed quite considerably in the ambit of meaning which they have associated with those terms, and since the nineteenth century, when writers began to compose treatises on the law of trusts, they have introduced further refinements into the use of those terms. Today, however, though the differences of usage still exist, and the student of trust law will observe those differences in judgments and non-judicial writing, there is no dispute that trusts arise either by intention or by imposition of law. The differences exist as to the naming of one or another particular type of trust.[1]

In very large measure, therefore, whether a trust is to be called express, implied, resulting or constructive is only of academic importance; practitioners in the field are prepared to adopt the generally adopted current meaning of those terms, and leave it at that. There are instances, however, where the distinction can be of practical importance and these instances spring from the employment by statute of these terms. At one time limitation Acts, for example, made different legal results follow from whether a trust arose from the intention of a party, or by imposition of law. Much nineteenth-century case law flowed from this, and considerable judicial discussion, often of a confusing nature, took place to decide whether particular trusts were of this or that kind. Such limitation provisions have now been repealed, however, and contemporary trust law with its generally agreed use of terms is little bothered with the few Acts that do still attach differing legal results to the varying types of trust.[2] Modern litigation is more concerned with the rules that apply to what is agreed to be a trust of a certain type, such as pension trusts and income trusts.

In the common usage of today, the terms "express" and "implied"[3] refer to the intention of the alleged settlor. If he clearly and specifically says that certain property is to be held in trust, then he has created an express trust. Similarly, if his language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he has created a trust arising by implied intent.[4] The nature of a resulting trust is still the subject of some discussion, however; is it a trust which is concerned with the intent of the transferor of the property, or does it describe a trust obligation imposed by law? The reader will have noticed that the adjective "resulting" describes *what happens* to the property subject

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[1] E.g., the question might be, is the trust which arises in these particular circumstances to be described as an implied trust, a resulting trust, or a constructive trust? Express trusts will usually be immediately recognizable as such.

[2] See further, chapter 25, Part IV C.

[3] However, this is a term which is also associated with those circumstances where the law lays down that because he has no personal entitlement to property, A shall hold on trust for B. Caution must always be exercised in the use of the term "implied trust"; because of the range of situations which it is used to describe, it can be confusing. See, e.g., *Underhill and Hayton*, at 80.

[4] This is the "precatory trust", where expressions of wish or desire are construed in the context to mean that the transferor intended a trust. Whether precatory language reveals an intention or otherwise to create a trust is a question of construction for the court. It is also possible to say, however, that once the trust obligation has been construed to be the intention of the transferor, that gives rise to an express trust. On "precatory trusts" see chapter 5, Part II A.

to the trust. Unlike the words "express" and "implied," it does not reveal a concern with the intent of the transferor, nor on the other hand does it show whether it comes into existence because the courts have imposed the trust obligation. Property "results" when it goes back to the transferor, and that can happen either because in certain circumstances the transferor impliedly intends the property to be returned to himself, or because in those circumstances the court imposes an obligation upon the holder of the property to return it to the transferor.[5]

A resulting trust occurs (1) where A purchases, or contributes to the purchase of, property and it is transferred into the name of B, or into the joint names of himself and B, (2) where, gratuitously, A transfers property to B or into the names of himself and B, or (3) where the purposes set out by an express or implied trust fail to exhaust the trust property. In this third situation, the trust may give a life interest to X, but say nothing as to what is to happen to capital and interest on X's death. Or a trust may have as its purpose provision for a young couple entering marriage, and for the children of the marriage. The trust purpose fails because the marriage never takes place. Another possibility is that the trust terms fail because the object is not sufficiently certain or it is illegal or against public policy.

Now in deciding whether the resulting trust is a product of intent or the imposition of law, it is possible to say that A in the first two of the above situations, and the settlor in the third, intend the property to be returned either immediately in the first instance or on failure of the purposes in the third situation. Alternatively, it is possible to say that some resulting trusts arise from intent, *others* from the law's imposition. The first two situations are truly matters arising from the implied intent of A, though here A's intent is construed from what he does, not from what he says. But where A's objects fail for uncertainty, illegality or public policy, the law is bringing about an equitable result by declaring that property goes back to the settlor. It might also be said in the situation where the marriage fails to take place, or the settlor has omitted to say what is to happen when the life tenant dies, that the law again imposes a trust in favour of the settlor. But the marriage and omission situations are arguably the kind of circumstance in which the settlor could have foreseen what has happened, and his consequent silence can reasonably be said to reveal intent. As a third line of analysis it could be said that in all resulting trust situations where A or the settlor has said nothing, his silence is irrelevant, and the court secures an equitable result by requiring the holder to hold on trust for A or the settlor, as the case may be.

Leading works take different views on this. The eighteenth edition of *Underhill and Hayton* is of the opinion that all trusts arising from intention, whether it is expressed or implied, are express trusts.[6] However, the eighteenth edition also notes that there is a "vital" distinction between these "express trusts" and "resulting or

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[5] The court's motivation in doing this is to secure a more equitable outcome between parties. See, e.g., *Todd v. Webster* (1976), 15 N.B.R. (2d) 343 (N.B. Q.B.), where both intention and equity led the court to speak of the "implied and actual" trustee.

[6] *Supra*, note 3, at 79-80.

TAB 10

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Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 3294
Ontario Superior Court of Justice

Density Group Ltd. v. HK Hotels LLC

2012 CarswellOnt 9115, 2012 ONSC 3294, 218 A.C.W.S. (3d) 328, 5 B.L.R. (5th) 131

Density Group Limited, Plaintiff and HK Hotels LLC and Henry Kallan, Defendants

J. Wilson J.

Heard: May 28, 2012
Judgment: July 20, 2012
Docket: CV-09-00376655-0000

Counsel: Martin Teplitsky, Brad Teplitsky, for Plaintiff
Brian J.E Brock, Paul E.F. Martin, for Defendants

Subject: Corporate and Commercial; Estates and Trusts; Civil Practice and Procedure; Contracts; Torts

Headnote

Business associations --- Specific matters of corporate organization — Directors and officers — Fiduciary duties — Miscellaneous

Fiduciary duty arising from alleged joint venture — Plaintiff corporation and defendant corporation (collectively, "corporate parties") agreed to work together on hotel project in city — Corporate parties entered into letter of understanding and agency agreement regarding hotel project, which plaintiff alleged created joint venture and fiduciary duties — Defendant corporation discovered that plaintiff had been paying itself unauthorized management fees on hotel project — Defendant corporation advised plaintiff that plaintiff was no longer representing it on hotel project — Plaintiff commenced action against defendant corporation and its principal, K, alleging breach of fiduciary duties — K brought motion for summary judgment dismissing claims against him personally — Motion granted — There was no genuine issue for trial regarding whether K individually prima facie owed fiduciary duty to plaintiff — Allegations of vulnerability and reliance by plaintiff were not borne out in primary role that plaintiff played with city in all negotiations — It was not disputed that plaintiff and its principal were active and visible parties in discussions with city — Reliance by city upon corporate defendant's established reputation in granting letter of intent did not create peculiar vulnerability on part of plaintiff or fiduciary duty owed by K personally.

Business associations --- Creation and organization of business associations — Partnerships — Fiduciary obligations

Plaintiff corporation and defendant corporation (collectively, "corporate parties") agreed to work together on hotel project in city — Corporate parties entered into letter of understanding and agency agreement regarding hotel project, which plaintiff alleged created joint venture and fiduciary duties — Defendant corporation discovered that plaintiff had been paying itself unauthorized management fees for hotel project — Defendant corporation removed plaintiff's name from Letter of Intent ("LOI") that it signed with city regarding hotel project — Plaintiff commenced action against defendant corporation and its principal, K, alleging that LOI was trust asset and that defendants breached their fiduciary duties by removing plaintiff's name — K brought motion for summary judgment dismissing claims against him personally — Motion granted — Even assuming that there was fiduciary relationship between corporate parties, this did not mean that K owed fiduciary duty to plaintiff — There was no triable issue whether LOI was trust asset — Even assuming that there was fiduciary relationship between corporate parties, LOI was not

trust asset unless requirements for trust were met — There was no evidence of intention to create express trust or to support finding that trust was established by implication — Terms of letter of understanding and agency agreement did not appear to create any sort of trust.

Estates and trusts --- Trusts — Constructive trust — Miscellaneous

With respect to letter of intent signed by joint venturers — Plaintiff corporation and defendant corporation (collectively, "corporate parties") agreed to work together on hotel project in city — Corporate parties entered into letter of understanding and agency agreement regarding hotel project, which plaintiff alleged created joint venture and fiduciary duties — Defendant corporation discovered that plaintiff had been paying itself unauthorized management fees for hotel project — Defendant corporation removed plaintiff's name from Letter of Intent ("LOI") that it signed with city regarding hotel project — Plaintiff commenced action against defendant corporation and its principal, K, alleging that LOI was trust asset and that defendants breached their fiduciary duties by removing plaintiff's name — K brought motion for summary judgment dismissing claims against him personally — Motion granted — Even assuming that there was fiduciary relationship between corporate parties, this did not mean that K owed fiduciary duty to plaintiff — There was no triable issue whether LOI was trust asset — Even assuming that there was fiduciary relationship between corporate parties, LOI was not trust asset unless requirements for trust were met — There was no evidence of intention to create express trust or to support finding that trust was established by implication — Terms of letter of understanding and agency agreement did not appear to create any sort of trust.

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R. 20 — referred to

MOTION by principal of defendant corporation to dismiss claims of breach of fiduciary duty against him personally.

***J. Wilson J.*:**

The Motion

1 The defendant Henry Kallan (Kallan) brings this motion for summary judgment seeking dismissal of the claims against him personally as not establishing genuine issues requiring trial.

2 In this action initiated by Density Group Limited (Density) against HK Hotels LLC (HK Hotels) and Kallan, the plaintiff Density seeks a declaration that HK Hotels holds in trust for Density a fifty percent interest in a joint venture agreement to construct a luxury hotel at Exhibition Place in the City of Toronto. Density alleges that Kallan, as the owner, president, and directing mind of HK Hotels breached the terms of the trust and hence breached fiduciary duties owed to Density.

3 After receiving notice of the motion for summary judgment, Density brought a motion to amend the pleadings to amplify the claims against Kallan personally. In the contested motion, on July 27, 2011, Master Hawkins allowed the amendments to the claim alleging various breaches by Kallan personally, subject to the right of the defendant to plead a limitation defence.

4 In the amended Statement of Claim, Density seeks damages from HK Hotels for breach of contract, and claims damages against Kallan personally for breach of fiduciary duty and for inducing breach of contract, trust, and fiduciary duty. Density asserts that its damages are in excess of $10,000,000.00.

The Issues

5 Is there a genuine issue requiring a trial whether Kallan may be personally liable to Density on the facts of this case? Conversely, is the claim as cast an attempt to utitize a breach of trust to implicate Kallan personally that has no merit in law or in fact?

6 It is the position of the defendants that this action involves a straightforward dispute for breach of contract between two commercial entities — Density and HK Hotels. Any remedies that may be available are between the two corporate entities.

7 To determine whether Kallan may be personally liable, I must decide whether I can reach conclusions based upon the record before me without the necessity of a trial about what caused the break-down in the relationship between Density and HK Hotels, and whether in the facts and circumstances there was any conduct by Kallan that could arguably create a fiduciary duty engaging potential personal liability by Kallan to Density.

Test for Summary Judgment

8 On January 1, 2010 amendments were made to the *Rules of Civil Procedure* as they apply to summary judgment motions.

9 The Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) [*Combined Air*], interpreted the meaning of the amended rule 20 and provided comprehensive guidelines to the profession and to motion judges.

10 The new rule provides enhanced powers to the motions court to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence guided at all times by the over arching principle of the "full appreciation test".

11 The "full appreciation test" as a primary guideline to decide whether or not a trial is necessary in the interest of justice is outlined at paras. 50-55 of *Combined Air*. I cite paragraphs 51 and 55:

> [51] We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
>
> [55] Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record — as may be supplemented by the presentation of oral evidence under rule 20.04(2.2) — the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.

12 The Court describes three kinds of cases, in which summary judgment may be granted. The first is when the parties submit their dispute on consent to be determined by summary judgment. The second is when the claim or the defence has no chance of success. The third kind of case, the most nuanced of the three, is deciding whether issues can be fairly and justly resolved without a trial, guided by the full appreciation test.

13 As this case falls within the third category, I outline the guidance provided by the Court at para. 74 when considering this category of of case:

> The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record — as may be supplemented by oral evidence under rule 20.04(2.2) — or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

Background Facts

14 Kallan is a director and officer of HK Hotels. HK Hotels operates a line of luxury boutique hotels in New York City. Peter Majer, who was a friend involved in other business dealings, advised Kallan that the Board of Directors of Exhibition Place in Toronto (the City) was exploring building a hotel project at Exhibition Place (the Hotel Project).

15 In response to the City's Request for Expressions of Interest, Majer and Kallan agreed to submit a bid for the Hotel Project. Majer chose to use Density, a company owned by his son, Sean Majerovic, as the vehicle involved in the Hotel Project, and Kallan conducted all matters through HK Hotels.

16 There is a dispute in the proceeding between Density and HK Hotels about the nature of the relationship between the two corporations. Density claims that the relationship between it and HK Hotels is that of joint venturers, giving rise to potential fiduciary duties, whereas HK Hotels asserts that Density was the agent of HK Hotels under an agency agreement that negated fiduciary duties. There are two documents between Density and HK Hotels relevant to this issue, both prepared by Density.

17 The first is a Letter of Understanding, and the second is an Agency Agreement.

The Letter of Understanding

18 On April 30, 2007 Density and HK Hotels entered into a Letter of Understanding (LOU) that provided the framework to explore the business opportunity of the Hotel Project. The LOU confirmed various terms that, if fulfilled, appear to constitute a joint venture.

Re: Hotel Development Project at Exhibition Place, Toronto, Ontario, Canada

1. This letter sets out the basis under which HK Hotels LLC ("HK") and Density Group Limited ("Density") (collectively, the "Co-Venturers") intend to proceed with the city approvals, pre-construction, construction and management of a hotel at the Canadian National Exhibition Grounds in the City of Toronto (the "Project.").

2. Density has prepared and HK has submitted, on behalf of the parties hereto, an expression of interest to the City of Toronto, dated January 22, 2007.

3. The Co-Venturers are proceeding with the intent that each shall have a 50% ownership interest in the Project.

4. Upon execution of this letter, the Co-Venturers will seek the necessary legal and tax advice with the intent of entering into and executing various agreements to formalize this relationship within a period of three months, including, but not limited to:

1. Co-ownership Agreement; and

2. Development and Construction Agreement; and

3. Hotel Management Agreement; and

4. Asset Management Agreement.

5. The above agreements are to be executed between the Co-Venturers within a period of three months from the execution of this letter.

6. Density will manage the pre-construction, construction, and city approval process, and will be consulted by HK on hotel design related approvals.

7. HK will manage hotel operations. Density will asset manage.

8. In consideration for the services as set out in paragraph 6 and 7 above, the Co-Venturers shall receive fees (payable as part of the project expenses) for the foregoing services as follows:

1. Hotel Management — 3% to HK; and

2. Asset Management — 1% to Density; and

3. Development and Construction Management — 3% to Density and 1% to HK,

all as more particularly to be set out in the agreements as set out in paragraph 4.

9. For greater certainty, unless otherwise agreed, all costs and expenses associated with the predevelopment and city approval phases throughout the process are to be shared jointly on a 50% - 50% basis.

10. The Co-Venturers shall keep the terms of this letter and the Project in strictest confidence, except as may be mutually agreed upon in writing otherwise, unless the disclosure is required in relation to the Request for Expressions of Interest from the City of Toronto, in which event, such disclosure shall be in a form mutually agreed upon, each party acting reasonably.

> 11. The parties agree that so long as they continue, in good faith, to pursue the Project, and during the period during which either this letter or the agreements between the parties described above are in effect, neither of them shall solicit, either directly or indirectly, discuss, entertain or accept any other letters of understanding, offers to purchase or agreements of purchase and sale or other disposition or participation from third parties with respect to the Project.

. . .

19 The LOU in para. 4 provided that the relationship would be formalized by execution of various agreements. Such agreements were never prepared. It is alleged by Density that such steps were not taken to save on legal fees as the Hotel Project had not sufficiently advanced to warrant such fees.

20 At issue in this motion is para. 9 of the LOU, which confirms that unless otherwise agreed, all costs and expenses associated with the predevelopment and city approval phases throughout the process are to be shared jointly on a 50% - 50% basis.

21 The LOU in para. 8 also provides for compensation for each of Density and HK Hotels as the project progresses for hotel management fees and asset management fees. There is no provision in the LOU for project management fees to be paid to Density.

22 The parties agreed on July 18, 2007 to extend the deadline for the execution of the agreements until February 15, 2008.

The Agency Agreement

23 On May 11, 2007 Density and HK entered into an Agency Agreement prepared by Density which confirmed that Density was authorized to bind HK Hotels for the purpose of the LOU, that Density was not liable to HK for any loss or damages beyond $100.00, except resulting from fraudulent conduct of the Agent.

24 The following are terms in the Agency Agreement:

> IN CONSIDERATION of TWO DOLLARS ($2.00) now paid by cash of the undersigned to the other and other valuable consideration, the receipt and sufficiency of which is hereby acknowledge, the parties hereto agree as follows:
>
> 1. HK Hotels, LLC ("HK"), a limited liability corporation incorporation under the laws of the State of New York, DOES HEREBY irrevocably appoint Density Group Limited (the 'Agent'), a corporation incorporated under the laws of the Province of Ontario, to be its agent to execute, complete and deliver any document and do any act or thing which may be, or which it may consider to be, necessary or expedient, with full power and authority to bind HK, for the purpose of completing the matters and/or transactions contemplated in paragraphs 1, 2 and 6 of the Letter of Understanding between the HK and the Agent, a copy of which is attached hereto as Schedule 'A'.
>
> 2. HK hereby agrees and covenants with the Agent that HK will indemnify and save harmless the Agent, its affiliates and associates and each of their respective directors, officers and shareholders from any loss, cost or damages arising in connection with the execution, completion and delivery by the Agent of any document or any act, omission or thing done or done on behalf of HK by the Agent pursuant to this agreement.
>
> 3. The Agent is not liable for any loss, costs or damages to HK in connection with the agency created hereunder or acts or omissions of the Agent in connection therewith, except if such loss, costs, or damages results from the fraudulent conduct of the Agent. HK shall not initiate or maintain any proceedings against any other person which could give rise to a claim against the Agent for contribution and indemnity or other relief over. The

maximum liability of the Agent under this Agreement, unless loss, costs, or damages result from the fraudulent conduct of the Agent, is CAD100.00.

4. HK acknowledges that this agreement does not create the relationship of partner or fiduciary between the Agent and HK.

25 The Agency Agreement authorizes Density to take all steps with the City on behalf of HK Hotels in furtherance of the terms outlined in the LOU between Density and HK Hotels.

26 Of particular note, and very relevant to the question of whether Kallan owes fiduciary duties to Density is paragraph 4 of the Agency Agreement which confirms that "*HK acknowledges that this agreement does not create the relationship of partner or fiduciary between the Agent and HK.*" [Emphasis added]

27 Density argues that the Agency Agreement was prepared in response to the request of the City to clarify the relationship between Density and HK Hotels and relies on the LOU to define the nature of the relationship between the parties.

28 The defendants rely upon the Agency Agreement as defining the scope of the relationship, and assert that any potential relationship between Density and HK Hotels arising from the LOU had expired.

Conclusions about the applicability of the two agreements

29 It is not for me to decide definitively at this juncture what the nature of the relationship was between Density and HK Hotels and the obligations, if any, that may flow from the relationship between the two corporations. Counsel agree that that is properly an issue for trial.

30 In this motion, my task is to determine whether there is a genuine issue for trial as to whether Kallan could be held to be personally responsible to Density based upon the pleadings and the evidence before me on any theory advanced by Density. I must ask myself, based upon the record, whether the full appreciation test outlined in *Combined Air* is met with respect to this issue, and whether it is in the interests of justice to determine the issue of Kallan's potential personal liability at this time.

31 It appears clear from the parties' conduct and the material before me that the parties continued to be guided by the principles of the LOU although the LOU had not been formally extended in writing. This conduct continued until the rupture in the relationship which occurred in February 2009. In the words of Kallan in his affidavit "HK continued with the Toronto hotel project in the normal course" until this time.

32 Although the written agreement was not formally extended in writing, it appears that the relationship continued between Density and HK Hotels following the terms and understanding of the LOU until the events that I will outline occurred in February 2009. For the purpose of this motion, I will assume that the LOU between Density and HK Hotels was still in effect. This finding is for the purpose of this motion only, and is not binding upon the trial judge.

33 The Agency Agreement continued to define and limit Density's relationship to HK Hotels and was not time limited in its terms.

34 I conclude for the purpose of this motion for summary judgment that both agreements continued to apply and are relevant in defining the relationships between the parties.

HK Hotels is chosen by the City for the Hotel Project

35 On September 24, 2007 the City announced in a press release that it was entering into exclusive negotiations with HK Hotels in response to the Request for a Proposal for a privately financed convention hotel to be located at Exhibition Place. The following information is contained in the press release:

About HKHotels:

HKHotels is a fully integrated hotel company involved in the construction, ownership and management of hotel properties. Founded by Henry Kallan and based in New York, HKHotels is a privately owned and operated hotel collection that takes a unique perspective to the business of hospitality. Since opening its first property in 1992, HKHotels has become renowned for developing hotels that have a distinct point-of-view and offer an outstanding level of service quality. Designs for new HKHotels are currently under development in other key locations in the U.S. and Europe.

36 On October 16, 2007 Sean Majerovic, on behalf of HK Hotels, signed the Proposed Development of Hotel at Exhibition Place with the City. (the First Letter of Intent)

37 Paragraph 1 of the First Letter of Intent confirms that HK Hotels will incorporate a Canadian corporation to develop the proposed hotel, and that the involvement of any other party or co-venturer requires the consent of the Board of the City:

> 1. Parties: The Board and HKHotels LLC ("HKH"). It is understood that HKH intends to form a Canadian corporation to develop the proposed hotel. The Board agrees that a Canadian company wholly-owned by HKH will be an acceptable party to the LOI. If the company is formed prior to execution of the LOI, HKH, and the Canadian company (collectively "HKH Group") will enter into the LOI with the Board and the City. HKH acknowledges that the Board selected it as the preferred proponent, and that the introduction of any new parties whether at the stage of signing the LOI, or as co-venturer in the development and operation of the hotel, or as tenant to the ground lease, or at any other time, shall constitute an assignment and be subject to the approval of the Board as described in paragraph 7 below.

38 The condition in the First Letter of Intent requiring HK Hotels to incorporate a Canadian operating company for the Hotel Project is relevant to the assertion of Density that HK Hotels is a shell corporation with no assets.

39 In the First Letter of Intent, Density does not appear as any interested party or co-venturer.

40 On July 16, 2008 HK Hotels, by their agent Density, signed the Proposed Development of Hotel at Exhibition Place dated July 9, 2008 (the Second Letter of Intent). Stan Kugelman of Blaney, McMurtry acting on behalf of Density, prepared the Second Letter of Intent.

41 The Second Letter of Intent, between HK Hotels and the City, contains two references to Density that did not appear in the First Letter of Intent dated October 16, 2007. These include:

> • First, para. 4 confirms that the City and the Board will grant a ground lease for the proposed hotel to the tenant corporation for the leased premises which will be owned by HK Hotels and Density.
>
> • Second, para. 26 confirms that HK Hotels shall not assign its rights under the Letter of Intent other than to a Canadian company owned by HK Hotels and Density without the consent of the Board.

[Emphasis added]

42 The paragraphs read as follows:

> 4. Grant of Lease and Option: In connection with the Phase 1 Project, the Board and the City will grant a ground lease ("the Phase 1 Lease") for the Phase 1 Lands (the "Leased Premises") to a corporation (the "Tenant") owned by the HKH AND Density Group Limited. HKH will be engaged to operate the Hotel in a manner and to a standard consistent with other HKH hotels as described in the Response. The Phase 1 Lease shall incorporate the terms and conditions set out in this LOI. Concurrently with the entering into of the Phase 1 Lease, the Board and the City

will grant to the Tenant an option to lease the Phase 2 Option Lands (the "Phase 2 Option") upon and subject to the terms and condition set out in paragraph 12.

26. Assignment/Subletting: HKH shall not assign its rights under this LOI other than to a Canadian company owned by HKH and Density Group Limited without the consent of the Board not to be unreasonably withheld or delayed. The Phase 1 Lease will provide that the Tenant will not assign, sublet or part with the possession of the Leased Premises or any part thereof to an arms' length assignee without first obtaining the consent of the Board in writing, which consent shall not be unreasonably withheld or delayed, and will not, under any circumstances, license or sublease all or any portion or portions of the meeting room space and/or business centre facilities in the Hotel other than to a licensee or subtenant that has otherwise been approved by the Board in accordance with the Lease. For greater certainty, an "assignment" shall include a change in the effective control of the Tenant by any means whatsoever other than changes in effective control between HKH and Density Group Limited and/or related and/or affiliated corporations. Notwithstanding the foregoing, the Tenant shall have the right without the consent of the Board or the City under the Phase 1 Lease but on notice to the Board to license or sublease premises within the Leased Premises to third parties of purposes which are ancillary to the primary use of the Leased Premises as a Hotel such as, by way of example only, a magazine stand, restaurant(s), parking operators, beauty salon, and car rental kiosk. Any change to the identity of the operator of the Hotel shall require the approval of the Board, which approval shall not be unreasonably withheld or delayed.

The allegations as to the cause of the break-up of the relationship

43 There are differing versions between the parties regarding why their relationship ended.

44 It is the position of Density that the relationship between Density and HK Hotels soured when an unrelated restaurant project in New York City fell apart in the fall of 2008. Density alleges that Kallan improperly ended the Hotel Project as a consequence of the failure of the restaurant project. It is this conduct that Density argues constitutes bad faith and improper dealings on the part of Kallan, underpinning in part their assertion of personal liability owed by Kallan.

45 HK Hotels asserts that the relationship ended abruptly when the comptroller for HK Hotels, Tom Mangan, requested on January 15, 2009 the back-up documentation and bank documentation for the project expenses incurred by HK Hotels to complete the year-end financial statements, and learned for the first time that Density had been paying itself unauthorized project management fees.

46 For reasons to follow, I do not accept the allegation put forward in Peter Majer's affidavit that the actions by Kallan with respect to the Hotel Project were a retaliation or reaction to the aborted restaurant transactions in New York.

47 Majer relies in his affidavit on hearsay evidence from three individuals to confirm this link between the failed restaurant venture in New York and the Hotel Project. Counsel for HK Hotels contacted these three individuals, and they conclusively denied under oath the contents and assertions contained in Majer's affidavit dated September 26, 2011 linking the restaurant failure to any dealings in this matter.

48 I find as a fact that this assertion by Density of a link between the Hotel Project and a failed restaurant project was clearly disproved in the evidence before me, in affidavits and cross-examinations, when counsel for HK Hotels contacted the individuals and obtained sworn evidence from them.

49 The credibility of Peter Majer was significantly undermined with respect to this issue.

The real cause of the breakup

50 Returning to the factual background, the LOU confirms in para. 9 that Density and HK Hotels would share any expenses for the Hotel Project on a 50/50 basis.

51 To that end, a bank account was opened in the name of Density. Density, through Sean Majerovic alone, controlled the bank account.

52 Density would forward invoices to HK Hotels seeking payment for 50% of the expenses associated with the bidding process. HK Hotels paid the expenses as requested by Density by regular bank transfers. The amounts escalated.

53 The documentary trail could not be clearer. The accountant for HK Hotels made routine inquiries concerning the production of back up documentation for the expenses for the Hotel Project. On January 15, 2009, he began making such requests in order to prepare the year end statements for HK Hotels.

54 On February 19, 2009, after some delay in producing the requested back up documentation, Sean Majorovic provided a summary of all transactions related to the Hotel Project as of January 2009 to the comptroller for HK Hotels (Project Expenses as of January 2009).

55 For the first time, the Project Expenses as of January 2009 produced by Sean Majerovic disclosed that project management fees had been paid to Density Group from June 30, 2007 to December 30, 2008 in the total amount of $199,090.00, while accounts were outstanding as unpaid to third parties. The comptroller made further inquiries about these payments to Density in emailed communication:

- "We never received any invoices for Density Group, we need copies of them and an explanation of what they represent"

- "There are fees listed under Density Group, which are not listed as paid, but Density Group is showing a zero balance due; can you let me know what that is?"

56 On February 27, 2009, soon after he produced the long awaited accounting information in the Project Expenses as of January 2009, Sean Majerovic requested further payment of funds from HK Hotels to pay the outstanding third party payments.

> I have advised you that outstanding monies related to work completed for the project are overdue. This includes amounts owed to the archaeological consultant, sub trades for the site works and retainer for the architects. You have avoided my phone calls and emails pertaining to this. You requested an accounting for your yearend review. We provided details of what was asked, the most recent being sent today under separate cover. I again request that you pay all monies owed to bring your position in the project to good standing.
>
> [Emphasis added]

57 In February 2009, Kallan was advised by his comptroller that Density had been paying itself project management fees in excess of $199,000.00 out of the total project expenses of $468,253.00.

58 The result was that Density had in fact contributed little to the Hotel Project development costs contrary to the terms of a 50/50 contribution to expenses specified in the LOU.

59 The facts amply support the conclusion that this was the first disclosure to HK Hotels or Kallan that project management fees were being paid to Density, rather than to arms-length third parties retained to promote the Hotel Project.

60 Kallan confirmed that payment of project management fees to Density was never discussed or agreed upon. Any shared expenses incurred were to be paid to arms-length third parties. I accept this evidence as proved as is entirely consistent with the documentary history.

Findings re: payment of project management fees

61 Peter Majer and Sean Majerovic have given three inconsistent explanations for the payment of project management fees to Density.

62 First, in an email dated March 2, 2009 Sean Majerovic provides the explanation that development/ project management fees were "as per project budgets provided in advance to HK".

63 I find based upon the record before me that although clearly projected budgets provided to HK Hotels included an entry for project management fees, there was never any indication to whom project management fees were being paid. Kallan confirmed that he understood all expenses, including project management fees, were payable to third parties. No document ever confirms that the project management fees were being paid to Density, until the Expenses as of January 2009 document was produced at the request of HK Hotel's comptroller.

64 Second, an alternative explanation was given at discovery by Peter Majer about these payments. He suggests that these fees were "activated as advances on funds that Density may earn in the future to be reconciled sometime in the future. (at pages 134 to 137 of his transcript)." Again, there is no document that supports this assertion.

65 Finally, in Sean Majerovic's affidavit sworn September 26, 2011 he stated that "he needed the money to live on, and was not going to do this work for free". Whatever Sean Majerovic's needs may have been, there is no indication anywhere of any agreement in writing, or any disclosure to HK Hotels until February 2009 that Sean was to be paid for alleged services rendered.

Conclusions as to the cause of the rupture in the relationship between Density and HK Hotels

66 I am satisfied based upon the record before me that there was never any discussion or agreement that Density would be paid management fees. The diverse and conflicting explanations given by Sean and Peter are to be given little or no weight as they are clearly contradicted by the documentary trail. There is no genuine issue requiring a trial about these findings.

67 Although the relationship between Peter Majer and Kallan may have deteriorated as a result of the failed restaurant project in New York, I find, based upon the evidence before me, that it is clearly proved that the precipitating event causing a breakdown in the relationship between Density and HK Hotels was the discovery that Sean Majerovic had improperly caused payment to Density of unauthorized project management fees of some $199,000.00. The hearsay evidence relied upon by Peter Majer of alleged conversations with three individuals was contradicted by their sworn evidence. There is no genuine issue requiring a trial about the cause in the rupture in the relationship between Density and HK Hotels.

Disclosure of the bank statements of Density

68 The comptroller for HK Hotels had requested copies of the bank statements from Sean Majerovic in January and February 2009. He did not receive them. He states in an email to Sean Majerovic on February 23, 2009:

> "I don't understand why we never received any copies of bank statements, after so many requests; they are the most important thing I need".
>
> [Emphasis added]

69 The Density bank statements were never voluntarily produced.

70 On March 26, 2010, well after this litigation commenced, Master Sproat made an order requiring Density to produce an authorization to HK Hotels to obtain the Density bank statements for the Hotel Project.

71 The Density bank statements confirm the history of regular payments made to Density in amounts of $5,000.00 prior to the March 4, 2009 letter terminating the relationship between Density and HK Hotels.

72 The bank statements revealed questionable expenses paid by Density *after the March 4, 2009 letter terminating the relationship* between HK Hotels and Density.

73 These expenses included a payment to the Teplitsky law firm in the amount of $3,622.50 on April 21, 2009, presumably for fees associated with this lawsuit.

74 Further, the bank statements show a continuing series of a further sixteen payments of $5,000.00 each (for a total of $80,000.00) continuing from March 2009 to December 2009 and following the pattern of prior payments for the supposed management fees paid to Density. These sixteen payments continued after Density was advised in writing by HK Hotels that it was no longer acting on its behalf.

Response of Kallan and the alleged breach of fiduciary duty

75 Upon discovering the disturbing facts in February 2009 about the unauthorized payment of project management fees to Density, Kallan immediately acted.

76 Until this discovery, HK Hotels had relied on Sean Majerovic and Density to represent its interests in the Hotel Project in any discussions with the City.

77 Kallan immediately contacted the members of the Board for the City by telephone. He attended a meeting in Toronto with City representatives on February 26, 2009 to confirm that HK Hotels wished to continue the project without any further involvement of Density.

78 The representatives of the City confirmed that they were interested in proceeding with the Hotel Project with HK Hotels. The representatives made it clear that HK Hotels had been chosen for the Hotel Project based upon its reputation for its management of quality hotels in New York.

79 At the meeting with the City on February 26, 2009, Kallan became aware that Density was specified in the Second Letter of Intent in paragraphs 4 and 26 as co-owner of the tenant corporation. Kallan's comptroller had not been provided with a copy of the Second Letter of Intent dated July 9, 2008, although he had asked for a copy from Sean Majerovic.

80 Density argues that the Second Letter of Intent is a trust asset owned by Density and HK Hotels.

81 When Kallan became aware that Density was referred to in the Second Letter of Intent with the City, he sought to remove the name of Density from paragraphs 4 and 26 of that document.

82 Although the City solicitor expressed the view that such deletion was not necessary, as at all times the City was contracting with HK Hotels, the City entered into a Third Letter of Intent dated September, 2009 that contains the same terms as reflected in the Second Letter of Intent, but deletes any reference to Density.

83 It is the actions resulting in the removal of Density from the Third Letter of Intent, that Density alleges is a misappropriation of a trust asset by Kallan in breach of his fiduciary duties to Density giving rise to potential personal liability.

84 Kallan swore in his affidavit dated September 8, 2011 that any actions that were undertaken by him were solely on behalf of HK Hotels and were clearly in the best interests of HK Hotels. He confirms at paras. 39 and 40 of that affidavit:

> 39. I do verily believe that I was acting in HK's best interests when I, acting solely as a representative of HK, terminated it continued involvement with Density. HK considered these "management fees, which amounted to an astounding 42% of total project expenses, to constitute a significant misapprehension of HK's contributions...."

40. For all intents and purposes, Density was not making any meaningful monetary contribution to his project, which was certainly in contrast to HK's understanding that each corporation would equally fund 50% of the project expenses. That was unfair to HK which had acted in good faith in its dealings with Density.

85 On March 4, 2009 Kallan, on behalf of HK Hotels, advised Peter Majer and Sean Majerovic that the relationship between Density and HK Hotels was at an end in light of the improper taking of project management fees. Kallan's letter provides:

I am writing in response to both Sean's February 27 email and with respect to the list of expenditures and other financial information that you finally provided to me after numerous requests therefore. A quick review of the lists and financial information has confirmed my worst fears. In the first place, there is a total contradiction between Sean's email, which lists accounts payable of approximately $82,000, and the lists of expenditures sent to us under separate cover, which lists all of the bills comprising the approximate $82,000, total, as being paid, except for the $18,143.60 invoice from Ex Place Arch. Work bill. Which of these is correct?

More significantly, it is clear that you have been paying Density "project management" fees of at least $154,000 (and possibly as much as $199,000) despite having no authority or approval to do so. Considering that the other invoiced amounts on your list total approximately $234,000, the outrageousness of your charging such project management fees while not fully paying third party vendors should be readily apparent. Aside from those improper project management fees, Density's financial contribution to the potential project is minimal. In short, it is clear that I have contributed almost all of the requested funds for this potential project (aside from the project management fees improperly paid to Density) and that you have not properly accounted for the expenditure of my contributions. In light of the foregoing and your general failure to act in good faith and in a forthright and trustworthy manner, I have no further interest in having you as a partner of HK Hotels, LLC ("HK") or participant in any manner whatsoever in this potential project.

Deciding that parties must go their separate ways is never easy. But in this case, your duplicity and unacceptable manner of conducting business have left me with no other choice.

In any event, please be advised that any attempt on your part to interfere with HK's continuing with the potential project without your participation therein will force me to retain attorneys to protect my rights and pursue all my remedies against you.

86 Peter Majer, Sean Majerovic and Density did not respond to the March 4, 2009 letter.

87 This action was commenced by Density on April 16, 2009.

Do these findings of fact, analyzed in the context of the applicable law, support a potential finding of liability against Kallan personally that is a genuine issue for trial?

88 The following are the allegations in the amended pleadings relevant to the claims against Kallan personally:

1.a Density claims from the Defendant Henry Kallan damages for inducing HK Hotels breach of contract, trust and fiduciary duty and damages for breaching his own fiduciary duty to Density in an amount to be determined prior to trial.

6. In furtherance of the co-venture, Kallan used HK, a shell corporation, as the corporate vehicle through which he would hold his interest in the joint venture.

12. Density states that it also reposed its complete trust and confidence in Kallan and was vulnerable to the exercise of his discretion and power. Density's trust and confidence in Kallan was a result of the Majerovic family's long standing friendship dating back to at least the 1980's and the business relationship with Kallan, which began in

or around 2007 with a restaurant business venture in New York City, but for which, and to Kallan's knowledge, Density would not have entered into the joint venture. Kallan was a trusted advisor to Density. It was also Kallan's reputation (in addition to the "HK" name), and the personal assets that Density and the Board were relying on in order for the development to be feasible. Density was vulnerable to the exercise of his discretion and power, which Kallan, in breach of his fiduciary duty ultimately used against Density as set out herein. Density therefore states that, at all material times, Kallan owed it a fiduciary duty.

89 In submissions, counsel for Density argued that the following arguments constitute triable issues regarding whether Kallan may be found to be personally liable:

- As a result of the prior history between the parties, Kallan was a trusted advisor and was *prima facie* in a fiduciary relationship to Peter Majer, Sean Majerovic and Density, who were vulnerable in the relationship.

- As Density and HK Hotels were co-venturers by the terms of the LOU, there necessarily existed a fiduciary relationship between the two corporations.

- The LOI with the City was a trust asset owned by Density and HK Hotels.

- Even if Kallan was not *prima facie* in a fiduciary relationship to Density in the facts of this case, Kallan induced the breach of contract and breach of fiduciary duties owed by HK Hotels as Kallan took steps with the City to ensure that Density's name was removed from the Letter of Intent, and there is a triable issue whether Kallan is personally liable to Density.

90 It is the position of the defendants that regardless of the nature of the relationship between Density and HK Hotels, on any theory presented by Density, the facts of this case cannot underpin a finding of personal liability for Kallan. Therefore there is no genuine issue for trial regarding whether Kallan owed a fiduciary duty to Density that he breached.

91 The following issues arise:

1. Is there a genuine issue for trial that Kallan personally owed a fiduciary duty to Density, due to the nature of the prior relationship?

2. Can the Second Letter of Intent be characterized as a trust asset owned by Density and HK Hotels?

3. Is there a genuine issue for trial whether Kallan induced a breach of contract or breach of fiduciary duty owed by HK Hotels to Density?

Issue 1: Is there a genuine issue for trial that Kallan prima facie personally owed a fiduciary duty to Density due to the nature of the prior relationship?

Guiding principle 1: Directors owe fiduciary obligations to their corporation, not to third parties

92 A finding of personal liability for directors of corporations for their actions conducted on behalf of the corporation that may affect third parties is rare.

93 In *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) [*Peoples*], at para. 25, Finlayson J.A. noted that findings of personal liability for directors of a corporation are rare unless there is fraud, deceit or want of authority. If the corporation is a sham from the outset, the corporate veil may be pierced:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil

has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour.

94 The case law is clear that *prima facie* a director owes a fiduciary duty to the corporation, in this case HK Hotels, not to third party stakeholders such as Density.

95 In *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) [*BCE*], at para. 66, the Supreme Court confirmed that a director's fiduciary duty is to the corporation, and that the reasonable expectation of any stakeholders is that the directors will act in the best interests of the corporation for which they are directors:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

96 A recent decision of Pepall J., *Fracassi v. Cascioli*, 2011 ONSC 178 (Ont. S.C.J. [Commercial List]), at paras. 292 and 293, reaffirms the *BCE* principles, and confirms that directors owe a fiduciary duty only to the corporation for which they are directors, and, where that duty conflicts with the interests of one of the corporation's stakeholders, a director must act only in the best interests of the corporation for which they are a director.

Guiding principle 2: to establish the existence of a fiduciary duty, strict requirements must be met

97 In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at para. 30, LaForest J., citing Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), outlined the three part test that must be met as prerequisites for a finding of a fiduciary relationship:

> (1) Scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power...
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

98 Agency is a recognized category of relationship giving rise to fiduciary duties. An agent owes such a duty to its principal. In this case, Density was agent to HK Hotels, and *prima facie* owed fiduciary duties to HK Hotels: *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (Ont. C.A.), leave to appeal to the S.C.C. refused, 2004 CarswellOnt 1610 (S.C.C.). The fiduciary obligations of Density are modified by the agency agreement which is specific that no fiduciary duty is owed by Density to HK Hotels.

99 There is no fiduciary duty owed by the principal to its agent.

100 The recent decision *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (S.C.C.) [*Alberta*] amplifies the vulnerability component in the *Frame* test. The SCC confirmed that in cases not covered by an established recognized category of fiduciary duty, a claimant has to show, in addition to the vulnerability arising from the relationship, that the following three conditions are met:

1. An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary,

2. A defined person or class of person, and

3. A legal or substantial practical interest of the beneficiary that will be adversely affected by the alleged fiduciary's exercise of discretion or control.

101 Density must prove that the three part test in *Frame*, as amplified in *Alberta*, has been met to successfully demonstrate a fiduciary duty owed by Kallan to Density.

Issue 1: Conclusions regarding whether there is a genuine issue as to whether Kallan prima facie owes a fiduciary duty to Density

Allegations that HK Hotels is a sham corportion

102 Density's first argument is that HK Hotels is a sham corporation, which may justify piercing the corporate veil to impose personal liability. This argument was not vigorously pursued.

103 The evidence before me is that HK Hotels is a respected corporation that is responsible for the management of some five hotels in New York. It receives management fees. It is not a sham corporation but it does not own property.

104 Further, the LOI requires HK Hotels to incorporate a Canadian corporation to conduct the business of the Hotel Project, which could be added as a party if the Hotel Project matures and proceeds with HK Hotels.

105 There is no merit to the allegation that HK Hotels is a sham corporation that could justify piecing the corporate veil and to personal liability upon Kallan. A trial is not necessary to determine this issue.

Is there a prima facie fiduciary duty owed by Kallan to Density?

106 The second argument that Density advances is that the nature of the prior relationship between the parties imposes fiduciary duties upon Kallan owed to Density.

107 Density argues that Kallan improperly ended the relationship between Density and HK Hotels as a result of the aborted, unrelated restaurant deal. Density does not allege in its pleadings any allegation of fraud, deceit or dishonesty in Kallan's conduct. Density suggests that Kallan improperly ended the Hotel Project due to difficulties in the New York restaurant project. For reasons that I have outlined, I do not accept this suggestion, which was advanced by Peter Majer. His evidence on this point was conclusively proved to be unreliable by the evidence of three individuals. I need make no further comment on this unsupported assertion, which does not raise a triable issue.

108 Finally, Density argues that as a result of the prior history between the parties, Kallan was a trusted advisor and was in a fiduciary relationship to Peter Majer, Sean Majerovic and hence Density, who were vulnerable in the relationship.

109 Density alleges that Kallan breached duties owed to Density when he went to Toronto to meet with representatives of the Board to confirm that HK Hotels wished to pursue the Hotel Project without any involvement of Density, and requested that Density's name be removed from the Second Letter of Intent.

110 In a motion for summary judgment the responding party cannot rely on bald allegations, but must bring forward facts that considered in light of the law raises a genuine issue for trial. Density has failed in this motion to bring forward facts that could possibly support a finding of a fiduciary duty owed by Kallan to Density.

111 The record is clear that Density acted as agent on behalf of HK Hotels in the discussions and negotiations with the City. It is not disputed that Density and Majerovic were the active and visible parties in discussions with the City.

112 The record establishes that Kallan, in his personal capacity, never assumed the role of fiduciary to Density. To the contrary, Kallan was at all times behind the scenes, and as I read the lengthy file, not paying close attention to matters, relying entirely on Density and Sean Majerovic.

113 HK Hotels and Kallan personally had very little direct involvement with the Hotel Project until February 2009 when the dispute arose between HK Hotels and Density concerning the inappropriate charging of project management fees.

114 As the allegation of fiduciary duty by Density is outside the recognized categories where such a duty exists, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. There is no evidence presented by Density that could possibly support such a finding in this case.

115 I find that when Kallan went to Toronto to meet with the City and sought to delete Density's name from the Second Letter of Intent, he was acting on behalf of HK Hotels in its best interests in accordance with his obligations as a director to that corporation. Clearly, continuing the relationship with Density in the circumstances was not in HK Hotels' interest.

116 Applying the three part test in *Frame*, it is clear that discretion and power were exercised by Density, not HK Hotels, until the rupture in the relationship. The stellar reputation of HK Hotels for the management of quality hotels in New York City was the reason that HK Hotels was chosen for the Hotel Project. Reliance by the City and the Board upon HK Hotels' established reputation in granting the LOI does not create a peculiar vulnerability on the part of Density or a fiduciary duty owed by Kallan personally. As well, any prior business dealings between the parties do not create vulnerability or a fiduciary obligation.

117 The allegations in the pleading, of vulnerability and reliance by Density, are not born out in the primary role that Density played with the City and the Board in all negotiations. The three part amplification of vulnerability as outlined in *Alberta* has not been met.

118 There are no disputed facts that require a closer review and involve findings of credibility that should be considered in a trial. The facts that Density purports to rely on were either proven to be totally unreliable (the allegations of the restaurant deal colouring the actions of Kallan) or were not supported by any evidence (the allegation of peculiar vulnerability of Density).

119 Applying the *Frame* and *Alberta* analysis as well as the full appreciation test, I conclude that there is no genuine issue for trial regarding whether Kallan individually *prima facie* owed a fiduciary duty to Density based upon the various arguments raised by Density. There is no such duty in the facts of this case.

Issue 2: Is there a genuine issue for trial that the Second Letter of Intent can be characterized as a trust asset owned by Density and HK Hotels?

The nature of joint ventures in Canada

120 To provide context in assessing Density's argument about the Second LOI being a trust asset held in a joint venture, I pause to outline the state of joint venture law and fiduciary duties.

121 Joint ventures are a relatively recent phenomenon. There is no statute law governing them, and little case law. Joint ventures are a form of business organization similar to a partnership; however, unlike the term "partnership", joint venture has no strict legal meaning, but is normally used to describe a form of business arrangement under which two or more persons or entities combine their efforts for a specified venture: CED Business Corporations (Ontario) I.1, §4.

122 Joint ventures do not automatically result in fiduciary duties arising between parties to the joint venture. The fact that two or more parties are in a joint venture, does not necessarily alter the legal relationship between them from being simply a contract.

123 The seminal case in Canada in the area of joint ventures and fiduciary duties between commercial parties is *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) [*LAC Minerals*]. The Court's determination with respect to whether there were fiduciary duties owing between the parties did not turn on the fact that they had pursued joint venture negotiations. The focus was on whether the test for fiduciary duties in *Frame* had been met. The important factor was that the parties had exchanged confidential information during those negotiations.

124 LAC Minerals purchased a property on the basis of confidential information obtained from International Corona Resources. As International Corona Resources had revealed the confidential information for the purpose of advancing joint venture negotiations, LAC Minerals was found to have breached a duty of confidence it owed to International Corona Resources.

125 For fiduciary duties to exist, the three-part test in *Frame* as amplified by *Alberta* must be met, as discussed above.

126 It is important to note that the majority did not find that LAC Minerals owed International Corona Resources any fiduciary duty applying the test in *Frame*, although the minority did make such a finding.

127 Justice Sopinka J. in *LAC Minerals*, cautioned of the dangers of imposing fiduciary duties in the context of commercial relationships. He noted at para 125:

> It is rare that [a finding of a fiduciary relationship] 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.

128 It is a seminal principle in commercial law that where parties to a commercial agreement have had an opportunity to define the nature of their relationship by contract, courts ought to be reluctant to impose obligations between them over and above that to which they have agreed without clear evidence that it would be just in equity to do so.

129 As professors Jane Knowler and Charles Rickett of the University of South Australia recently observed in their article "The Fiduciary Duties of Joint Venture Parties — When do They Arise and What Do They Comprise?" (2011) 42 Victoria U. Wellington L. Rev. 117 at 118:

> The majority of self-styled "joint ventures" are, invariably, nothing more in legal terms than contracts. If parties are going to be bound by fiduciary duties, over and above the contractual duties they owe each other, this will only be by virtue of the particular arrangement they have entered into which, on a thorough examination of the facts, is found to require each party to give unstinting loyalty to the other. That undertaking of loyalty justifies each party reposing trust and confidence in the other, so that one can safely conclude they are bound by fiduciary ties (which manifest themselves as fiduciary duties) to each other.
>
> [Emphasis added]

130 Finally, I note that in the unanimous decision of *United Dominions Corp. v. Brian Proprietary Ltd.* (1985), 157 C.L.R. 1 (Australia H.C.), at 10 -11, cited with approval by La Forest J. and Sopinka J. in separate opinions in *LAC*

Minerals, the High Court of Australia confirmed that the nature of the relationship between joint venturers is a question of fact:

> One would need a more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one... The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend on the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.

131 For the purposes of this case, the critical point from *LAC Minerals* is that in the context of a joint venture, for a fiduciary duty to exist, the test in *Frame* (as now amplified by *Alberta*) must be met. There are no special rules for joint ventures. When commercial parties have had the opportunity to define the nature of their relationship by contract, the terms of their contract should be respected, unless the rigorous test for a Court to impose a fiduciary duty has been met.

Assumptions made for the purpose of this motion for summary judgment

132 Density alleges that Density and HK Hotels were in a joint venture relationship giving rise to fiduciary duties owed between the parties. Whether or not Density and HK Hotels were in a joint venture and subject to fiduciary duties are issues that are hotly disputed. There are strong counter arguments raised, particularly in light of the explicit terms of the Agency Agreement.

133 As can be seem from a review of the *LAC Minerals* decision and other cases, the hurdle to prove a fiduciary relationship in the context of any commercial relationship, including a joint venture is high and multifaceted. However, counsel agree that this contested issue is properly an issue for trial.

134 For the purpose of this motion only, and not binding upon the trial judge, I assume that the terms of the LOU bound Density and HK Hotels together as co-venturers or joint venturers and that it is arguable that a fiduciary duty existed between Density and HK Hotels.

135 The issue in this motion however, is not the nature of the duty that may have existed between HK Hotels and Density, but rather what duty, if any, existed between Kallan and Density.

136 The finding for the purpose of the motion that Density and HK Hotels may have been in a fiduciary relationship does not mean that Kallan, as director of HK Hotels, owes a fiduciary duty to Density. If this were the case, it would defeat one of the bedrock principles of corporate law: limited liability for directors and officers. At all times Kallan owed a fiduciary duty to the corporation of which he was director, HK Hotels: (see *BCE*, Peoples*Montreal Trust Co. of Canada*).

Second Argument raised by Density to impose a personal obligation upon Kallan

137 The argument that the Second LOI is a trust asset underpins Density's second argument to attempt to impose personal liability upon Kallan.

138 The argument is as follows: as Density and HK Hotels were arguably in a fiduciary relationship in a co-venture relationship, any agreement entered into on behalf of the parties including the Second LOI, becomes a trust asset. This trust in turn imposes fiduciary duties upon directors of the co-venturer corporations and personal liability upon directors if an agreement is dealt with contrary to the interests of one of the co-venturer corporations.

139 Density argues that Kallan induced a breach of contract, or a breach of fiduciary duty owed by HK Hotels to Density, when he negotiated with the City to remove Density from the Letter of Intent, and therefore is personally liable for these actions.

140 For the reasons to be outlined, I conclude that being a party to a joint venture with fiduciary duties owed between the joint venturers (which is assumed for the purpose of this motion), does not mean that any agreement is a trust asset, unless the requirements of what constitutes a trust have been met.

Requirements to establish a trust

141 Creation of a trust involves very specific factual requirements that I conclude, for reasons to be outlined, are not met in this case.

142 Counsel produced no legal analysis or any case law that supports the argument that any agreement entered into in a joint venture with fiduciary duties owed between the contracting parties becomes a trust asset. The argument appears to be inconsistent with the reasoning in *LAC Minerals*.

143 As there is no case law in support of Density's argument, to assess its merits, I return to first principles.

144 Trust case law is clear that for a trust to be established, the intention to create a trust must have been made expressly, or by implication.

145 Even if it is arguable that fiduciary duties may be owed between Density and HK Hotels, for an agreement in a joint venture to become a trust asset, Density must meet the legal requirements for the finding that a trust has been established. Joint ventures have no special status converting agreements into trust assets.

146 Density does not assert that there was an intention to create an express trust, and nothing in the record could support such a finding.

147 The question, therefore, is whether there is a genuine issue for trial whether the Second LOI can be a trust asset by implication, guided by the principles outlined in the case law.

148 The case law confirms that the agreements in question must be reviewed, along with the surrounding circumstances to see if the requirement of a clear intention to create a trust can be found.

149 If a trust is to be implied, "*it is necessary that the intention to create a trust can be clearly inferred from the language used or the surrounding circumstances*": *Maralta Oil Co. v. Industrial Incomes Ltd.*, [1964] A.J. No. 82 (Alta. S.C. (App. Div.), at para. 7 [Emphasis added].

150 In *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2005 BCSC 368 (B.C. S.C.), Morrison J. noted, at para. 58, that "a trust can be construed from conduct alone. The intention to create a trust can be inferred from the language used, along with the surrounding circumstances." The Court further noted, at para. 101, that a court may only do this "so long as the consideration of the surrounding circumstances does not overwhelm the wording in the actual contracts."

151 In *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.* [2008 CarswellOnt 1615 (Ont. S.C.J.)], Hoy J. confirmed the elements that must be proved to establish the requirement of a clear intention to create a trust, at paras. 20 and 21:

> 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 to determine if the requisite clear intention to a create a trust is present.
>
> Factors the Court will consider 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.

152 I turn to consider the agreements, and the circumstances of the case to determine whether there is any evidence of an intention to create a trust.

Review of the Agreements — Relevant terms of the LOU and the Agency Agreement

153 The only argument available to Density that the LOI with the City was a trust asset is that the LOU between Density and HK Hotels outlined in paragraph 12 of these reasons refers to the parties as "Co-Venturers". For the purpose of this motion only, I have assumed that there is an arguable issue whether Density and HK Hotels were in a fiduciary relationship. This finding is helpful to Density, but does not make the Second LOI a trust asset.

154 I conclude that a review of the specific terms in the LOU cannot be interpreted to support a conclusion that the LOI was intended to be a trust asset.

155 The LOU confirms that the relationship will be formalized by entering into several agreements including a Co-ownership Agreement, a Development and Construction Agreement, a Hotel Management Agreement, and an Asset Management Agreement. None of these agreements were drafted.

156 Paragraph 11 of the LOU confirms that so long as the parties agree in good faith to pursue the Project, neither party shall solicit others with respect to the Project.

157 The LOU was extended to expire on February 15, 2008. No other formal extensions took place. Kallan acknowledges that, notwithstanding that there was no formal extension of the LOU, the parties continued to be guided by the LOU until the rupture in the relationship in February 2009.

158 The Agency Agreement dated May 11, 2007 limits the liability of Density as agent acting on behalf of HK Hotels with respect to the LOU to $100 unless there is fraudulent conduct. Most importantly, the Agency Agreement specifies that HK acknowledges that the agreement does not create the relationship of partner or fiduciary between the Agent, Density, and HK Hotels.

159 The Agency Agreement is crystal clear that, notwithstanding the usual rule that Density as agent for HK Hotels *prima facie* owes a fiduciary duty to its principal HK Hotels, in this case no such duty was owed by Density to HK Hotels. Apart from fraud, damages are limited as recoverable from Density in the amount of $100.00.

160 The terms of the two relevant documents considered individually or together do not appear to create any sort of trust by the terms of the agreements. To the contrary, they appear by their terms to be commercial contracts between two corporate entities; no more, no less.

Consideration of the surrounding circumstances

161 In the absence of formal trust documentation, the Court must also consider the circumstances and evidence as to what the parties intended, including how the parties conducted themselves, to determine if the requisite clear intention to a create a trust is present.

162 There is no credible evidence before me that there was ever any discussion that a trust would be created, or that the nature of the relationship between Density and HK Hotels was other than a commercial contract.

163 Density was in charge of all negotiations with the City, and the Second LOI was prepared on Density's instructions.

164 It appears that Kallan saw the Second LOI at the meeting with the City on February 26, 2009 for the first time, and that his comptroller did not have a copy of this document. The Second LOI may have been sent to Kallan by email.

165 The LOU is the document that Density relies upon as creating a fiduciary duty. It had been extended once, and had expired on February 15, 2008 and had never been formally or informally extended. Any continued relationship between the parties appeared to be loose.

166 It appears that the only potential trust property that may have been created was the joint bank account, which was controlled exclusively by Density and used to make payments to advance the Hotel Project.

167 HK Hotels had no access to the bank documentation, and in fact was denied access in spite of requests for bank documentation from the comptroller to prepare the year-end financial statements of HK Hotels. The bank documentation was only disclosed after this litigation commenced pursuant to an order of this court. As outlined in the facts, HK Hotels alleges improprieties by Density with respect to the bank funds both before and after the dispute between the parties.

168 The onus is upon Density to provide some credible evidence in support of their position, not merely theories.

169 I conclude that there is no evidence that the Second LOI was a trust asset owned by Density and HK Hotels. Density called no evidence that would support a finding that a trust was established by implication, guided by the principles outlined in the case law and having regard to the language used in the LOU and particularly in the Agency Agreement, or in any of the surrounding circumstances.

170 Having regard to the full appreciation test, I conclude that a trial is not necessary on the issue of whether the Second LOI was a trust asset.

171 If there is no triable issue whether the Second LOI is a trust asset, that is the end of Density's second argument attempting to impose personal liability upon Kallan and the motion for summary judgment dismissing the claim against Kallan personally should be granted.

Issue 3: Is there a genuine issue for trial whether Kallan induced a breach of contract or breach of fiduciary duty owed by HK Hotels to Density?

172 However, in the alternative, if I am wrong in my conclusion that there is no triable issue as to whether the Second LOI was a trust asset, I will consider the final argument of Density whether there is a triable issue that Kallan may be found personally liable for inducing HK Hotels to breach its fiduciary duty or its contract based upon his conduct.

173 The leading authority on inducing breach of trust is *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) [*Air Canada*]. In that case, the Court outlined, at paras. 32 to 38, "two general bases upon which a stranger to [a] trust can be held liable as a constructive trustee for breach of trust." The first category, known as "trustees de son tort", does not apply in the present circumstances as it would require that Kallan, personally, take legal control of the alleged trust property, which clearly he did not.

174 The second category, upon which Density relies, is where a stranger to the trust knowingly participates in a breach of trust. As the Court in *Air Canada* noted at para. 35, this second category can be divided in to two further categories: "knowing receipt and dealing" with trust property resulting in a breach, and "knowing assistance" in a breach of trust.

175 The "knowing receipt" branch applies when a stranger to a trust receives and handles trust property in their personal capacity. In this case, Kallan never handled the alleged trust property in his personal capacity, so this branch does not apply. When Kallan requested that the City remove the references to Density from the LOI, he was acting on behalf of HK Hotels.

176 The only argument that Density can rely upon is that Kallan induced the breach of contract or trust by "knowingly assisting" in the alleged breach of trust by the corporation.

177 In *Air Canada*, at para. 37, the Court cited *Barnes v. Addy* (1874), 9 Ch. App. 244 (Eng. C.A.) in describing the "knowing assistance" branch of a breach of trust:

> ... in Barnes v. Addy, supra, at p. 252, Lord Selborne L.C. stated that persons who "assist with knowledge in a dishonest and fraudulent design on the part of the trustees" will be liable for the breach of trust as constructive trustees. See also, *Soar v. Ashwell*, [1893] 2 Q.B. 390 (C.A.). This basis of liability raises two main issues: the nature of the breach of trust and the degree of knowledge required of the stranger.

178 As confirmed in *Air Canada*, to "knowingly assist" in a breach of trust, a person must "assist with knowledge in a dishonest and fraudulent design on the part of the trustee". Where this can be demonstrated a person will be liable for breach of trust as a constructive trustee.

179 There are two prerequisites to the test for "knowing assistance": the first is the degree of knowledge of the stranger, and the second is the nature of the breach of trust.

Density has proved actual knowledge of Kallan of the actions of HK Hotels

180 Turning to the first prerequisite, as confirmed at para. 38 of *Air Canada*, the degree of knowledge factor directs that in order for the stranger to be personally liable, his or her knowledge must amount to actual knowledge, recklessness, or willful blindness.

181 In this case, clearly Kallan had actual knowledge of the position and actions of HK Hotels as he was the one who took the action on behalf of the company. The first prerequisite of knowledge is met.

No proof that HK Hotels' actions were fraudulent or dishonest

182 The second prerequisite directs that in order for an agent of a trustee (in this case Kallan) to be liable for a breach of trust by a trustee (in this case HK Hotels), the conduct of the trustee must have been "fraudulent and dishonest". The following excerpt from *Air Canada*, at para. 58, is instructive:

> It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized. *Barnes v. Addy* clearly states that the stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions which must be examined... It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly.

183 Thus, for Kallan to be liable to Density for breach of trust by HK Hotels, Density must demonstrate that HK Hotels, as the alleged trustee, acted fraudulently and dishonestly in breaching a trust relationship with Density, and Density must demonstrate that the *Said v. Butt* principle ([1920] 3 K.B. 497 (Eng. K.B.)) does not apply with respect to Kallan's personal liability.

184 The *Said v. Butt* principle, which continues to be applied by Ontario courts stands for the proposition that a director or officer acting *bona fide* as such cannot induce his or her own corporation to breach a contract. To hold otherwise would render officers and directors personally liable for every breach of contract by a corporation.

185 This principle was recently applied by Perell J. in *Laurier Glass Ltd. v. Simplicity Computer Solutions Inc.* (2011), 80 B.L.R. (4th) 305 (Ont. S.C.J.). He confirmed at para. 33 that, "[a] claim for inducing breach of contract cannot proceed as against a corporate officer or director where a claim for breach of contract lies against the corporation." In this case, Density alleges breach of contract by HK Hotels. Both claims cannot coexist.

186 In order for an officer or director to rely on the *Said v. Butt* principle, the director must be acting *bona fide* in the best interests of the corporation and cannot have individually engaged in tortious or unlawful conduct that would lead to the director having a separate legal identity from the corporation.

187 Although conduct considered unlawful or tortious may have once been interpreted quite broadly, in the recent case of *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.), the Court of Appeal confirmed that the term "unlawful conduct", as it relates to intentional interference case, has "tightened" over the years. The case considered whether a trial judge had erred in concluding that "[in] intentional interference cases, "unlawful conduct" includes conduct that the defendant is "not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or understanding".

188 In observing that the Court of Appeal has tended towards a tighter definition of what constitutes unlawful conduct, Goudge J.A. noted, at paras. 32 and 33, that,

> [w]hat is clear from this jurisprudence is that, to constitute unlawful conduct for the purposes of the tort of intentional interference, the conduct must also be actionable. It must be wrong in law. Conduct that is merely not authorized by a convention or an understanding is not enough.
>
> [Emphasis added]

189 At para. 38, the court noted that "[i]n the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of [the intentional interference] tort."

190 It was clear when Kallan discovered that Sean Majerovic had been paying unauthorized project management fees to Density, that this was the end of any co-venture relationship. In response, Kallan promptly, on behalf of HK Hotels, attended a meeting with the Board to ascertain whether the Board would continue with the Hotel Project without the involvement of Density. Kallan took these steps to preserve HK Hotels' interests and reputation. In the highly competitive commercial world, Kallan's conduct was prudent and could not on any view of the facts be characterized as unlawful or wrong. Any understanding or convention which may have existed between the parties was brought to an abrupt end when the financial disclosure was finally made by Density.

191 There are no facts before me of fraud or dishonesty by HK Hotels in seeking to have Density's name removed from the Second LOI in the circumstances of this case. Kallan was taking steps on behalf of, and in the interests of, HK Hotels in an attempt to salvage a potential opportunity for the company. The actions by HK Hotels cannot be held to be fraudulent or dishonest. There was no independent tortuous or unlawful conduct by Kallan and he is entitled to rely upon the *Said v. Butt* principle.

192 For these reasons, I conclude that there is no genuine issue for trial whether Kallan is personally liable to Density for inducing breach of contract, or breaching fiduciary duties.

Conclusions

193 To determine whether Kallan may be personally liable, I must decide whether I can reach conclusions based upon the record before me without the necessity of a trial about what caused the break-down in the relationship between Density and HK Hotels.

194 I am satisfied based upon the record before me that there was never any discussion or agreement that Density would be paid management fees. The diverse and conflicting explanations given by Sean and Peter are to be given little or no weight as they are clearly contradicted by the documentary trail. There is no genuine issue requiring a trial about these findings.

195 Although the relationship between Peter Majer and Kallan may have been influenced as a result of the failed restaurant project in New York, I find, based upon the evidence before me, that it is clearly proved that the precipitating event causing a breakdown in the relationship between Density and HK Hotels was the discovery that Sean Majerovic had improperly caused payment to Density of unauthorized project management fees of some $199,000.00. There is no genuine issue requiring a trial about the cause of the rupture in the relationship between Density and HK Hotels.

196 Next, I must determine whether in the facts and circumstances there was any conduct by Kallan that could arguably create a fiduciary duty engaging potential personal liability owed by Kallan to Density, and whether the various arguments advanced should properly be determined without a trial, having regard to the full appreciation test outlined in *Combined Air (supra)*.

197 I conclude that the issues as to potential personal liability can and should be determined on this motion. The evidence as to the cause of the breakdown in the relationship is clear, and in fact overwhelming.

198 For the reasons that I have fully outlined, I conclude that there is no genuine issue for trial whether on the facts of this case, Kallan, as director of HK Hotels, personally owed or breached a fiduciary duty to Density.

199 Further, I conclude that there is no basis in fact or in law that the Second Letter of Intent can be characterized as a trust asset owned by Density and HK Hotels.

200 Finally, given the facts of this case, and the prerequisite elements of the test in law, there is no genuine issue for trial whether Kallan induced a breach of contract or breach of fiduciary duty owed by HK Hotels to Density.

Costs

201 I reserved my reasons on this motion, but heard the submissions on costs from both counsel before the outcome of the motion was known.

202 HK Hotels sought substantial indemnity costs including making a claim against Peter Majer personally due to the inaccuracies in his affidavit. Counsel then withdrew this request. In the alternative, Kallan sought partial indemnity costs in the amount of $70,306.12. Submissions were made that significant costs were incurred in locating and cross-examining out of province the three witnesses referred to in the affidavit of Peter Majer, adding to the costs incurred in this already complex one-day motion.

203 Density argued that there was no underpinning to justify an award of substantial indemnity costs, and sought partial indemnity costs in the amount of $35,000.00 to $40,000.00 inclusive, payable in the cause, if Density was successful in resisting the motion for summary judgment.

204 There is no basis to justify an award of substantial indemnity costs. Density did not allege dishonesty or fraud on the part of Kallan or HK Hotels that may warrant an award of substantial indemnity costs.

205 I have carefully reviewed the bill of costs prepared by HK Hotels and Kallan. In my view, the appropriate award of costs for a one day motion of significant complexity, involving examination of several witnesses is $52,000.00 inclusive of HST and disbursements. This amount shall be paid by Density to HK Hotels and Kallan forthwith.

Motion granted.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Burke v. Hudson's Bay Co. | 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, 268 O.A.C. 1, 84 C.C.P.B. 1, 60 E.T.R. (3d) 1, 406 N.R. 109, 193 A.C.W.S. (3d) 1332, J.E. 2010-1818, D.T.E. 2010T-674, [2010] 2 S.C.R. 273, [2010] S.J. No. 34, 324 D.L.R. (4th) 498, 2010 C.E.B. & P.G.R. 8408 (headnote only) | (S.C.C., Oct 7, 2010)

2006 SCC 28
Supreme Court of Canada

Buschau v. Rogers Communications Inc.

2006 CarswellBC 1530, 2006 CarswellBC 1531, 2006 SCC 28, [2004] S.C.C.A. No. 350, [2006] 1 S.C.R. 973, [2006] 8 W.W.R. 583, [2006] B.C.W.L.D. 4053, [2006] B.C.W.L.D. 4123, [2006] B.C.W.L.D. 4124, [2006] B.C.W.L.D. 4201, [2006] B.C.W.L.D. 4202, [2006] B.C.W.L.D. 4203, [2006] S.C.J. No. 28, 226 B.C.A.C. 25, 269 D.L.R. (4th) 1, 26 E.T.R. (3d) 1, 349 N.R. 324, 373 W.A.C. 25, 52 C.C.P.B. 161, 54 B.C.L.R. (4th) 1, J.E. 2006-1309

Rogers Communications Incorporated (Appellant) v. Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and National Trust Company (Respondents)

National Trust Company (Appellant) v. Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell,

Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and Rogers Communications Incorporated (Respondents)

McLachlin C.J.C., Bastarache, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: November 15, 2005
Judgment: June 22, 2006 *
Docket: 30462

Proceedings: reversing *Buschau v. Rogers Communications Inc.* (2004), 24 B.C.L.R. (4th) 85, 6 E.T.R. (3d) 236, [2004] 5 W.W.R. 10, 39 C.C.P.B. 247, 193 B.C.A.C. 258, 316 W.A.C. 258, 2004 BCCA 80, 2004 CarswellBC 325, 236 D.L.R. (4th) 18, C.E.B. & P.G.R. 8090 (B.C. C.A.); additional reasons at *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279, 9 E.T.R. (3d) 221, 27 B.C.L.R. (4th) 17, [2004] 7 W.W.R. 218, 239 D.L.R. (4th) 610, 40 C.C.P.B. 199, 197 B.C.A.C. 279, 2004 BCCA 282, 2004 CarswellBC 1095, C.E.B. & P.G.R. 8101 (B.C. C.A.); further additional reasons at *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279 at 287, [2005] 2 W.W.R. 67, 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, 40 C.C.P.B. 209, 197 B.C.A.C. 279 at 287, 2004 BCCA 369, 2004 CarswellBC 1450 (B.C. C.A.); reversing *Buschau v. Rogers Communications Inc.* (2003), 2003 BCSC 683, 2003 CarswellBC 1042, 35 C.C.P.B. 199, [2003] 7 W.W.R. 341, C.E.B. & P.G.R. 8499 (note), 13 B.C.L.R. (4th) 385 (B.C. S.C.); and reversing *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279, 9 E.T.R. (3d) 221, 27 B.C.L.R. (4th) 17, [2004] 7 W.W.R. 218, 239 D.L.R. (4th) 610, 40 C.C.P.B. 199, 197 B.C.A.C. 279, 2004 BCCA 282, 2004 CarswellBC 1095, C.E.B. & P.G.R. 8101 (B.C. C.A.); and affirming *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279 at 287, [2005] 2 W.W.R. 67, 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, 40 C.C.P.B. 209, 197 B.C.A.C. 279 at 287, 2004 BCCA 369, 2004 CarswellBC 1450 (B.C. C.A.)

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Jennifer J. Lynch, Joanne Lysyk for Appellant/Respondent, National Trust Co.
John N. Laxton, Q.C., Robert D. Gibbens for Respondents, Sandra Buschau et al.

Subject: Estates and Trusts; Corporate and Commercial; Civil Practice and Procedure

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

XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.b Successful party deprived of costs
XXIV.6.b.ii Grounds
XXIV.6.b.ii.B Nominal success

Estates and trusts

II Trusts
II.2 Express trust
II.2.g Termination
II.2.g.i General principles

Estates and trusts

II Trusts
II.2 Express trust
II.2.g Termination
II.2.g.ii Rule in Saunders v. Vautier

Pensions

I Private pension plans
I.1 Administration of pension plans
I.1.j Designation of beneficiaries
I.1.j.i General principles

Pensions

I Private pension plans
I.5 Practice in pension actions
I.5.a Jurisdiction

Pensions

I Private pension plans
I.5 Practice in pension actions
I.5.d Costs

Headnote

Estates and trusts --- Trusts — Express trust — Termination — Rule in Saunders v. Vautier

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier — Pension trust was not stand-alone instrument — Termination of plan in accordance with prevailing PBSA was condition precedent to distribution — Superintendent's power under s. 29(2)(a) of PBSA becomes almost duty when employees ask him to act — Superintendent could review all circumstances and decide whether facts warranted winding-up of part of merged plan that related to pension plan, which would have effect of terminating trust.

Estates and trusts --- Trusts — Express trust — Termination — General principles

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier — Pension trust was not stand-alone instrument — Termination of plan in accordance with prevailing PBSA was condition precedent to distribution — Superintendent's power under s. 29(2)(a) of PBSA becomes almost duty when employees ask him to act — Superintendent could review all circumstances and decide whether facts warranted winding-up of part of merged plan that related to pension plan, which would have effect of terminating trust.

Pensions --- Administration of pension plans — Designation of beneficiaries — General principles

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier.

Pensions --- Practice in pension actions — Jurisdiction

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier.

Pensions --- Practice in pension actions — Costs

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable —

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Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Nominal success

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Members were not required to pay R Inc.'s costs — R Inc. was ordered to pay trustee's costs — Order of Court of Appeal was set aside with exception of order as to costs.

Successions et fiducies --- Fiducies — Fiducie explicite — Cessation — Règle de Saunders v. Vautier

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier — Fiducie de retraite n'était pas un instrument distinct — Cessation du régime conformément à la LNPP était une condition préalable à la répartition — Pouvoir conféré au Surintendant par l'art. 29(2)a) LNPP devient presque une obligation lorsque les employés lui demandent d'agir — Surintendant peut examiner les circonstances et décider si les faits justifiaient la liquidation d'une partie du régime fusionné concernant le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Successions et fiducies --- Fiducies — Fiducie explicite — Cessation — Principes généraux

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi

accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier — Fiducie de retraite n'était pas un instrument distinct — Cessation du régime conformément à la LNPP était une condition préalable à la répartition — Pouvoir conféré au Surintendant par l'art. 29(2)a) LNPP devient presque une obligation lorsque les employés lui demandent d'agir — Surintendant peut examiner les circonstances et décider si les faits justifiaient la liquidation d'une partie du régime fusionné concernant le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Régimes de retraite --- Administration des régimes de retraite — Désignation des bénéficiaires — Principes généraux

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier.

Régimes de retraite --- Procédure dans le cadre d'actions relatives à des régimes de retraite — Compétence

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier.

Régimes de retraite --- Procédure dans le cadre d'actions relatives à des régimes de retraite — Frais

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation

Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Participants n'avaient pas à payer les dépens de R inc. — R inc. s'est vue ordonner de payer les dépens du fiduciaire — Ordonnance de la Cour d'appel a été annulée, sauf en ce qui concernait les dépens.

Procédure civile --- Frais — Effet de la réussite des procédures — Partie gagnante privée des frais — Motifs — Réussite symbolique

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Participants n'avaient pas à payer les dépens de R inc. — R inc. s'est vue ordonner de payer les dépens du fiduciaire — Ordonnance de la Cour d'appel a été annulée, sauf en ce qui concernait les dépens.

The pension plan was established in 1974 for the employees of P Ltd. The pension plan provided for defined benefits and was funded by the employer only. The pension plan stated that the company expected to continue the plan indefinitely but that in the event of termination, the surplus remaining in the trust fund was to be distributed among the remaining members. In 1980, P Ltd. was acquired by R Inc. The pension plan was closed to future employees in July 1984. In 1985, trustee refunded $968,285 to R Inc. upon request by R Inc. By the end of 1986, R Inc. had taken contribution holidays evaluated at $842,000. In 1992, R Inc. amended the pension plan to merge it retroactively with four other pension plans. Pension plan members initiated litigation against R Inc., requesting the return of the trust funds and a declaration that the funds belonged to them. The trial judge dismissed the claim on most issues and the members appealed. The Court of Appeal concluded that the merger of the plans was valid but did not affect the existence of the trust as a separate trust. The members were at liberty to institute proceedings to terminate the trust based on the rule in Saunders v. Vautier or on the Trust and Settlement Variation Act to the extent that either might be applicable. R Inc.'s withdrawal of substantial funds from the surplus had been properly repaid.

The plan members applied in 2001 for an order terminating the plan. Termination was ordered on the basis that the rule in Saunders v. Vautier was applicable and that s. 1(b) of the Trust and Settlement Variation Act provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were sui juris. By 2002 the trust had a surplus evaluated at $11 million. On appeal by R Inc., the part of the decision based on the Trust and Settlement Variation Act was set aside. The members were provided with an opportunity to show that all required consents had been obtained. The Court of Appeal found that the rule in Saunders v. Vautier could operate to terminate the trust. R Inc. and the trustee appealed.

Held: The appeal was allowed.

Per Deschamps J. (LeBel, Fish, Abella JJ. concurring): Neither the trust agreement nor the pension plan provided for the termination of the trust by the employees. The members consequently relied upon the rule in Saunders v. Vautier. That rule did not apply. First, pension plans are heavily regulated. To the extent that it provides a means

to reach the distribution stage, the Pension Benefits Standards Act, 1985 (PBSA) prevailed over the traditional rule in Saunders v. Vautier. Second, a family or testamentary trust was generally a stand-alone instrument. The trust agreement was expressly made a part of the plan and the plan was attached to that agreement. The trust could not be collapsed without regard to the plan itself. The two instruments were indissociable. Termination of the plan in accordance with the prevailing PBSA was a condition precedent to distribution. Third, employers establish plans because it is in their interest to do so and under normal circumstances they have the right not to have their management decisions disturbed. A blanket statement that the employer had no interest conflicted with the usual expectation of parties to a pension plan. Fourth, gift or legacy trusts were gratuitous and accelerating the date of the beneficiaries' entitlement had no broad social consequences. The capital of the pension trust fund could not be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

The impediments to applying the rule in Saunders v. Vautier were numerous. Termination was dealt with explicitly in the PBSA. The members could have asked the Superintendent to step in. The members could ask the Superintendent to partially terminate the merged plan insofar as it related to the pension plan. The Superintendent was in the best position to monitor the orderly termination of the part of the merged plan that related to the members. Most of the facts presented by the members to the courts could have been submitted to the Superintendent. The Superintendent's power under s. 29(2)(a) of the PBSA becomes almost a duty when employees ask him to act. The Superintendent's power must be exercised in conformity with the remedial purpose of the provisions of the PBSA. The Superintendent could review all the circumstances and decide whether the facts warranted a winding-up of the part of the merged plan that related to the pension plan, which would have the effect of terminating the trust.

R Inc.'s arguments had not prevailed. The members were not required to pay R Inc.'s costs. R Inc. was ordered to pay the trustee's costs. The order of the Court of Appeal was set aside with the exception of the order as to costs.

Per Bastarache J. (McLachlin C.J.C., Charron J. concurring): The PBSA is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the workforce. Section 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets. The Superintendent is given power to terminate pension plans in certain specified situations. There was no provision in the PBSA for plan beneficiaries to terminate a pension plan. There was no provision in the PBSA for any party to terminate the trust under which the pension fund contributions were held as security for the payment of the plan benefits prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2) but the Superintendent's power to terminate the plan is available only where the stipulated pre-conditions are met. None of the statutory grounds for termination of a pension plan were present. The pension plan was fully funded and there was no threat to the solvency of the plan or the security of the pension benefits. There was no issue that the merged plan was being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

In view of its very terms, there was no entitlement to an actuarial surplus while the plan was ongoing. The trust agreement and the plan formed an integrated whole. It was an error to infer that the rule in Saunders v. Vautier could in effect create a manner of realizing on the actuarial surplus in violation of the terms of the plan. Absolute entitlement to the surplus would only occur once the surplus had become real. The rule in Saunders v. Vautier could not be invoked since the rule required that the beneficiaries seeking early termination possess the sum total of vested interests in the trust corpus. The pension plan clearly stated that it was the employer who might amend and terminate the plan and that it was the employer's expectation that the plan and trust would continue indefinitely. There could be no reasonable expectation on the part of R Inc. or the members that the trust could be terminated by the members, over R Inc.'s objections, in order that the members might obtain the surplus. The application of the rule in Saunders v. Vautier would contradict the reasonable contractual expectations of the parties. The terms

of the contract at the root of the trust could not be circumvented and the legislative framework could not be made irrelevant by applying the rule in Saunders v. Vautier. The introduction of the Saunders v. Vautier principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan.

The rule in Saunders v. Vautier requires the consent of all parties who have an interest, or who own rights of enjoyment, in trust property. Section 22 of the PBSA requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on that date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 per cent of the joint benefit. The inclusion of survivor benefits was a policy choice that must be honoured. These statutory rights could not be overwritten by the consent of the present plan members and other beneficiaries or by the courts. The current spouses and common law partners who have present contingent interest were sui juris. While the current spouses and common law partners of the plan members were able to consent to termination, future spouses and common law partners who were currently unascertainable could not give consent and a court would be reluctant to give consent on their behalf.

The conclusion of the Court of Appeal on the issue of good faith was premised on its earlier decision that the amendment would deprive the beneficiaries of the trust of their right to terminate under the rule in Saunders v. Vautier. R Inc.'s powers of amendment were not forfeited or estopped because of the closure of the plan. Any termination of the plan and amendments to it had to be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the PBSA. What was permitted and what was abusive would have to be determined in future proceedings according to the standard set in s. 8(10)(b) of the PBSA.

En 1974, un régime de retraite a été établi au bénéfice des employés de P ltée. Il était à prestations déterminées et n'était financé que par l'employeur. Il énonçait que la compagnie s'attendait à ce qu'il subsiste indéfiniment mais, en cas de cessation, l'actif restant dans la fiducie serait partagé entre les participants restants. En 1980, R inc. a acquis P ltée. En 1984, le régime de retraite a été fermé aux employés futurs. En 1985, le fiduciaire a remboursé 968 285 $ à R inc. à la demande de celle-ci. Vers la fin de 1986, R inc. s'était accordée des congés de contribution évalués à 842 000 $. En 1992, R inc. a modifié le régime de retraite afin de le fusionner rétroactivement avec quatre autres régimes de retraite. Les participants au régime de retraite ont entamé des procédures judiciaires contre R inc., demandant le remboursement des fonds et qu'il soit déclaré que les fonds leur appartenaient. Le premier juge a rejeté la demande à presque tous les égards; les participants ont interjeté appel. La Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait pas d'effet sur l'existence de la fiducie comme entité distincte. Il était loisible aux participants d'entamer des procédures judiciaires pour qu'il soit mis fin à la fiducie, en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre était applicable. R inc. avait remboursé à juste titre les fonds considérables qu'elle avait retirés de l'actif restant.

En 2001, les participants au régime ont demandé une ordonnance mettant au régime. La cessation a été ordonnée au motif que la règle de Saunders v. Vautier s'appliquait et que l'art. 1(b) de la Trust and Settlement Variation Act donnait compétence à la cour de consentir au nom des bénéficiaires juridiquement autonomes mais manquants. En 2002, l'excédent d'actifs de la fiducie était évalué à 11 millions de dollars. R inc. a interjeté appel, et la portion du jugement se fondant sur la Trust and Settlement Variation Act a été annulée. Les participants avaient eu l'opportunité de démontrer que tous les consentements nécessaires avaient été obtenus. La Cour d'appel a estimé que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie. R inc. et le fiduciaire ont interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (LeBel, Fish, Abella, JJ., souscrivant à son opinion): Ni la convention de fiducie ni le régime de retraite ne prévoyaient que les employés pouvaient mettre fin à la fiducie. Les participants se sont donc fondés sur la règle de Saunders v. Vautier. Cependant, cette règle ne s'appliquait pas. Premièrement, les régimes de retraite sont fortement réglementés. Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la Loi de 1985 sur les normes de prestation de pension (LNPP) l'emportait sur la règle traditionnelle de Saunders v. Vautier. Deuxièmement, une fiducie familiale ou testamentaire constituait généralement un instrument distinct. La convention de fiducie a été expressément intégrée au régime et ce dernier était joint à cette convention. On ne pouvait mettre fin à la fiducie sans tenir compte du régime lui-même. Ces deux instruments étaient indissociables. La cessation du régime conformément à la LPNN prédominante était une condition préalable à la répartition. Troisièmement, les employeurs établissent des régimes de retraite parce qu'il est dans leur intérêt de le faire; dans des circonstances normales, ils ont droit à ce que leurs décisions administratives soient respectées. Une déclaration générale selon laquelle l'employeur n'avait aucun intérêt allait à l'encontre des attentes normales des parties à un régime de retraite. Quatrièmement, les donations ou les legs en fiducie sont des libéralités, et le fait de rapprocher la date à laquelle les bénéficiaires peuvent exercer leur droit n'a aucune conséquence sociale générale. Le capital de la fidudie de retraite ne pouvait être réparti sans contrecarrer l'objectif social consistant à assurer la sécurité financière des employés retraités en leur permettant de recevoir des versements périodiques jusqu'à la fin de leurs jours.

Plusieurs motifs empêchaient l'application de la règle de Saunders v. Vautier. La LPNN traitait explicitement de la cessation. Les participants auraient pu demander au Surintendant d'agir. Ils auraient pu lui demander de mettre fin au régime fusionné dans la mesure où il avait trait au régime. Le Surintendant était le mieux placé pour assurer la cessation ordonnée de la partie du régime fusionné relative aux participants. La plupart des faits mis en preuve par les participants devant les tribunaux auraient pu être soumis au Surintendant. Le pouvoir conféré à ce dernier par l'art. 29(2)a) LPNN devient presque une obligation lorsque les employés lui demandent d'agir. Le Surintendant doit exercer ce pouvoir conformément à l'objet réparateur des dispositions de la LPNN. Il peut examiner l'ensemble des circonstances et décider si les faits justifiaient de mettre fin à la partie du régime fusionné qui concernait le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Les arguments de R inc. n'ont pas été retenus. Les participants n'étaient pas tenus de payer les dépens de R inc. Cette dernière s'est vue ordonner de payer les dépens du fiduciaire. L'ordonnance de la Cour d'appel était annulée, sauf en ce qui concernait les dépens.

Bastarache, J. (McLachlin, J.C.C., Charron, J., souscrivant à son opinion): La LPNN constitue un régime législatif complet, conçu pour favoriser la réalisation de l'objectif de politique générale d'amélioration de la sécurité financière des travailleurs au moment où ils quittent les rangs de la population active. L'article 29 et le règlement qui s'y rapporte contiennent des dispositions détaillées qui régissent la cessation des régimes de retraite et la répartition de leurs actifs. Le Surintendant se voit conférer le pouvoir de mettre fin aux régimes de retraite dans certains cas précis. La LPNN ne contient aucune disposition permettant aux participants au régime de mettre fin à ce dernier. Elle ne contient aucune disposition permettant à quiconque de mettre fin à la fiducie en vertu de laquelle les cotisations à la caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires ne peuvent demander au Surintendant d'exercer ses pouvoirs discrétionnaires pour mettre fin au régime que lorsque les conditions préalables stipulées sont remplies. Aucun des motifs prévus par la loi pour mettre fin au régime n'existait en l'espèce. Le régime de retraite était entièrement capitalisé et la solvabilité du régime et la sécurité des prestations de retraite ne sont pas compromises. Personne ne contestait que le régime fusionné était géré d'une manière contraire aux bonnes pratiques du commerce ou non conforme aux exigences de la mesure législative.

Compte tenu des modalités mêmes du régime, il n'y avait aucun droit à un surplus actuariel pendant que le régime était en vigueur. La convention de fiducie et le régime constituait un tout. Il était erroné d'inférer que la règle de Saunders v. Vautier pouvait, dans les faits, créer une façon de réaliser le surplus actuariel contrairement aux

modalités du régime. Un droit absolu au surplus ne pourrait exister qu'une fois le surplus devenu réel. On ne pouvait invoquer la règle de Saunders v. Vautier, puisque celle-ci exigeait que les bénéficiaires sollicitant la cessation anticipée possèdent tous les intérêts dévolus dans le capital de la fiducie. Le régime de retraite énonçait clairement que c'était l'employeur qui pouvait modifier le régime et y mettre fin et que c'était l'employeur qui s'attendait à ce que le régime subsiste indéfiniment. Ni R inc. ni les participants ne pouvaient raisonnablement s'attendre à ce que, en dépit des objections de R inc., les participants puissent mettre fin à la fiducie afin de pouvoir toucher les surplus. L'application de la règle de Saunders v. Vautier irait à l'encontre des attentes contractuelles raisonnables des parties. On ne pouvait se soustraire aux termes du contrat à l'origine de la fiducie et on ne pouvait appliquer la règle de Saunders v. Vautier afin de faire perdre au cadre législatif toute sa pertinence. L'introduction du principe de Saunders v. Vautier dans le système de régimes de retraite privés, sans réserve ou restriction, constituerait une atteinte importante au droit de l'employeur de décider de son propre gré d'offrir ou de maintenir un régime de retraite.

La règle de Saunders v. Vautier requiert le consentement de toutes les parties qui ont un intérêt dans les biens en fiducie ou qui possèdent des droits de jouissance sur ceux-ci. L'article 22 LPNN exige que, en l'absence d'une renonciation écrite dans la forme prescrite, toute prestation de retraite versée après le 1er janvier 1987 à un participant actuel ou ancien, qui avait un époux ou un conjoint de fait à la date du premier versement, doit être une prestation réversible, ce qui permet à l'époux ou au conjoint survivant de recevoir une prestation équivalant à au moins 60 pour 100 de la prestation réversible. Il fallait respecter ce choix de politique générale que constituait l'inclusion des prestations de survivant. Ces droits prévus par la loi ne pouvaient être écartés avec le consentement des participants actuels au régime et des autres participants ou par les tribunaux. Les époux et conjoints de fait actuel qui avaient un intérêt éventuel étaient juridiquement autonomes. Même si les époux et conjoints de fait actuels des participants au régime pouvaient consentir à la cessation du régime, les futurs époux et conjoints de fait, qui étaient actuellement indéterminés, ne pouvaient donner leur consentement et un tribunal serait hésitant à consentir en leur nom.

La conclusion de la Cour d'appel relativement à la question de la bonne foi reposait sur sa décision antérieure selon laquelle une modification au régime retirerait aux bénéficiaires de la fiducie leur droit de mettre fin au régime en appliquant la règle de Saunders v. Vautier. R inc. n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime devaient être examinées en fonction de ses modalités et des dispositions applicables de la LNPP. La question de savoir ce qui était permis et ce qui était abusif devrait donc être tranchée, dans toute instance future, en fonction de la norme énoncée à l'al. 8(10)b) LNPP.

Annotation

This decision can perhaps best be characterized as a "good news, not so good news" development in the pension law area. The good news is that the Court held unanimously that the ancient trust law rule in *Saunders v. Vautier* should not apply to permit the members of a trusteed pension plan to terminate that plan. The Court noted that its previous decision in *Schmidt v. Air Products of Canada Ltd.* did not make pension plans subject to ALL trust law principles, but only to APPLICABLE trust law principles, and held that where Parliament had legislated rules in regard to the operation of pension plans, the legislation could be taken to have occupied the field to the exclusion of the common law. This development is to be welcomed, and represents, one hopes, the beginnings of a judicial retreat from the rote application in the pension area of trust rules that were designed for the most part to apply to arrangements very different from modern-day pension plans.

The not so good news is that the majority opinion contains a number of curious passages which could spell trouble down the line. For one, Mme Justice Deschamps advanced the hypothesis that the rule in *Saunders v. Vautier* could still be applied in the case of certain corporate executive pension plans, although her statement on this point is almost certainly obiter. For another, and more ominously, she mused about the possibility that in some cases contribution

holidays could be disguised plan terminations, although she does not elaborate. Again, this passage is probably best characterized as obiter. Finally, in holding that jurisdiction in this case lies with the Superintendent of Financial Institutions (i.e. OSFI), she did not draw any distinction between regulatory power to terminate a pension plan and regulatory power to wind up a pension plan. It must be admitted in this latter regard that even for most pension practitioners that distinction is a subtle one, at best; it remains to be seen how OSFI will define the scope of its own powers in this area.

Overall, and with respect, Mr. Justice Bastarache's concurring opinion seems somewhat more cohesive and more consistent with established understandings on many points as compared to the majority opinion. Only time will tell whether the law will develop more in the direction of the majority opinion or the direction of the concurring opinion in the coming years.

One other observation about the *Buschau* decision might also be worth making. That is, this is the third pension decision from the Supreme Court in the past year, after the decisions in *Boucher c. Stelco Inc.*, 48 C.C.P.B. 167, 2005 CarswellQue 9790/9791 and *Bisaillon c. Concordia University*, 51 C.C.P.B. 163, 2006 CarswellQue 3689/3690, which has focused as much on jurisdictional issues as on substantive issues. The hope is that the Supreme Court has now provided sufficient guidance that henceforth, parties will be more likely to commence their proceedings in the proper forum right from the start.

Gary Nachshen

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s. 8(3) — referred to

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POURVOI de l'employeur et du fiduciaire à l'encontre des arrêts publiés à *Buschau v. Rogers Communications Inc.* (2004), 24 B.C.L.R. (4th) 85, 6 E.T.R. (3d) 236, [2004] 5 W.W.R. 10, 39 C.C.P.B. 247, 193 B.C.A.C. 258, 316 W.A.C. 258, 2004 BCCA 80, 2004 CarswellBC 325, 236 D.L.R. (4th) 18, C.E.B. & P.G.R. 8090 (B.C. C.A.), *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279, 9 E.T.R. (3d) 221, 27 B.C.L.R. (4th) 17, [2004] 7 W.W.R. 218, 239 D.L.R. (4th) 610, 40 C.C.P.B. 199, 197 B.C.A.C. 279, 2004 BCCA 282, 2004 CarswellBC 1095, C.E.B. & P.G.R. 8101 (B.C. C.A.), et à *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279 at 287, [2005] 2 W.W.R. 67, 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, 40 C.C.P.B. 209, 197 B.C.A.C. 279 at 287, 2004 BCCA 369, 2004 CarswellBC 1450 (B.C. C.A.), qui ont accueilli le pourvoi à l'encontre de la demande visant à ce qu'il soit mis fin à la fiducie.

***Deschamps J.*:**

1 The 112 respondents are pension plan members who have been litigating for over 10 years to gain access to their pension trust fund. This case is about whether and how the fund can be distributed to them.

2 By 2002, the plan for which the trust was created, the Premier pension plan ("Plan"), had a surplus evaluated at $11 million. The Supreme Court and the Court of Appeal for British Columbia accepted the members' arguments and found that the trust used to fund the Plan ("Trust" or "Premier Trust") could be collapsed under the common law rule in *Saunders v. Vautier* (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.). According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. For the reasons that follow, I am of the view that the common law rule does not apply to the Trust in the case at bar. The context and the purpose of pension plans do not generally lend themselves well to the common law rule. Moreover, a pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. Any recourse available to the members here is subject to the provisions of a federal statute, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."). In my view, the Superintendent of Financial Institutions ("Superintendent"), who

is responsible for the application of the P.B.S.A., is in a position to resolve the impasse that the members would face if the interpretation suggested by my colleague Bastarache J. were adopted.

3 In order to explain the particular context in which the termination of the Trust is sought, a few facts will have to be elicited to situate the dispute between the members and their former employer. Then, to explain why the common law rule does not apply, it will be useful to briefly review pension plans in general and the Plan itself. Finally, I will comment on the relevant provisions of the P.B.S.A. that would allow the members to make a proper request to the Superintendent.

I. Facts

4 The Plan was established in 1974 for the employees of Premier Communication Ltd. It provides for defined benefits and is funded by the employer only. It states that the company expects to continue the Plan indefinitely, but that in the event of termination, the surplus remaining in the trust fund is to be distributed amongst the remaining members:

> **General Rule Seven — Amendment or Termination of Plan**
>
> . . . . .
>
> 2. While the Company expects to continue the Plan indefinitely, it must and does reserve the right to terminate the Plan, if, at any time in the future, conditions should arise that indicate the necessity of such action.
>
> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

5 In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used for improvements to improve benefits for members. On April 12, 1984, the actuary actually recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:

> It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).

6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:

> You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc).
>
> We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.

7 The members initiated the litigation against Rogers in 1995. They requested the return of the trust funds paid to Rogers in 1985 and a declaration that the funds belonged to them. The trial judge dismissed the claim on most of the issues (*Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125 (B.C. S.C.)). The members appealed. The Court of Appeal [2001 CarswellBC 40 (B.C. C.A.)] found that trust law imports its own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent and in view of Rogers' concession that the merger was not complete as regards the Plan, members of the Plan retained rights that were distinct from those of members of the other plans that had been merged with it in the RCI Plan. The Court of Appeal concluded that the merger of the Plan with the RCI Plan was valid but did not affect the existence of the Trust as a separate trust. The members were also at liberty to institute proceedings to terminate the Trust based on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent that either may be applicable. The Court of Appeal held that the employer's withdrawal of substantial funds from the surplus in 1985, which was admitted to have been in breach of trust, had been properly repaid to the trustee. Thus, the Plan's members retained the right to distribution of the surplus upon termination (*Buschau v. Rogers Cablesystems Inc.*, 83 B.C.L.R. (3d) 261 (B.C. C.A.) ("*Buschau* #1"), at paras. 63 to 68). This Court denied leave to appeal that decision, [2001] 2 S.C.R. vii (note) (S.C.C.).

8 In 2001, the members applied to the Supreme Court of British Columbia for an order terminating the Plan. Loo J. ordered termination on the basis that the rule in *Saunders v. Vautier* was applicable and that s. 1(*b*) of the *Trust and Settlement Variation Act* provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were *sui juris* (*Buschau v. Rogers Communications Inc.*, 100 B.C.L.R. (3d) 327, 2002 BCSC 624 (B.C. S.C.)). Rogers appealed.

9 The Court of Appeal found that the members were at liberty to invoke the rule in *Saunders v. Vautier* provided that the consents of all members and beneficiaries had been obtained. It set aside a part of the chambers judge's decision based on the *Trust and Settlement Variation Act*, finding that a court did not have the power to consent on behalf of contingent *sui juris* beneficiaries. However, it provided the members with an opportunity to show that all the required consents had been obtained (*Buschau v. Rogers Communications Inc.*, 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (B.C. C.A.) ("*Buschau* #2")). After receiving additional evidence and representation, the Court of Appeal found that the rule in *Saunders v. Vautier* could operate to terminate the trust. It recognized that questions could arise concerning the "mechanics" of the termination, but it was of the opinion that the trustee would have to satisfy itself that "[all] the conditions have been met and that all statutory requirements — including the payment of applicable taxes ëdash; have been complied with" before distributing the trust assets (*Buschau v. Rogers Communications Inc.*, 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (B.C. C.A.) ("*Buschau* #3"), at para. 17). Rogers and the trustee appealed to this Court.

10 Rogers submits that the rule in *Saunders v. Vautier* does not apply. National Trust does not take issue with the Court of Appeal's order inasmuch as it determines the rights of Rogers or of the members. However, the trustee claims that the order places it in an untenable position by devolving upon it the authority and legal responsibility to give effect to and administer the termination of the Premier Trust, although this authority is not provided for by the terms of the Trust or by statute. The members maintain that the rule in *Saunders v. Vautier* applies but argue, in the alternative, that Rogers should terminate the Plan pursuant to its fiduciary duty under the P.B.S.A. At the end of the hearing before this Court, the parties were asked to provide their views on the application of the P.B.S.A. to the termination of a plan by the Superintendent. Rogers takes the position that the Superintendent does not have the right to terminate the Plan because his role is limited to solvency issues. The members submit that the Superintendent has a discretionary power and that, as a result, they do not have a clear recourse. In their view, the rule in *Saunders v. Vautier* is not ousted by the P.B.S.A.

11 It is clear from the history of the litigation that some of the issues are now *res judicata*. One of them is that the merger of the Plan with the RCI Plan did not affect the Trust. As the Court of Appeal noted at the time, this peculiar situation may present some conceptual difficulties (*Buschau* #1, at para. 66). Nonetheless, these facts must be interpreted with the help of the general principles of pension law. For this reason, it will be useful to review some background information concerning pension plans in general and the Plan in particular.

II. Pension Plans in General

12 Pension plans have a complex history and constitute a response to a multitude of needs. As R. L. Deaton puts it:

> ...[employee] benefits [initially] served multiple purposes, including attracting a labour supply and reducing turnover, serving as an investment in human capital by improving morale, increasing productivity and efficiency by rationalizing the human element in the work process, promoting loyalty to the firm, preventing or forestalling unionization, preventing government intervention with respect to compulsory social insurance, maximizing the tax position of certain benefits by increasing non-taxable compensation to employees, minimizing the cost per unit of benefit through group arrangements, thereby compensating for imperfect individual knowledge of insurance markets, and creating a favourable corporate public relations image.
>
> (*The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at pp. 119-20)

He adds that in recent years many sophisticated employers have adopted a compensation approach based on the "total value of labour remuneration, wages and fringes having become interchangeable costs" (p. 122). Thus, what some may still view as a gratuitous reward for employees remains a powerful long-term human resources management tool as well as an undeniable benefit for aging employees. Employees rightly see their pension benefits as part of their overall compensation. How important pension benefits are to employees, and how sensitive employees are about such benefits, is even clearer in the present context of corporate mergers and acquisitions.

13 Pension benefits also serve broader social goals, which were recognized by the Court of Appeal (*Buschau* #2, at para. 47), citing approvingly E. E. Gillese (now a justice of the Ontario Court of Appeal), "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 232-34. Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support. In recognition of the social value of such an investment, pension contributions receive special tax treatment. The social component of private pension plans plays a crucial role in an era in which public pension programs have not yet been reformed to ensure adequate funding (see Deaton, at pp. 136-37, for an outline of the increase in contributions that would be required to conform to international standards). Courts do not make social policy, but the social role of pension plans might prove relevant when it comes time to decide whether the rule in *Saunders v. Vautier* can be employed to terminate a pension trust.

14 In Canada, defined benefit plans are usually funded in one of two ways: the funds are either held by an insurance company or held in trust (D. Rienzo, "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14; G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *Meredith Memorial Lectures 1988, New Developments in Employment Law* (1989), 59, at p. 64). In an insured plan, the insurance company receives an agreed payment and, bearing the risk of a shortfall, undertakes to pay the pension benefits to the members. When a plan is funded through a trust, the employer contracts with a trust company. The trust company holds and invests the pension contributions, subject to instructions under the trust agreement. The contributions are generally adjusted following an evaluation by an actuary who determines the level of funding needed to meet the solvency requirement under the applicable legislation. Here, the Plan is and always has been funded through a trust, so the discussion can be limited to trust-related issues.

15 A defined benefit plan can fall into deficit or accumulate a surplus. Pension underfunding is a cause for concern. Almost 70 percent of major corporate pension plans were in deficit positions in the late 1970s. In the early 1980s, however, the situation reversed. Surpluses were generated by high levels of investment earnings coupled with lower wage increases and widespread layoffs, while employer contributions were left in the funds as employees forfeited their future pension rights: Deaton, at pp. 133-34, and Nachshen, at pp. 66-67. The situation reverted to one of deficits in the late 1990s. The magnitude of the underfunding problem has only recently started to emerge in legal commentaries ("Pension Underfunding Still Widespread, Yet...", *Business and Legal Reports*, October 1, 2003 (online)). However, a surplus or deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as

an ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding while preventing the unnecessary accumulation of surpluses. Although the existence of deficits or surpluses is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations.

16 Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), the Court, dealing with issues relating to the distribution of a surplus, held that "when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust" (p. 639). The Court also stated that "[w]hen a pension fund is impressed with a trust, that trust is subject to all *applicable* trust law principles" (p. 643 (emphasis added)). It is thus necessary to determine which trust law principles *are applicable* before considering how they apply.

17 Before termination of a plan, a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at para. 48) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 39).

18 Pension plans are heavily regulated. At this juncture, it is worth looking at the legislative scheme applicable to the issue.

III. *The Pension Benefits Standards Act, 1985*

19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the economic and social importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the P.B.S.A., was initially enacted in 1986 (S.C. 1986, c. 40). Under it, an important role of control and supervision is assigned to the Superintendent (see A. N. Kaplan, *Pension Law* (2006) for analysis on the analogous role of the Superintendent under the Ontario legislation). The Superintendent administers the P.B.S.A., collects information and conducts studies concerning pension plans and their operation (s. 5). Strict investment and solvency standards are imposed on plan administrators (s. 9(1) and *Pension Benefits and Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the P.B.S.A. (ss. 7.4 and 12). A plan administrator also acts as a trustee for the employer, the members of the plan, and any persons entitled to pension benefits. The Superintendent can issue a direction of compliance if he is of the view that an administrator or an employer is pursuing a course of conduct that is contrary to sound financial practices, or that a pension plan is not being administered in accordance with the P.B.S.A. (s. 11(1) and (2)). If the Superintendent's direction is not complied with, the pension plan's registration may be revoked (s. 11.1). The Superintendent also plays a key role at the termination and distribution stage (ss. 9.2 and 29, and rr. 16 and 24). For example, his consent must be obtained before a surplus can be distributed (r. 16(2)(*d*)). Guidelines and instruction guides are published by the Superintendent to assist in the administration and termination of plans and trusts. Specific attention is paid to the rights of beneficiaries upon a request for distribution of a surplus. The *Guidelines to Administrators for Plan Terminations* make it clear that a delay in winding up will not be accepted simply because the administrator prefers to manage the funds.

20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities vis-à-vis beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

IV. The Rule in *Saunders v. Vautier*

21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

According to D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

22 The members argue that this rule allows them to terminate the Trust fund even though the employer, upon agreeing to the Trust, stated that only he could terminate it. The terms of the Plan and its Trust fund are the key to the analysis. I will now turn to them.

V. The Plan and its Trust Fund

23 The Plan, as stated in 1974, provided for the assets to be held in accordance with the terms of a Trust agreement. A committee known as the Retirement Committee was appointed by the company to administer the Plan. All employees hired after January 1, 1974 were required to become members of the Plan, while the other employees were eligible to join it under certain conditions (General Rule Two). The benefits were not to exceed the maximum permitted under the prevailing legislation and were payable upon retirement (the normal retirement age was 65 years). Although entitled to make additional contributions, employees were not required to contribute to the regular funding of the Plan (Special Rule Four (1)). The employer's contribution was calculated by the actuary appointed under the Plan (General Rule Four (2)). Benefits were to be paid to the member for the remainder of his or her life and then to the member's beneficiary for any remaining portion of a "guaranteed period". A lump sum could be paid, but only to a member, if the benefit was less than $10 per month, and even so this was at the Retirement Committee's discretion. The committee could decide all matters in respect to the operation, administration and interpretation of the provisions of the Plan (General Rule Six (12)). The company had the right to amend the Plan provided that the amendment did not affect rights acquired or benefits earned as at the date of the amendment. Upon termination, benefits were to be paid as provided for in the Plan, and the balance of assets remaining in the trust fund, after all liabilities had been satisfied, were to be distributed by the Committee among the remaining members on the basis of s. 12 of the former *Pension Benefits Standards Act* (General Rule Seven).

24 The Trust agreement was entered into for the specific purpose of creating a Trust fund for the Plan. The fund was to be held and administered for the benefit of employees and of beneficiaries under the Plan. The trustee was to follow directions given by the company. The company also had the right to terminate the Trust agreement (art. V(2)).

25 Rogers purported to amend the Plan to give itself the right to the surplus in 1992, but the Court of Appeal found (*Buschau* #1, at para. 59) that the amendments had not affected the members' rights; its judgment in that case is now binding on the parties.

26 Thus, neither the Trust agreement nor the Plan provides for termination of the Trust by employees. The members consequently rely on the rule in *Saunders v. Vautier*. Does it apply? Like my colleague Bastarache J., I conclude that it does not. My reasons are slightly different, however.

VI. Non-Application of the Rule in *Saunders v. Vautier*

27 There are many reasons why the rule is not easily incorporated into the context of employment pension plans.

28 First, pension plans are heavily regulated. The P.B.S.A. regulates the termination of a plan and the distribution of the fund and the trust assets. I accept the following comment of the Court of Appeal (*Buschau* #2, at para. 47):

> It must be acknowledged that the application of the rule in *Saunders v. Vautier* to pension trusts does involve different and more complicated factors, financial and legal, than an ordinary legacy or gift in trust. As already noted, pension trusts are part of the complex of rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

However, the Court of Appeal's order (*Buschau* #3) defies the application of the P.B.S.A. because it allows for the operation of the rule in *Saunders v. Vautier* without regard to the obligations to report to the Superintendent and to provide for the payment of pension benefits before distribution of the trust fund. The P.B.S.A. deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that it provides a means to reach the distribution stage, the P.B.S.A. prevails over the traditional rule in *Saunders v. Vautier*.

29 Second, a family or testamentary trust is generally a stand-alone instrument. It does not usually depend on any other instrument for its operation. No indirect effect results from the application of the rule in *Saunders v. Vautier* in such cases. In contrast, a pension trust serves only as a vehicle for holding and managing the funds required by the pension plan. In the instant case, the Trust agreement is expressly "made a part of the Plan" (art. I(1)) and the Plan is attached to that agreement (preamble to the Trust agreement). The Trust agreement is therefore dependent on the Plan for which it was created. The Premier Trust cannot be collapsed without regard to the Plan itself. The two instruments are therefore indissociable. This particular situation was not dealt with in *Schmidt*, which focussed on the distribution of trust assets, not the termination of a trust agreement that had been expressly made part of a Plan. In the case at bar, despite the link between the Plan and the Trust agreement, the judgment of the Court of Appeal purports to authorize the members to resort to the rule in *Saunders v. Vautier*, but does not provide for termination of the Plan. And yet, termination of the Plan in accordance with the prevailing P.B.S.A. is a condition precedent to distribution. This awkward juridical status illustrates why the common law rule is not an easy fit in the pension law context.

30 Third, employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.

31 Fourth, gift or legacy trusts are gratuitous, and accelerating the date of the beneficiaries' entitlement has no broad social consequences. Pension trusts funds, however, are no longer generally viewed as being gratuitous: either employees contribute directly or their entitlement is regarded as remuneration deferred until the date of their retirement. The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

32 Thus, this case amply demonstrates the difficulties associated with applying the rule in *Saunders v. Vautier* to a pension trust. The Court of Appeal issued an order stating that the members were at liberty to invoke the rule in *Saunders v. Vautier*. All the reporting and approval mechanisms that must precede termination by virtue of the P.B.S.A. were disregarded. They were treated as issues relating merely to "mechanics" (*Buschau* #3, at para. 17). According to the Court of Appeal, the Premier Trust may be collapsed without regard to its purpose of providing a means to defer income. No order was made to provide for annuities as required by the P.B.S.A. Moreover, while the Court of Appeal held that the

Premier Trust may be terminated pursuant to the rule in *Saunders v. Vautier*, no corresponding provision was made for terminating the trustee's obligations to the members under the merged RCI Plan.

33 I therefore conclude that the impediments to applying the rule in *Saunders v. Vautier* are numerous. The rule is not easily applicable to pension trusts and not even the length of time elapsed since the beginning of the proceedings can allow the members to bend the rule to fit it to their case. I do not exclude the possibility that the common law rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general the fit is wrong. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the P.B.S.A. provides mechanisms that protect members from inappropriate conduct by plan administrators. Since my colleague Bastarache J. does not share my opinion on this point, I feel that I should elaborate on it.

VII. Members' Recourse

34 I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers' right to terminate is still common. A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. However, they are not left without recourse should the employer infringe the P.B.S.A. or their plan. They can alert the Superintendent and trigger action if and when required.

35 The P.B.S.A. is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the P.B.S.A. When asked to submit representations on the remedies afforded by the P.B.S.A., the members took the position that the remedy afforded by the statute could not cover all their claims. They also stated that the Superintendent could have intervened on his own.

36 This answer is not satisfactory. The members wanted the Trust fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*. As mentioned above, however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum. Moreover, the members' position is not compatible with the P.B.S.A. and it puts them at risk of attracting undesirable tax consequences (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11) and (13); *Income Tax Regulations*, C.R.C. 1978, c. 945, ss. 8501(1) and 8502). Also, the Superintendent can hardly be expected to be familiar with details of the management of a particular pension plan. The members could have asked him to step in.

37 A clear illustration of the Superintendent's potential role can be found in the facts that gave rise to the members' original action. In 1985, the trustee, at Rogers' request, transferred close to $1 million to Rogers out of the Plan's Trust fund. Rogers eventually acknowledged that the transfer was improper and reimbursed the amount in the course of that initial proceeding. However, the members could have asked the Superintendent to exercise his powers under the P.B.S.A.

38 Under s. 8(3) of the P.B.S.A., plan members can object to an administrator's conduct if it is in breach of its fiduciary duty to them. Also, under s. 8(10), an employer who is an administrator is forbidden to put itself in a material conflict of interest. The Superintendent could have directed Rogers to return the money to the Trust (s. 29(11) and s. 11(1) of the P.B.S.A.).

39 Here, the members claim to be entitled to distribution of the surplus. For them to be entitled to distribution, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the Superintendent could order a distribution if he were faced with circumstances falling within the parameters of the P.B.S.A.

40 Is that the case? I mentioned earlier that clauses allowing employers to control terminations are common. However, the traditional pension plan analysis does not apply in the instant case. Rogers conceded that the 1992 amendments entitling it to any surplus on termination were "invalid as against the [members]" (*Buschau* #1, at para. 38). The Court of Appeal found (*Buschau* #1, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau* #1 is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau* #1 limit Rogers' rights to use it.

41 One circumstance that could justify delaying the termination of the Plan (as incompletely merged with the RCI Plan) and the incidental distribution of the Premier Trust fund would be if Rogers had a right to amend the Plan to open it to new members. However, the possibility of reopening the Plan is problematic and has been commented on by the courts below.

42 In the second action, the chambers judge interpreted the Court of Appeal's conclusion in *Buschau* #1 concerning the distinct right of the Plan members to the surplus as preventing Rogers from using its power to amend the Plan to reopen it to new members. Dealing with Rogers' argument that the rule in *Saunders v. Vautier* could not apply because it had the right to amend, the chambers judge found, in her 2002 reasons, that Rogers could not use its amending power to do what it could not do through a merger (at para. 29):

> The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to re-opening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

43 The Court of Appeal left this finding undisturbed (*Buschau* #2, at para. 61):

> The particular circumstances of this case make it impossible in my view that RCI could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time RCI gave any thought to re-opening ... was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other RCI employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by RCI some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust - the purported "merger" of the Plan with other plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the employer would be required to account to the existing Members as if the Plan had not been re-opened.

44 If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau* #1, the matter is best left to the Superintendent.

45 The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members.

46 If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the P.B.S.A.

47 The Superintendent could consider the Plan terminated because all contributions ceased in 1984. He could find that this cessation is, in the circumstances, a *termination* as that word is defined in the P.B.S.A.:

> **2.** (1) In this Act,
>
> . . . . .
>
> "termination", in relation to a pension plan, means the cessation of crediting of benefits to plan members generally; and includes the situations described in subsections 29(1) and (2);

According to the guidelines issued by the Office of the Superintendent, winding up must not be delayed without the Superintendent's consent, and the administrator wanting to manage the fund is not an acceptable reason for delay. Moreover, the trust Fund, according to its terms, must be administered for the benefit of the employees and the beneficiaries, not the employer.

48 It is up to the Superintendent to decide whether the circumstances surrounding the cessation of the contribution make the definition of "termination" mentioned above applicable and whether the delay in winding up is justified (s. 11.1).

49 If the cessation is a termination and if the delay is not justified, the Superintendent can direct that the plan be wound up in part in accordance with s. 29(11), which reads as follows:

> **29.** ...
>
> (11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

50 It is also possible that the Superintendent could exercise his power of termination. Section 29(2) provides as follows:

> **29.** ...
>
> (2) The Superintendent may declare the whole or part of a pension plan terminated where
>
> (*a*) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

51 Obviously, not every cessation of contributions will result in a direction by the Superintendent. Such a direction is not, however, restricted to cases in which the trust fund no longer meets the solvency requirements. The Superintendent's power in relation to solvency issues is governed by s. 29(2)(*c*), which reads as follows:

> the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1) [proper funding].

Since s. 29(2)(*c*) deals with solvency requirements, s. 29(2)(*a*) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.

52 Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power.

53 Most of the facts that the members presented to the courts in their quest to have the rule in *Saunders v. Vautier* applied could have been submitted to the Superintendent. I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward-looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. The provisions of the P.B.S.A. and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.

54 Rogers argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(*a*), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(*c*), a provision that deals solely with solvency issues.

55 The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (Ont. C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P-8 (s. 69(1)(a)), similar to s. 29(2)(*a*) of the P.B.S.A., that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Court of Appeal for Ontario affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, ftn. 5):

> I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the [*Pension Benefits Act*] envisions a wind-up process initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

56 I agree with the Court of Appeal for Ontario, and it is my view that the Superintendent's power under s. 29(2)(*a*) of the P.B.S.A. becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the P.B.S.A.

57 In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties.

58 Although the appeal is allowed, Rogers' arguments have not prevailed. As a result, the members should not be required to pay Rogers' costs. In addition, Rogers should bear the trustee's costs. The Court of Appeal's order as to costs should however be left undisturbed.

59 For these reasons, I would allow the appeal, order Rogers to pay National Trust's costs in this Court and set aside the order of the Court of Appeal with the exception of the order as to costs, which I would affirm.

***Bastarache J.*:**

1. Introduction

60 This appeal concerns a decision of the British Columbia Court of Appeal holding that the respondents Sandra Buschau et al. ("respondents") are entitled to terminate an ongoing employee pension trust by invoking the rule in *Saunders v. Vautier* (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.), a 19th century doctrine that arose in connection with the postponement of gifts in private trusts. The rule was considered by this Court in *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196 (S.C.C.), where, at p. 215, in concurring reasons (for himself and Rinfret J.), Crocket J. addressed the origins and rationale of the rule in these terms:

> It is true that in *Saunders v. Vautier; Gosling v. Gosling; Wharton v. Masterman*, and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime....
>
> Various reasons have been ascribed for its [the rule's] establishment. Lindley, L.J., in *Harbin v. Masterman*, which went to the House of Lords on appeal under the name of *Wharton v. Masterman*, above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:
>
> > Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded....
>
> Herschell, L.C. said:
>
> > The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
>
> Lord Davey said:
>
> > The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. [Footnotes omitted.]

61 The Court of Appeal relied on the judgment of this Court in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), as holding that the rule in *Saunders v. Vautier* was applicable to pension trusts, based on the finding in *Schmidt v. Air Products of Canada Ltd.* that pension trusts are "classic" trusts which are subject to "all applicable trust law principles" (*Buschau v. Rogers Communications Inc.*, 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (B.C. C.A.) ("*Buschau #2*"), at para. 52). The appellant employer, Rogers Communications Inc. ("RCI"), now appeals that decision of the Court of Appeal, arguing that the respondents cannot invoke the rule in *Saunders v. Vautier* to terminate the pension trust. The respondents' purpose in seeking to terminate the pension trust was to crystallize and obtain the actuarial surplus, to which they would not otherwise be entitled unless the pension plan was terminated in some other way, such as by the

employer pursuant to the terms of the plan. A previous decision of the Court of Appeal had determined that despite the amendments to the trust made by RCI, the respondents retained the right to any actual surplus upon termination (see *Buschau v. Rogers Cablesystems Inc.*, 83 B.C.L.R. (3d) 261 (B.C. C.A.) ("*Buschau #1*"). It should also be noted that the pension plan itself provided that any surplus remaining upon termination after payment of the defined benefits would be distributed among the plan members.

62 The decision of the Court of Appeal also raises questions regarding the nature and content of an employer's obligation of good faith in a pension plan setting. In particular, it asks to what extent an employer is entitled to act in its own interests in the administration of a pension plan, consistent with its obligation to act in good faith. In *Buschau #2*, the Court of Appeal held that RCI's good faith obligation would preclude an amendment to re-open the Rogers Communications Inc. pension plan ("RCI Plan"), which was closed to new members in 1984.

63 National Trust Co., trustee of the pension trust under consideration in the main case (the "Trust"), also appeals the Court of Appeal's decision. It asks this Court to overturn the order made in the supplementary reasons of the Court of Appeal issued on May 18, 2004, wherein that court ordered National Trust to "turn ... over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners" (*Buschau v. Rogers Communications Inc.*, 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (B.C. C.A.) ("*Buschau #3*"), at para. 16). National Trust argues that the effect of the decision of the Court of Appeal is to devolve upon it the authority and legal responsibility to give effect to and administer the termination of the Trust, an authority it says it does not possess under the terms of the RCI Plan or any applicable statute. National Trust argues that it is in no position to reconcile the decision of the court with the various legislative standards and requirements applicable to the termination of the Plan and Trust. It asks this Court to reverse the decision to impose on it duties and responsibilities it is not authorized to undertake pursuant to the Trust agreement, such duties and responsibilities belonging to the employer RCI or the Superintendent of Financial Institutions ("Superintendent"), pursuant to the applicable legislation and/or the terms of the Plan.

2. Background

64 RCI and respondents both provided a description of the events leading to the present appeal to establish the factual background for dealing with this case. I reproduce here the essence of their descriptions. It must be noted however that there is some disagreement concerning, in particular, the actual number of members in the Plan and the role played by the trustee National Trust, also an appellant.

65 The corporate predecessor of RCI established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

66 Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

67 Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

68 The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: *Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125 (B.C. S.C.). On January 11, 2001, the Court of Appeal [2001 CarswellBC 40 (B.C. C.A.)] upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see *Buschau #1*). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal, I would note at the outset that the court's finding in *Buschau #1* that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, *inter alia*, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the plan "so they can obtain the necessary consents to terminate the Plan" (100 B.C.L.R. (3d) 327, 2002 BCSC 624 (B.C. S.C.), at paras. 12 and 33).

71 On January 7, 2003 the respondents came to court with consents executed by the 144 members of the plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act*.

72 In reasons issued on May 1, 2003 (*Buschau v. Rogers Communications Inc.*, 13 B.C.L.R. (4th) 385, 2003 BCSC 683 (B.C. S.C.)), Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

73 Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, 2004. She held, at paras. 11 and 22 of *Buschau #2*, that:

> (a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;
>
> (b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;
>
> (c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;
>
> (d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances of this case, be taken in good faith by this employer *vis-à-vis* the existing beneficiaries".

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in *Buschau #3*, the court held that the appeal should be allowed but made, *inter alia*, the following orders:

> THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;
>
> THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;
>
> THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;
>
> . . . . .
>
> THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members (RCI's factum, at para. 24).

77 The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (*Buschau #3*).

78 At the hearing of this appeal on November 15, 2005, this Court requested that the parties provide further written submissions regarding the interface between the rule in *Saunders v. Vautier* and the P.B.S.A. This decision followed a discussion between various members of the Court and counsel concerning possible conflicts between the rule in *Saunders v. Vautier* and the P.B.S.A. I might also add that the same concerns had been raised by National Trust in its factum.

3. Analysis

79 The P.B.S.A. is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The P.B.S.A., together with the *Pension Benefits Standards Regulations, 1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.

80 Within this comprehensive scheme, s. 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets.

81 Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, as expressed in most plan documents, including the Plan at issue here. This right is recognized in s. 29(5) of the P.B.S.A., which refers to the intention of a plan administrator (who in most cases will be the employer) to terminate a pension plan. But the Superintendent is also given power to terminate pension plans in other certain specified situations.

He has the power to revoke a pension plan's registration for failure to comply with directions (s. 11.1). Directions of compliance can be issued where the Superintendent is of the opinion that an administrator or employer is acting in a manner "contrary to safe and sound financial or business practices" (s. 11(1)), or that a pension plan, or the administration of a pension plan, is not compliant with the P.B.S.A. or regulations (s. 11(2)). If registration is revoked, a plan is deemed to have been terminated (s. 29(1)).

82 In addition to deemed termination in consequence of the revocation of a plan's registration, s. 29(2) stipulates three other situations in which the Superintendent has power to directly order the termination of a plan. The Superintendent may exercise this power when there has been: a) cessation or suspension of employer contributions; b) discontinuance of the employer's business operations; or c) the employer's failure to fund the plan in accordance with prescribed standards of solvency. In each case, the power is directed to circumstances in which the security of the promised pension benefits is threatened.

83 This is consistent with the statute governing the Office of the Superintendent which states that the objects of the Office, in respect of pension plans, are: a) to supervise pension plans in order to determine if they meet minimum funding requirements or are complying with the other requirements of the legislation; b) if not, to advise the administrator and take, or advise the administrator to take, necessary corrective measures; and c) to promote the adoption by administrators of policies and procedures designed to control and manage risk (see the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I). It is apparent from the statutory objects of the Office that the supervisory focus of the Superintendent is primarily on matters affecting the solvency or financial condition of pension plans. It is worth noting here that National Trust invokes the P.B.S.A. in its appeal, arguing at para. 70 of its factum that "[t]he judgment of the British Columbia Court of Appeal turns this statutory scheme on its head and places the Trustee in the role that by statute has been assigned to the administrator and to the Superintendent".

84 There is no provision in the P.B.S.A. for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the P.B.S.A. for any party (employer, administrator, trustee, Superintendent, plan members or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.

85 "[T]ermination" in relation to a pension plan is defined in the P.B.S.A. as the cessation of the crediting of benefits to plan members generally (s. 2(1)). Termination of a pension plan is distinguished from "winding-up" which refers to the distribution of the assets of a terminated pension plan. The P.B.S.A. provides that the pension fund assets are only to be distributed after the Superintendent approves a report filed by the plan administrator on the termination of a plan. The report must set out the nature of the benefits to be provided under the plan and describe the methods of allocating and distributing those benefits (s. 29(9) and (10)).

86 A major issue in this appeal is whether termination of the Plan must logically precede the termination of the Trust. According to RCI, the judgment of the British Columbia Court of Appeal reverses the legislative scheme by permitting the beneficiaries of the Premier Plan to terminate the Trust and distribute the Trust assets, which were being held as security for the pension benefits accruing under the Plan, outside the legislative scheme and prior to the termination of the pension Plan itself. It argues at para. 18 of its supplemental factum that:

> In enacting the *PBSA, 1985*, Parliament intended to devise a comprehensive scheme for dealing with issues of pension plan regulation, including the circumstances of their termination and the winding up and distribution of assets held in pension funds. If it had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.

87 It would appear that none of the statutory grounds for termination of a pension plan are present in this case. The Premier Plan is fully funded and there is no threat to the solvency of the plan or the security of the pension benefits.

There is no issue that the RCI Plan is being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

88 RCI has suspended contributions to the Plan. However, these contribution holidays are authorized by the terms of the Plan and have been approved by the courts. The reference to "suspension or cessation of employer contributions" in s. 29(2)(*a*) of the P.B.S.A. must be construed as referring to situations where an employer does not make required contributions. It does not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan.

3.1 The Applicability of the Rule in Saunders v. Vautier

89 RCI recognizes that there may be circumstances in which it is appropriate to apply common law trust principles to resolve issues regarding pension plans which have not been directly addressed in the legislation. I agree. This was the approach taken in *Schmidt* with respect to the question of ownership of surplus on termination of a pension plan. In that case, it was acknowledged that there was a gap in the legislation and the provisions of the statute did not provide guidance on this issue. However, RCI argues that, in the present case, s. 29 contains detailed provisions regarding the circumstances and manner in which pension plans may be terminated. RCI concludes that the legislation has "occupied the field" on this issue and there is no room for the operation of a common law rule.

90 Pension trusts are not the same as traditional trusts, as stated by the Court of Appeal at paras. 1-2 in *Buschau #1*. In employment pension trusts, there is a legal relationship between the parties apart from the trust and continuing obligations on the part of the administrator. In the present case, in view of its very terms (see General Rule 7.2), there is no entitlement to an actuarial surplus while the Plan is ongoing. As stated by the Court of Appeal, the Trust Agreement and the Plan form an "integrated whole" (*Buschau #2*, at para. 13). Moreover, this is a defined benefit plan, i.e., a plan that is entirely funded by the employer, where members have an equitable interest in the trust assets, a right *in personam* against the trustee to require proper administration of the trust assets, and a contingent interest to the trust assets existing on plan termination if they are alive and members at the date of termination. The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract clearly contemplated a continuing Plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan; in the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus, which does not vest until the Plan is terminated. This is reinforced by the statement in *Schmidt*, at p. 655: "When the plan is terminated, the actuarial surplus becomes an actual surplus and *vests* in the employee beneficiaries" (emphasis added) (see also p. 654). As a result, the rule in *Saunders v. Vautier* cannot be invoked here, since the rule requires that the beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust *corpus*: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178. The question then is whether termination of this Plan can occur outside the boundaries of the P.B.S.A. The Court of Appeal reasoned that *Schmidt* had implicitly accepted that the rule in *Saunders v. Vautier* could apply independently of the P.B.S.A. and of any contract. The real question is whether trust law can in effect prevail over the contract and governing legislation in the present case (*Buschau #2*).

91 It is important to take note of the terms of the Plan and Trust documents. As I have previously stated, these are not distinct. The terms of the Plan are very specific and somewhat atypical of plans adopted in later years. In particular, art. V of the Trust Agreement reserves to the employer

> ...the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the Plan (including [the Trust] Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the [Trust] to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan....

General Rule Five permitted, but did not oblige, the employer to allocate additional pensions or pension entitlements to Plan members, retired or otherwise, if the Plan had an actuarial surplus. General Rule Six permitted members to designate a beneficiary, and to alter or revoke that designation within the bounds of the law. General Rule Seven gave the employer the right to amend, modify or change the Plan, provided that the changes did not affect certain of the members' rights or benefits. It also gave the employer the right to terminate the Plan if necessary. It went on to say:

> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of the assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

92 The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of RCI or the members that the Trust could be terminated by the members, over RCI's objections, in order that the members might obtain the surplus. The application of the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties because beneficiaries who can collapse a trust under *Saunders v. Vautier* can, with the consent of the trustees, collectively agree to vary its terms. The rule would permit members of a pension plan to unilaterally vary its terms without the employer's consent.

93 It is also very important to consider the legislative context in which modern pension plans operate. It would appear that, in her 2003 decision, Loo J. disregarded the provisions of the P.B.S.A. regarding termination, but applied the *Trust and Settlement Variation Act* where it was necessary to circumvent the difficulty in obtaining all consents necessary under the rule in *Saunders v. Vautier*. In *Buschau #3*, the Court of Appeal noted that the rule in *Saunders v. Vautier* could result in the termination of the Plan if all of the preconditions of the rule were met, without regard for the legislative scheme and in particular s. 29(9) which provides that on termination of a plan, the administrator must file a report with the Superintendent

> ...setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

94 This means that the rule in *Saunders v. Vautier* would permit the termination of the pension Plan and Trust without the involvement of the employer as Plan administrator and without the approval of the Superintendent. The only logical explanation for this conclusion is that the Court of Appeal had accepted that the Trust was independent of the Plan and could be dealt with solely by reference to the Trust itself, notwithstanding, in particular, that the P.B.S.A. (and the terms of the Plan, at art. 9.3) provided special protections for spouses and common law partners. The terms of the Plan could be totally disregarded. At para. 54 of its reasons in *Buschau #2*, the Court of Appeal seems to accept that the Trust and the Plan constitute an "integrated whole", but nevertheless concludes that this whole is subject to trust law principles and to the resulting "disappearance" of the employer's rights and powers on the sole initiative of the Plan members. This is very different from the decision to apply the rule only where there is no conflict with the legislative scheme as in *Schmidt*. In my view, the unique role of the employer in respect of the pension Plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier*.

95 In the context of the appeal brought by National Trust, particular regard must be given to s. 8(3) of the P.B.S.A., which states:

> 8. ...
>
> (3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

It is clear that a court has no authority to assign to National Trust the responsibilities of the administrator and of the Superintendent contrary to the legislative scheme which has determined a process to terminate a pension plan. But here I believe the Court of Appeal was defining a role for National Trust in light of the distinction it had made between the termination of the Plan and the termination of the Trust, only the former being subject to the terms of the Plan and provisions of the P.B.S.A.

96 The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security. This is not consistent with the operation of the rule in *Saunders v. Vautier*, as applied by the Court of Appeal in this case, which is based on an entirely different policy objective.

97 The introduction of the *Saunders v. Vautier* principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests. In these circumstances, the "fair and delicate balance between the employer and employee interests" (*Monsanto Canada*, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans.

98 The rule in *Saunders v. Vautier* requires the consent of all parties who have an interest, or who own rights of enjoyment, in the trust property. The Court of Appeal held that the rule could be applied with the consent of all members (by which they surely meant to include former members) of the Premier Plan and those persons who are now designated beneficiaries (*Buschau #2*). But s. 22 of the P.B.S.A. requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on the date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 percent of the joint benefit. This requirement is reflected in the terms of the Premier Plan (art. 9.3). The inclusion of survivor benefits was a policy choice of the Legislature that must be honoured. These statutory rights cannot be overridden by the consent of present Plan members and other beneficiaries or by the courts. Nor can s. 1(b) of the *Trust and Settlement Variation Act* assist. The current spouses and common law partners who have a present contingent interest are *sui juris*. As such, they could give their consent to termination of the Plan, and the court does not have the power to consent on their behalf unless they are legally incapacitated.

99 As for the interests of future possible spouses and common law partners, whose consent would also be required for termination pursuant to *Saunders v. Vautier*, those interests are more problematic in that their direct consent cannot be obtained, and asking a court to consent on their behalf would raise serious questions. RCI notes at para. 37 of its supplementary factum that, "the court may only consent on behalf of a beneficiary if the proposed trust variation is in the interests of that party. It is difficult to conceive of a circumstance in which termination of a pension trust would be in

the interests of future spouses or common law partners". Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners would presumably not be in their best interests. If Plan members who are not currently married or in a common law relationship were allowed to terminate the Plan and obtain the surplus, but were then to enter into a marriage or common law relationship in the future, their future spouses or common law partners would not enjoy their statutory right to the joint and survivor benefit to which they would have been entitled had the Plan been ongoing and not terminated. Thus, even if this was sufficient, valid consents to termination of the Plan in order to satisfy the pre-conditions of the *Saunders v. Vautier* rule have not been and cannot be obtained from all possible beneficiaries here; more importantly, while the current spouses and common law partners of Plan members are able to consent to termination, future spouses and common law partners who are currently unascertainable cannot give such consent, and a court would likely be reluctant to give its consent on their behalf.

100 For these reasons, I would conclude that the rule in *Saunders v. Vautier* does not apply in the circumstances of this case and that any application regarding the termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the P.B.S.A. The respondents' suggestion that the absence of a procedure in the P.B.S.A. permitting a unilateral termination of the Plan by the members justifies the action under the rule of *Saunders v. Vautier* cannot be accepted. The rule simply does not apply. Members' rights are determined by the Plan itself and the P.B.S.A.; as indicated above, neither the terms of the Plan itself nor the provisions of the P.B.S.A. grant the members a right to terminate the Plan. The unilateral right of members to terminate the Plan simply does not exist in this case.

3.2 The Issue of Good Faith

101 The Court of Appeal decided, at para. 61 of its reasons in *Buschau #2*, that the obligation of good faith of the employer precluded RCI from adopting any amendments to the Plan and Trust opening it to new members following its closure in 1984; it related this to what it termed the "stratagem" adopted by RCI years earlier to benefit from the actuarial surplus by merging different pension plans. The Court of Appeal then continued with a discussion of the employer's "interest" in the Plan and Trust.

102 It is quite obvious that the whole discussion concerning good faith had to do with fair conduct as administrator of the Plan. RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plans's terms. RCI says there is no stratagem, only the exercise of a power to amend in the context — and this is fundamental — of a defined benefit plan. RCI says that "the analysis of good faith in respect of the exercise of a discretionary power in a contractual context begins with a careful consideration of the parties' reasonable contractual expectations" (factum, at para. 75). It is a prohibition against acting in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" unless the employer has "reasonable and proper cause" (para. 80, quoting *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* (1990), [1991] 2 All E.R. 597 (Eng. Ch. Div.), at p. 606). The respondents reject the contractual perspective and say that nothing done by the employer should affect or dilute their entitlements under the Plan; equitable principles should apply. I do not consider it necessary to arbitrate this debate. Section 8(10) of the P.B.S.A. provides sufficient guidance. The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees' pension benefits, not in a way that would reduce, threaten or eliminate them (see *Imperial Group*).

103 It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier*. I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier*. But of course the parties could not ignore the Court of Appeal's decision in *Buschau #1*. As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could

be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning is however driven by the idea that the Plan members were promised more than their pensions under the Plan, i.e., the right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the P.B.S.A. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(*b*) of the P.B.S.A. which states that "where the employer is the administrator pursuant to paragraph 7(1)(*c*), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer ... (*b*) shall act in the best interests of the members of the pension plan".

4. Disposition

104 The appeal is allowed and the order of the Court of Appeal is set aside with costs in all courts to RCI and in this Court to National Trust.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on June 26, 2006 has been incorporated herein.

GAIL MacDONALD

Applicant

- and -

VIOLET COOPER

Respondent

Court File No. 05-145-15

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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