Court File No. CV-12-9656-00CL
Estate No. 32-1633386

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,*
R.S.C. 1985, c-B-3, AS AMENDED

AND IN THE MATTER OF THE BANKRUPTCY OF PCAS PATIENT CARE AUTOMATION SERVICES INC. and 2163279 ONTARIO INC.

FACTUM OF DASHRX, INC.
(Motion returnable November 13, 2012)

November 1, 2012

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PART I – OVERVIEW

1. This is a motion to correct an honest mistake. On June 13, 2012, due to a genuine administrative error, DashRx, the purchaser of the assets of the Companies (defined below) made a mistaken payment in the amount of $115,144.08 (the "**Mistaken Payment**") to the payroll administrator of the Companies which was then distributed to certain Former Employees (defined below) of the Companies on account of pre-CCAA filing vacation pay (the "**Employee S.81 Claims**"). Pursuant to the asset sale transaction between DashRx and the Companies sanctioned by this Court on June 6, 2012, a roughly equivalent amount had already been advanced by DashRx and is being held by the Trustee in Bankruptcy of the Companies (the "**Trustee**") solely to satisfy the Employee S.81 Claims. DashRx has therefore inadvertently paid twice for the same obligation. DashRx needs this Court's assistance to obtain the return of the funds held by the Trustee in an amount equal to the Mistaken Payment, *i.e.* $115,144.08. The Trustee does not oppose the motion, but requires direction from the Court.

2. The funds held by the Trustee in the amount of the Mistaken Payment were specifically earmarked to satisfy the Employee S.81 Claims pursuant to both the Purchase Agreement and the orders of this Court. DashRx has satisfied the Employee S.81 Claims through the Mistaken Payment. Equity and common sense therefore dictate that the Court exercise its equitable jurisdiction to craft a remedy that sees the Trustee return to DashRx funds in the amount of $115,144.08. Honest mistakes happen, even in the commercial context, and neither companies nor individuals should be punished for their honest errors where they do not prejudice others.

PART II – FACTS

Background

3. On March 23, 2012, PCAS Patient Care Automation Services Inc. ("**PCAS**") and 2163279 Ontario Inc. doing business as Touchpoint ("**Touchpoint**" and, together with PCAS, the "**Companies**") made an application under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") seeking court protection from their creditors, which protection was granted pursuant to an Order of the Honourable Mr. Justice Morawetz (the "**Initial Order**").

> Affidavit of Kevin Farrell sworn October 24, 2012 (the "**Farrell Affidavit**"), Motion Record of DashRx ("**Motion Record**"), Tab 2, pg. 3, para 4.

4. Pursuant to the Initial Order, PricewaterhouseCoopers Inc. was appointed as CCAA Monitor (the "**Monitor**").

> Farrell Affidavit, Motion Record, Tab 2, pg. 3, para. 5.

5. Pursuant to the Order of the Honourable Justice Brown made May 14, 2012 (the "**May 14 Order**"), a sale and investor solicitation process (the "**SISP**") was approved.

Farrell Affidavit, Motion Record, Tab 2, pg. 3, para. 6.

The Sale and Investor Solicitation Process

6. The Companies, with the assistance of the Monitor and PricewaterhouseCoopers Corporate Finance Inc., conducted the SISP and selected the bid from DashRx as the "Successful Bid" (as such term is defined in the SISP).

Farrell Affidavit, Motion Record, Tab 2, pg. 3, para. 7; Seventh Report of the Monitor dated June 1, 2012 ("**Seventh Report**"), Motion Record, Tab I, pg. 7, paras. 19 to 21.

7. The Companies suffered an acute liquidity crisis in late May. The Monitor was advised that the DIP Lender (and unsuccessful stalking horse bidder) was not prepared to continue to fund the operations of the Companies. In order to allow the purchase negotiations to proceed, Court approval to be sought, and the transaction to close, DashRx agreed to fund the cash operating requirements of the Companies until June 6th, 2012 to a US $250,000 cap. These funds were unsecured and were not set off against the purchase price paid by DashRx for the assets of the Companies.

Farrell Affidavit, Motion Record, Tab 2, pg. 3, para. 8.

The Purchase Agreement

8. The Companies and DashRx subsequently negotiated and executed the Purchase Agreement dated June 1, 2012 (the "**Purchase Agreement**") with the assistance of the Monitor. The Purchase Agreement was the result of lengthy, robust and complex negotiations.

Farrell Affidavit, Motion Record, Tab 2, pg. 4, para. 9.

9. The consideration to be paid under the Purchase Agreement was a combination of the assumption of secured liabilities, cash, and secured and unsecured convertible promissory notes to be issued to the Applicants' creditors, including unsecured creditors. It did not provide any recovery for the Companies' shareholders.

Farrell Affidavit, Motion Record, Tab 2, pg. 4, para. 10.

10. Pursuant to section 7.1(3) of the Purchase Agreement, the Companies (and not DashRx) were made responsible for all wages, termination, severance, and other obligations in respect of certain employees who were not offered or did not accept employment with DashRx (the "**Former Employees**") at the time of closing as contemplated in section 7.1 of the Purchase Agreement.

Farrell Affidavit, Motion Record, Tab 2, pg. 4, para. 12.

11. Section 2.3 (1)(a) of the Purchase Agreement specifically earmarked a cash sum equal to the lesser of $235,315 and such amount as was actually owed by the Companies at the time of closing "to be used" to pay certain statutory priority claims, including wage and related obligations to the Former Employees.

Farrell Affidavit, Motion Record, Tab 2, pg. 5, para. 13.

12. Given the Companies' liquidity situation, the necessity of implementing an expedited SISP and the bids received, the price obtained for the Company's assets was held to be fair and reasonable.

Seventh Report, Motion Record, Tab I, pg. 14, para. 52.

13. On June 6, 2012, the Purchase Agreement was approved pursuant to the order of the Honourable Mr. Justice Brown (the "**Approval and Vesting Order**").

Farrell Affidavit, Motion Record, Tab 2, pg. 6, para. 14.

14. At paragraph 19 of His Honour's Reasons for Decision, His Honour found, among other things, that the cash portion of the purchase price is designated in part for: "distribution in payment of all statutory priority claims, comprised of approximately $235,000 in accrued and unpaid vacation pay..."

Reasons for Decision, Motion Record, Tab F, pg.4, para. 19.

15. Paragraph 6 of the Approval and Vesting Order contains a clause that reads in pertinent part that "...notwithstanding....any assignment in bankruptcy made in respect of the Applicants...the APA, the transaction and distributions provided for in the APA and/or in this Order...shall be binding on any Trustee in Bankruptcy that may be appointed in respect of any of the Applicants...".

Approval and Vesting Order, Motion Record, Tab E, pg.3, para. 6.

16. On June 6, 2012, Justice Brown also granted an ancillary order (the **"Ancillary Order"**) which, among other things, approved the scheme of distribution of the sale proceeds of the transaction, and in relevant part authorized and directed the Companies to make a distribution of "$235,315 in connection with employee wage claims, in accordance with Section 36(7) of the *Companies' Creditors Agreement Act* to those employees who are or have been terminated by the Applicants and continue to have any outstanding employee wage claims."

Ancillary Order, Motion Record, Tab G, pg. 4, para. 6(a).

17. Forthwith after the granting of the Approval and Vesting Order, the Companies and DashRx took steps to implement the transaction contemplated in the Purchase Agreement, and on June 8, 2012, the Monitor's Certificate required pursuant to section 3 of the Approval and Vesting Order was filed with the Court, thereby confirming the completion of the transaction contemplated in the Purchase Agreement, including payment of the purchase price.

Farrell Affidavit, Motion Record, Tab 2, pg. 7, para. 19.

18. The only statutory priority claims owing by the Companies on closing were in respect of pre-CCAA filing and post-CCAA filing accrued and unpaid vacation pay for employees who either had been or were to be terminated prior to Closing.

Seventh Report, Motion Record, Tab I, pg. 15, para. 54.

The Mistaken Payment

19. The initial estimate of the post-CCAA vacation amount was $119,266.94. This was to be paid by PCAS. So on June 7, before the bankruptcy was effective, a lump sum of $120,000 was transferred to ADP as a funding in advance for the following week's payment.

Farrell Affidavit, Motion Record, Tab 2, pg. 9, paras. 25-26.

20. A subsequent re-calculation of the post-CCAA vacation resulted in a total of $111,457.14. This meant that the ADP account had a "surplus" of $8,542.86 (the difference between $120,000 and $111,457.14).

Farrell Affidavit, Motion Record, Tab 2, pg. 9, para. 26-28.

21. The pre-CCAA vacation amount was re-calculated and fell to $115,144.08 and the current payroll and all deductions were $54,206.28. These two figures total $169,350.36. However, given the "surplus" of $8,542.86, the cash required to fund the ADP payroll was reduced to $160,807.50.

Farrell Affidavit, Motion Record, Tab 2, pg. 9, paras. 28 and 30-31.

22. As a result of a miscommunication as to the total amount and the components of the total amount required to be transferred to ADP by DashRx (a miscommunication that was compounded by the contemporaneous termination of the person responsible for administering payroll at the Companies), DashRx transferred $161,000 to ADP on June 13, 2012, which included both:

a) current salary for active employees; and

b) pre-CCAA filing vacation pay for Former Employees.

This inadvertent mistaken payment resulted in the satisfaction of the claims of the Former Employees on account of pre-CCAA filing vacation pay in the amount of $115,144.08, leaving a

roughly equivalent amount in the hands of the Trustee (as previously defined, the "**Mistaken Payment**").

Farrell Affidavit, Motion Record, Tab 2, pg. 10, paras. 29 - 31.

23. All parties on the service list and all of the Former Employees were served with the motion materials in this matter on October 26, 2012. The Former Employees also received a copy of the letter appended to this factum at Tab 8 with their copy of the Motion Record. A copy of the Affidavit of Service will be available for inspection at the return of the motion.

PART III – LAW AND ARGUMENT

24. The principle of Roman law *Nemo Debet Locupletari Ex Aliena Jactura* means "no one should be enriched by another's loss". It is a basic tenet of fairness that permeates our legal system and forms the underpinning of equitable relief such as the doctrines of mistake and unjust enrichment. Equity and common sense dictate that no party should suffer as a result of an honest error that does not prejudice another.

A. DashRx made the payment to the Former Employees under a Mistake of Fact

25. The general rule that monies may be recovered in an action for money received where the money is paid under a mistake on the part of the payer is applicable in this case. Martland J. in speaking for the Supreme Court of Canada in *Storthoaks v. Mobil Oil* stated:

> ...where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it".
>
> *Storthoaks v. Mobil Oil* [1976] 2 S.C.R. 147 (SCC), Book of Authorities of DashRx ("Book of Authorities"), Tab 1 at para. 37.

26. In *Pinnacle Bank, N.A. v. 1317414 Ontario Inc.*, the Ontario Court of Appeal considered and affirmed the following criteria regarding the right to recover money paid under a mistake of fact:

a) the mistake must be honest;

b) the mistake must be as between the person paying and the person receiving the money;

c) the facts, as they are believed to be, impose an obligation to make the payment; and

d) the receiver of the money has no legal or equitable or moral right to retain the money as against the payer.

Pinnacle Bank, N.A. v. 1317414 Ontario Inc. 2002 CarswellOnt 218 (ONCA), Book of Authorities, Tab 2 at para. 10.

27. All four criteria are met in this case: DashRx made an honest mistake in directly paying the Employee S.81 Claims to the *Former* Employees; the mistake is as between DashRx and the Former Employees; DashRx mistakenly believed it was obligated to make the payment; given that the Trustee received funds it is holding for the express purpose of satisfying the Employee S.81 Claims, the Former Employees do not have a legal or moral right to retain the money as against DashRx.

28. A rectification of the Mistaken Payment, in theory, requires a refund of the funds by the Former Employees to DashRx. In practical terms, however, it would be inefficient, expensive and confusing to require a *refund* from each of the Former Employees only to have the Trustee

subsequently pay the self-same amount to the Former Employees. It is submitted that this Court should craft a more sensible solution by ordering the Trustee to return to DashRx funds in the amount of the Mistaken Payment, which funds were provided to the Trustee and are being held for the very purpose of satisfying the now-satisfied Employee S.81 Claims.

B. Equity demands a refund of the Mistaken Payment to DashRx based on Unjust Enrichment

29. In the alternative, should the Court feel compelled to engage in an unjust enrichment analysis, the elements of a claim for an unjust enrichment are easily satisfied in this case. These elements are a) an *enrichment*; b) a corresponding deprivation; and c) no juristic reason to permit such enrichment.

> *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (SCC), Book of Authorities of DashRx ("Book of Authorities"), Tab 3, para. 30.

Enrichment and Corresponding Deprivation

30. Pursuant to this Court's approval of the Purchase Agreement and the Ancillary Order directing the allocation of the purchase price, the Trustee is currently holding funds in the sum of $115,144.08 for the sole purpose of satisfying obligations to the Former Employees in respect of the Employee S.81 Claims. Given that the obligations pursuant to the Employee S.81 Claims have been satisfied by DashRx through the Mistaken Payment, if funds in the amount of the Mistaken Payment are not returned to DashRx, the estate will be enriched to the corresponding deprivation of DashRx.

No Juristic Reason to permit Enrichment

31. Funds in the amount of the Mistaken Payment currently being held by the Trustee were not provided gratuitously, on *account* of a debt owed to the Companies, or for the general benefit of the estate. The following facts go towards establishing a lack of juristic reason for the enrichment:

    a) the terms of the Approval and Vesting Order indicate the finality of the terms of the Purchase Agreement;

    b) the creditors of the Companies did not oppose the terms of the Purchase Agreement at the Sanction Hearing; and

    c) the Mistaken Payment was never contemplated as a term of the deal.

32. In this case, the terms of the *transaction* were sanctioned by this Honourable Court in an Approval and Vesting Order and an Ancillary Order. In particular, the Ancillary Order approved the precise terms of the distribution scheme of the sale proceeds, including the purpose of the funds held to satisfy the Employee S.81 Claims. The addition of an amount in the sum of the Mistaken Payment for distribution to the creditors is not in accordance with the Purchase Agreement, the Approval and Vesting Order or Ancillary Order or capable of being made, given that the earmarked funds are impressed with a trust.

33. Adequate notice was provided to all known and interested parties, including all known creditors, and no steps were taken by any creditor to raise any objections regarding the same at the Sanction Hearing or to set aside or vary the terms of the court orders during the applicable

appeal period. It would be unfair to allow a party that raised no objections to any term of the deal to now receive a windfall to the corresponding detriment of DashRx.

34. Moreover, this is not a case where a potential for an overpayment on the purchase price was an established or even contemplated term of the transaction. It cannot be argued that DashRx assumed any risk that the Mistaken Payment would not be repaid. In fact, the precise breakdown of the allocation of the purchase price was a settled term in the Purchase Agreement, specifically outlined by the Court at paragraph 19 of His Honour's Reasons for Decision and approved and made binding on the Trustee in the Approval and Vesting Order. The Mistaken Payment was the result of an inadvertent mistake. Common sense and equity dictates the potential enrichment is unjust as it would be contrary to all parties' legitimate expectations.

35. An increase to the purchase price for no additional consideration on account of an inadvertent mistake would not only mark a departure from the established terms of the Purchase Agreement, it would also be *unfair* to DashRx which has acted in a cooperative and committed manner, working alongside the Monitor, the Companies and the DIP Lender to complete a going concern purchase of the Companies' assets.

36. In particular, DashRx has acted equitably with respect to the Companies and its creditors by:

a) funding the Companies' operating requirements (up to a $250,000 cap on an unsecured basis and not set off against the purchase price), absent which the Companies would not have been able to close the transaction;

b) providing consideration to the Companies' unsecured creditors who would receive no value under the Stalking Horse bid; and

c) funding the Companies' bankruptcy (up to $100,000), absent which there would be no mechanism to run a proper process to allow the unsecured creditors to receive the consideration provided for in the Purchase Agreement.

Seventh Report, paras. 44 and 85 – 87.

Remedy of a Constructive Trust Appropriate

37. In order to establish the remedy of a constructive trust, the plaintiff must establish a direct link to the property that is the subject of *the* trust by reason of the plaintiff's contribution. In *Canada Revenue Agency v. TNG Acquisitions Inc. (Trustee of)*, the CRA sought a return of an overpayment of tax refunds made to the debtor. In that case, although the court found that unjust enrichment had been clearly established, it declined to impose the remedy of a constructive trust. The court in that case held that there was an insufficient link between the overpayment made by the CRA and the accounts receivable owing to the debtor to be subject to a constructive trust.

Peter v. Beblow, [1993] 1 S.C.R. 980 (SCC), Book of Authorities, Tab 4, paras. 25 and 98; *Canada Revenue Agency v. TNG Acquisitions Inc. (Trustee of)* ("***TNG Acquisitions***"), 2011 ONSC 3129, Book of Authorities, Tab 5, paras. 28-29.

38. In contrast to *TNG Acquisitions*, in this case, pursuant to the Purchase Agreement, His Honour's Reasons for Decision, and both the Approval and Vesting Order and the Ancillary Order, the Mistaken Payment stands in direct stead of the $115,144.08 being held by the Trustee for the sole purpose of satisfying the Employee S.81 Claims. Having fulfilled the purpose of satisfying the Employee S.81 Claims by way of the Mistaken Payment, DashRx can establish a

direct proprietary link to the $115,144.08. This is a case where equity can and must intervene to remedy the unjust enrichment by way of a constructive trust over funds in the amount of the Mistaken Payment.

C. DashRx is entitled to take an assignment of the Former Employees' claims and has priority in a distribution of the Companies estate

39. In the further alternative, if the court is not satisfied that mistake of fact is applicable or that the test for unjust enrichment is made out, DashRx, submits that having paid out the Mistaken Payment to the Former Employees, it is entitled to take an assignment of the claim pursuant to section 136(1) of the BIA.

40. Under section 136(1) of the BIA, claims of wage earners under section 81.3 of the BIA are afforded preferential status in the scheme of distribution ranking ahead of secured and unsecured creditors. *Re Inverness Railway & Colliery Ltd.* stands for the proposition that a trustee who pays wages of wage earners is entitled to take assignment of their claims and is entitled to the rights of the wage-earners. In that case, the trustee for the bondholders of the bankrupt company paid workmen for the assignment of their insurance claims and the court in that case found that the trustee was entitled to all the rights of the employees.

> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 136(1); *Re Inverness Railway & Colliery Ltd.* (1924), 5 C.B.R. 58 (N.S.T.D) ("***Inverness Railway***") Book of Authorities, Tab 6, para. 14; Houlden, Lloyd; Morawetz, Geoffrey and Sarra, Janis *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2012) at G §117(4) Book of Authorities, Tab 7, at page 673.

41. Similarly, under both the federal and provincial corporate statutes, a director who has paid an employee's wages because of statutory liability is entitled to any preference that the employee was entitled to.

Canada Business Corporations Act, R.S.C. 1985 c C-44, s. 119(5); *Business Corporations Act (Ontario)*, R.S.O. 1990, c B-16, s. 131(4).

42. DashRx is in an analogous position to the trustee in *Inverness Railway* and to a director who has paid out employees' wages under the applicable provisions of the corporate statutes discussed above. Where a third party satisfies wage obligations owing to employees, it is entitled to take the benefit of any preferential right that goes along with the obligation it has satisfied. In this case, having directly paid the obligations owing under the Employee S.81 Claims to the Former Employees, DashRx should be seen as stepping into the Former Employees' shoes for the purposes of statutory priorities and as such is entitled to a preferred claim in the amount of $115,144.08 in a distribution of the Companies' assets.

D. Conclusion

43. Equity would not be served if a genuine administrative error resulted in an increase in the purchase price of a Purchase Agreement previously sanctioned and approved by this Court. The Trustee does not oppose DashRx's motion. This Court should find that DashRx is entitled to the return of funds in the amount of the Mistaken Payment. Equity and common sense demand that funds in the amount of the Mistaken Payment be returned to DashRx by the Trustee from funds being held by the Trustee on account of the obligation satisfied by the Mistaken Payment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2012.

Bennett Jones LLP

Gavin H. Finlayson/Mark S. Laugesen/Karma Dolkar

Lawyers for the Moving Party, DashRx, Inc.

TAB 'A'

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Storthoaks v. Mobil Oil* [1976] 2 S.C.R. 147 (SCC).

2. *Pinnacle Bank, N.A. v. 1317414 Ontario Inc.* 2002 CarswellOnt 218 (ONCA).

3. *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (SCC).

4. *Peter v. Beblow*, [1993] 1 S.C.R. 980 (SCC).

5. *Canada Revenue Agency v. TNG Acquisitions Inc. (Trustee of),* 2011 ONSC 3129.

6. *Re Inverness Railway & Colliery Ltd.* (1924), 5 C.B.R. 58 (N.S.T.D).

7. Houlden, Lloyd; Morawetz, Geoffrey and Sarra, Janis *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2012 at G §117(4) at page 673.

TAB 1

1975 CarswellSask 56, [1975] 4 W.W.R. 591, [1976] 2 S.C.R. 147, 5 N.R. 23, 55 D.L.R. (3d) 1

1975 CarswellSask 56, [1975] 4 W.W.R. 591, [1976] 2 S.C.R. 147, 5 N.R. 23, 55 D.L.R. (3d) 1

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.

Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.

Supreme Court of Canada

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.A.

Judgment: April 22, 1975

Counsel: *M. C. Shumiatcher, Q.C.*, for appellant.

R. L. Barclay and *M. J. Sychuk*, for respondent.

Subject: Restitution

Restitution --- Bars to recovery — Voluntary conferral of benefits.

Restitution --- Benefits conferred under mistake — Mistake of fact.

Actions — Action for money paid under a mistake of fact — Governing principles.

Appeal from the judgment of the Saskatchewan Court of Appeal, [1973] 6 W.W.R. 644, 39 D.L.R. (3d) 598, allowing an appeal from the judgment of Tucker J., [1972] 5 W.W.R. 90, 29 D.L.R. (3d) 483. Appeal dismissed.

Respondent had, since April 1964, paid compensatory royalties to appellant under two oil and gas leases. In July 1964 respondent surrendered the leases, thus terminating its obligation to pay further royalties. The surrender of the leases was not made known to respondent's accounting department which continued to pay royalties until a total of $31,163.95 had been overpaid. Respondent's action for recovery back of money paid under a mistake of fact was dismissed by Tucker J. who held that the payments were voluntary and further that, ex aequo et bono appellant should not be required to pay.

Held, the appeal should be dismissed; the Court of Appeal correctly found that the moneys were paid under a mistake of fact and that the case was governed by the principle stated in *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24; it could not be success fully contended that the payments were voluntarily made with full knowledge of the facts; respondent's paying agent, its accounting department, did not have knowledge of the facts. Nor were there any considerations which would make it inequitable to require repayment; the money had gone into appellant's general account and had been used for day to day expenses, and appellant could not show that it had materially changed its circumstances as a result of the receipt of the money: *Kelly v. Solari*, supra; *Anglo-Scottish Beet Sugar Corpn. Ltd. v. Spalding Urban District Council*, [1937] 2 K.B. 607, [1937] 3 All E.R. 335; *Turvey v. Dentons (1923) Ltd.*, [1953] 1 Q.B. 218, [1952] 2 All E.R. 1025; *Purity Dairy Ltd. v. Collinson* (1966), 57 W.W.R. 737, 58 D.L.R. (2d) 67 (B.C. C.A.) applied.

The judgment of the Court was delivered by *Martland J.*:

1975 CarswellSask 56, [1975] 4 W.W.R. 591, [1976] 2 S.C.R. 147, 5 N.R. 23, 55 D.L.R. (3d) 1

1 This is an appeal from the Court of Appeal for Saskatchewan which allowed the appeal of the respondent (hereinafter referred to as "Mobil") [[1973] 6 W.W.R. 644, 39 D.L.R. (3d) 598] from the judgment at trial [[1972] 5 W.W.R. 90, 29 D.L.R. (3d) 483] which had dismissed Mobil's claim to recover from the appellant (hereinafter referred to as "the municipality") the sum of $31,163.95.

2 On 11th April 1962, the municipality granted to the predecessor of Mobil a petroleum and natural gas lease in respect of the N.E. $^1/_4$ of sec. 17, twp. 5, rge. 31, West of the Principal Meridian, in Saskatchewan, excepting .52 of an acre, for a term of five years and so long thereafter as the leased substances were produced therefrom.

3 On 19th March 1964 a similar lease was made to Mobil in respect of the fraction of an acre excluded from the first lease.

4 Each of these leases contained the following provisions:

> 8. OFFSET WELLS:
>
> In the event of commercial production being obtained from any well drilled on any drilling unit laterally adjoining the said lands and not owned by the Lessor, or, if owned by the Lessor, not under lease to the Lessee, the Lessee shall either:
>
> > (a) commence or cause to be commenced within six (6) months from the date of such well being placed on production, the drilling of an offset well on the drilling unit of the said lands laterally adjoining the said drilling unit on which production is being so obtained, and thereafter shall drill the same to the horizon in the formation from which production is being obtained from the said adjoining drilling unit;
>
> or
>
> > (b) subject to Clause 4 hereof, pay to the Lessor, commencing six (6) months after the date of such well being placed on commercial production and from time to time thereafter such royalty as would have been payable if the petroleum and natural gas produced from the well creating the offset were actually being produced from a well on the drilling unit of the said land laterally adjoining the said drilling unit on which production is being so obtained; PROVIDED, HOWEVER, that should any drilling unit of the said lands be so offset by more than one well the royalty payable to the Lessor hereunder shall be based only on the production from the first of such wells;
>
> or
>
> > (c) surrender to the Lessor the drilling unit on which the offsetting well is required, such surrender to be in respect of all formations covered by the lease except any zone in respect of which petroleum and natural gas is being obtained by the Lessee;
>
> PROVIDED that if any well drilled on lands adjoining the said lands has been proved to be productive primarily or only of natural gas, the Lessee shall have no obligations under this clause 8 unless an adequate and commercially profitable market for natural gas which might be produced from the offset well can be previously arranged and provided ...
>
> 15. Surrender: —

> Notwithstanding anything herein contained, the Lessee may at any time or from time to time determine or surrender this Lease and the term hereby granted as to the whole or any part or parts of the leased substances and/or the said lands, upon giving the Lessor written notice to that effect, WHEREUPON this Lease and the said term shall terminate as to the whole or any part or parts thereof so surrendered and all the Lessee's obligation with respect thereto shall be at an end and the rental, royalty or otherwise, shall be extinguished or correspondingly reduced as the case may be, but the Lessee shall not be entitled to a refund of any such rent theretofore paid.

5 By Order in Council enacted pursuant to The Oil and Gas Conservation Act, R.S.S. 1965, c. 360, applicable to the area in which the leased lands were situate, drilling units with an area of 80 acres were established comprising two legal subdivisions in any section, grouped as follows: legal subdivi sions 1 and 2; 3 and 4; 5 and 6; 7 and 8; 9 and 10; 11 and 12; 13 and 14; and 15 and 16.

6 Mobil drilled a successful well upon lands not leased from the municipality on legal subdivision 14 of sec. 16, twp. 5, rge. 31, West of the Principal Meridian. The drilling unit on which this well was located laterally adjoined the drilling unit on the leased lands comprising legal subdivisions 15 and 16.

7 Mobil then had to elect, under cl. 8, whether to: (a) drill an offset well on the latter drilling unit; (b) pay compensatory royalties based upon the production from the successful well; or (c) surrender the drilling unit affected by cl. 8.

8 Mobil elected, under cl. 8(b), to pay compensatory royalties, and, pursuant to that election, cheques were forwarded monthly to the municipality.

9 Following the drilling of two dry holes on legal subdivisions 9 and 10 of the leased land lying immediately to the south of legal subdivisions 15 and 16, Mobil decided to surrender legal subdivisions 15 and 16. On 16th July 1964, Mobil wrote to the municipality the following letter:

> Relative to that certain Petroleum and Natural Gas Lease and Grant dated April 11, 1962, by and between the Rural Municipality of Storthoaks, as Lessor, and Mobil Oil of Canada, Ltd., as Lessee, which lease was subsequently assigned by the said Mobil Oil of Canada, Ltd. to Socony Mobil Oil of Canada, Ltd., The Pure Oil Company and Sinclair Canada Oil Company, covering among other lands, Lsds 15 and 16, Section 17, Township 5, Range 31, WPM, we wish to advise that Socony Mobil Oil of Canada Ltd., The Pure Oil Company and Sinclair Canada Oil Company will surrender and yield up all of their right, title and interest granted in the said lease as to the said Lsds 15 and 16, Section 17, Township 5, Range 31, WPM.
>
> This surrender will take place July 16, 1964, and Socony Mobil Oil of Canada, Ltd., The Pure Oil Company and Sinclair Canada Oil Company will be under no further obligation relative thereto.
>
> Yours very truly,
>
> SOCONY MOBIL OIL OF CANADA, LTD.
>
> K. C. Coulter
>
> (Sgd.) James B. Morris
>
> James B. Morris,
>
> District Landman.

JBM:fs

cc: The Pure Oil Company (2), Calgary

The Pure Oil Company, Regina

Sinclair Canada Oil Company, Calgary

H. H. Haraldson, Calgary

10 The following day a further letter was sent relative to the surrender in its entirety of the lease covering the fractional acre.

11 Mr. Haraldson, to whom a copy of each of these letters was despatched, was the supervisor of Mobil's land titles records department at its Calgary office. It was from Mobil's production accounting section of its Calgary office that the compensatory royalty cheques were sent to the municipality. It would normally be Mr. Haraldson who would notify everyone affected, including the accounting section which paid the compensatory royalties, as to the surrender of the leases.

12 For some unexplained reason the production accounting section was not notified about the surrender of the two leases. The computation of the compensatory royalty, based upon the production obtained from the adjacent producing well, continued to be made, and each month a cheque was sent by Mobil to the municipality for the amount so computed. These payments continued until August 1967 when they were temporarily discontinued.

13 On 20th February 1968, Mrs. Gauthier, the secretary treasurer of the municipality, wrote the following letter:

Mobil Oil Canada Ltd.

Mobil Oil Building

Calgary, Alberta.

Dear Sirs:

Re: Offset Royalties

For the past three or four years we have received Offset Royalties for Nottingham Field 14-16-5-31 W 1st. As we have not received any payment since August 1967 we have been wondering why the payments were discontinued.

Would you please advise and oblige,

Yours truly,

(Mrs.) Rita Gauthier

Secretary Treasurer

14 Mobil replied by letter dated 29th February 1968 the relevant portions of which read as follows:

Dear Mrs. Gauthier:

Due to a change in organization the records pertaining to your offset royalty were mislaid.

The following is a breakdown of revenue owing you from August, 1967 to January, 1968.

15 There followed a statement showing the amounts stated by Mobil to be owing in respect of each month from August 1967 to January 1968 inclusive for a total of $3,781.82, which amount was paid by Mobil to the municipality. The letter was signed "for D. M. Hinchee, Manager, Accounting, Computer & Services Centre".

16 Thereafter further monthly payments were made for February and March 1968. Subsequently Mr. Simington, the chief of the accounts payable section, decided to have his assistant go to the titles records section to obtain information, when it was discovered that there had been a surrender as to parts of the leased lands.

17 On 24th June 1968, Mobil sent the following letter to the municipality:

Pursuant to the provisions of Subclause (b) of Clause 8 of the subject lease, Socony Mobil, on behalf of the lessees, commenced in April 1964 to pay compensatory royalties to the Rural Municipality of Storthoaks. This obligation arose as a result of the drilling, completion and taking of production from the well SMPS Nottingham 14-16-5-31 WPM. On July 16, 1964, pursuant to Subclause (c) of Clause 8 and also in accordance with Clause 15 of the Lease, Socony Mobil, on behalf of the lessees, caused Legal Subdivisions 15 and 16 of Section 17, Township 5, Range 31, WPM, as well as 0.58 acres covered by a separate lease, to be surrendered to the lessor by serving registered notices to that effect on the Rural Municipality of Storthoaks No. 31. Due to an oversight in communicating the fact of such surrender to Mobil's Production Accounting Department, compensatory royalty payments were not discontinued and were paid in error to the Municipality up to and including March of this year. The overpayment amounts to $31,163.95 as set forth in the attached calculation schedule.

Under the circumstances, we have no alternative but to request a refund of the aforesaid amount. We would appreciate your advising us, as to when we may expect payment.

Yours truly,

(Sgd.) W. F. Brann

W. F. Brann

Controller

ACMcMillan:bml

18 The municipality did not make the requested payment, and this action was commenced.

19 The evidence at trial showed the the municipality considered the payments made to be compensation for oil being removed from the leased land by Mobil's producing well on the adjacent land. When asked what the municipality considered to be the meaning of the surrender notices, the secretary treasurer gave the following evidence:

Q. What did it mean to you? A. Well all it meant was that Mobil Oil would not have the right to come in and drill

wells in the future.

Q. On these lands? A. On these two LSD's.

20 She also testified that the moneys received from Mobil had been taken into general account and had been expended for municipal purposes. The municipality had no funds on hand with which to pay the amount claimed by Mobil. To meet that amount out of taxes would involve a mill rate increase of 15 mills.

21 The learned trial Judge dismissed Mobil's claim, holding that there had not been a mistake of fact by Mobil itself, in the light of its officer's knowledged of the surrenders. He decided that the payments were voluntary payments and could not be recovered.

22 This judgment was reversed on appeal on the ground that the moneys were paid under mistake of fact and that the case was governed by the principle stated in *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24. Maguire J.A. would have reduced the amount of the claim by the amounts paid by Mobil to the municipality after the exchange of correspondence in February 1968. He was of the view that Mobil's letter of 29th February 1968 constituted a representation that those moneys were owing and that it would be against good conscience to require the return of those moneys.

23 The first contention made on behalf of the municipality was that Mobil did not have the right to surrender its leasehold rights in legal subdivisions 15 and 16. The argument was that when commercial production of oil was obtained upon the laterally adjoining drilling unit cl. 8 of the lease required Mobil to elect to do one of three things. Having elected to make the payments defined in para. (b) of cl. 8, Mobil could not, thereafter, elect to surrender the drilling unit comprising legal subdivisions 15 and 16, and Mobil was bound to continue the payments provided in para. (b) during the term of the lease.

24 This submission would have some weight if Mobil's right to surrender the two legal subdivisions depended exclusively upon para. (c) of cl. 8, but that is not the case. A general right of surrender is given to Mobil by cl. 15 of the lease, which begins with the words "Notwithstanding anything herein contained". That clause gave to Mobil the right at any time to surrender the lease as to any part or parts of the leased lands, and provided that upon such surrender Mobil's obligation with respect thereto should be at an end. In my opinion Mobil was entitled to effect the surrenders which it made.

25 The second submission was that the payments made by Mobil to the municipality were voluntarily made with full knowledged of all the facts. It is contended that the knowledged of Mr. Morris, the district landman, who signed the letters of surrender, was the knowledge of Mobil and, therefore, that Mobil knowingly made the payments to the municipality. This raises the issue as to whether a corporation, whose authorized agent makes payments of money on its behalf, under a mistake of fact, is entitled to recover the money if some other agent of the corporation had full knowledge of the facts.

26 This question was considered in the case of *Anglo-Scottish Beet Sugar Corpn. Ltd. v. Spalding Urban District Council*, [1937] 2 K.B. 607, [1937] 3 All E.R. 335. The plaintiff company had its head office in Glasgow, a district office at Nottingham and a branch factory at Spalding. Water was supplied to this factory by the defendant district council under a contract made in 1925 calling for a minimum quarterly payment of £375. In 1927 a new contract was made which provided for a minimum quarterly payment of £100. This later contract was negotiated at the plaintiff's head office in Glasgow by the general manager. By mistake, the factory manager at Spalding and the district manager at Nottingham were not notified of the new agreement. The defendant, by mistake, continued to bill the plaintiff at the old rate. The bills were forwarded by the manager at Spalding to the commercial manager at Nottingham, who paid them. The error was not discovered until 1936, when claim was made for the amounts overpaid.

27 The plaintiff's action succeeded. Atkinson J. relied upon the case of *Kelly v. Solari*, and, at p. 613, cited the

well-known passage from the judgment of Parke B. in that case, and also from the reasons of Rolfe B.:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley J. in the case of *Milnes v. Duncan* (1827), 6 B. & C. 671, 108 E.R. 598; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact'. Rolfe B. said: 'With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.

28 Atkinson J. pointed out that *Kelly v. Solari* had been cited with approval in the judgments of Lord Shaw, Lord Sumner and Lord Carson in *Jones (R. E.) Ltd. v. Waring & Gillow Ltd.*, [1926] A.C. 670.

29 His conclusion, at p. 627, was:

> In my opinion the mere fact that some agent of the company knew of the second agreement is immaterial so long as he had no idea that it was not being acted upon. I think this case is well within the principle of *Kelly v. Solari*, and certainly the point relied on here was not raised there although obviously some servants of the company knew all about the lapsing of the policy.

30 The *Anglo-Scottish* case was followed in *Turvey v. Dentons (1923) Ltd.*, [1953] 1 Q.B. 218, [1952] 2 All E.R. 1025. That case involved a claim to recover overpayments of rental under a lease. The accountant of the lessee erred in making rental payments because he thought that the lease was for a term of ten years, whereas it was for 99 years. The difference between these terms affected the deductions which could be made from the rental under the Finance Act, 1940, c. 29. The secretary of the company knew what the actual term of the lease was.

31 Pilcher J. in this case said, at p. 224:

> It is, however, clear upon authority that where, as in the present case, a limited liability company is concerned and payments are made under a bona fide mistake of fact by an authorized agent of the company, the fact that some other agent of the company may have had full knowledge of all the facts does not disentitle the company to recover the money so paid, provided that the agent with the full knowledge does not know that the payments are being made on an erroneous basis. For this proposition I need only refer to the case of *Anglo-Scottish Beet Sugar Corpn. Ltd. v. Spalding Urban District Council* [supra], where the facts were curiously similar to those which I have had to consider in the present case.

32 The *Anglo-Scottish* case was cited by Davey J.A. in the British Columbia Court of Appeal in *Purity Dairy Ltd. v. Collinson* (1966), 57 W.W.R. 737, 58 D.L.R. (2d) 67, a case in which, through mistakes made by the company's billing clerk, overpayments had been made for the purchase of milk.

33 I would accept the statement of the law made by Pilcher J., quoted above. In my opinion the mistake which

occurred on the part of the accounting department of Mobil in continuing the payments to the municipality after the surrenders, not knowing that the lease had ceased to exist in relation to legal subdivisions 15 and 16, was a mistake of fact by Mobil within the rule stated in *Kelly v. Solari.*

34 This conclusion does not determine the matter, because the municipality contends that, even though the payments were made under a mistake of fact, Mobil is not entitled to recover them if considerations exist which would make it inequitable to require their repayment.

35 The proposition upon which the municipality relies was stated by McKay J.A. in *Garden River v. Montreuil*, [1929] 1 W.W.R. 486, 23 Sask. L.R. 439, [1929] 2 D.L.R. 396, a judgment of the Saskatchewan Court of Appeal, at p. 400:

> In order that the plaintiff should be entitled to return of the money, not only must it be shown that it was paid under a mistake of fact, but also that the defendant is not entitled to retain it. Or, as Parke, B., said in *Kelly v. Solari* (1841), 9 M. & W. 54, at p. 58, 152 E.R. 24: 'It is against conscience to retain it.'

36 This passage was cited in the judgment of the same Court in *Royal Bank v. Huber*, [1972] 2 W.W.R. 338, 23 D.L.R. (3d) 209.

37 With respect, I do not think that the interpretation placed upon the words quoted from the judgment of Parke B. in *Kelly v. Solari* is correct. He did not purport to limit the right to recover money paid under a mistake of fact to cases in which it would be against conscience for the recipient of the money to retain it. What he did say was that where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it". In other words, given the circumstances he outlines, it is against conscience for the recipient to keep the money paid.

38 The submission of the municipality on this point has some support in the statement of Idington J. in *Bank of Montreal v. The King* (1907), 38 S.C.R. 258 at 280:

> Let us bear in mind that the action for money had and received by means of which this right has usually been asserted, rests upon the principle that *primâ facie* it is against equity and good conscience that the party who received it should retain it, and remember further that in many instances this *primâ facie* case is answered by virtue of conditions existing at the time of payment, or subsequent events creating, so to speak, a countervailing equity that would make it against equity and good conscience to insist on the return of the money.

39 However, that case was not a claim for the recovery of money paid under a mistake of fact, but was a claim by the Crown to recover moneys paid out of its bank account on the basis of forged cheques. The real issue was as to whether the Crown, by acknowledging the accuracy of the bank statements, could be estopped from making its claim.

40 Duff J. (as he then was) expressed a similar view of the law in *Dominion Bank v. Union Bank* (1908), 40 S.C.R. 366 at 381:

> The action for money had and received is an equitable action; 'the gist of it' in Lord Mansfield's phrase, *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676, at page 1012
>
> > is that the defendant is obliged by the ties of natural justice and equity to refund the money.
>
> *Tregoning v. Attenborough* (1831), 7 Bing, 97, 131 E.R. 283; *Phillips v. London School Bd.; Cockerton v. London*

School Bd., [1898] 2 Q.B. 447, at pages 452-3; *Jacobs v. Morris*, [1902] 2 Ch. 816; *Re Bodega Co. Ltd.*, [1904] 1 Ch. 276; *Lodge v. National Union Investment Co. Ltd.*, [1907] 1 Ch. 300, at pages 311, 312. Accordingly in an action for money paid under mistake of fact, or for a purpose or consideration which has failed, the defendant may meet the plaintiff's claim by shewing that there is something in the conduct of the payer or in the transaction itself, or its legal incidents making it inequitable that the defendant should be compelled to restore what he has received. *Bank of Montreal v. The King* (1907), 38 S.C.R. 258; *Phillips v. London School Bd.; Cockerton v. London School Bd.* [supra].

41 The basis of the action for recovery of money paid under mistake of fact as being founded on "equitable" grounds was later rejected in England. Instead, such a claim was regarded as being based on contract upon an implied contract to pay.

42 Thus, Hamilton L.J. in *Baylis v. Bishop of London*, [1913] 1 Ch. 127 at 140, said:

To ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish v. Ross* (1849), 3 Exch. 527; and *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24. Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'.

43 In *Sinclair v. Brougham*, [1914] A.C. 398, after he had become Lord Sumner, he said, with reference to a claim for money paid under mistake of fact, and other similar claims, at p. 452:

All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay.

44 Scrutton L.J., in *Holt v. Markham*, [1923] 1 K.B. 504 at 513, discussed Lord Mansfield's view in somewhat pungent fashion when he said:

This is a troublesome instance of a particularly troublesome class of action. It is an action for money had and received to the plaintiffs' use, and is based upon the ground that the payment was made under a mistake of fact. Now ever since the time when that great judge, Lord Mansfield, with no doubt a praiseworthy desire to free the Court from the fetters of legal rules and enable them to do what they thought to be right in each case, obscured, in my respectful view, the nature of the action for money had and received, by saying in *Sadler v. Evans* (1766), 4 Burr. 1984 at 1986, 98 E.R. 34: 'It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action,' the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought. I do not propose to repeat the very pungent criticisms which Lord Sumner has made upon that now discarded doctrine of Lord Mansfield in *Baylis v. Bishop of London* or in *Sinclair v. Brougham*, but I respectfully entirely agree with what he says in the former case.

45 Lord Greene, in *Morgan v. Ashcroft*, [1938] 1 K.B. 49 at 62, [1937] 3 All E.R. 92, said that:

Lord Mansfield's views upon these matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim.

46 The significance of the issue discussed in these cases is that if a claim for the return of money paid under mistake of fact is founded on the basis defined by Lord Mansfield in *Moses v. Macferlan*, then, as he said in that case, at p. 1010, the recipient may "plead every equitable defence upon the general issue" and "may defend himself by everything which shows that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand, or to any part of it." If, however, the obligation to repay is contractual, it does not depend upon whether the requirement to repay is just

and equitable. To meet a claim falling within the definition in *Kelly v. Solari* it would be necessary to prove a legal estoppel.

47 The issue may not yet finally be determined in English law. Lord Wright, in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 at 61, [1942] 2 All E.R. 122, said:

> Is it clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

48 He also said, at p. 62, referring to *Moses v. Macferlan*:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it.

49 In two more recent dicta there is an indication that the question as to whether the action for money had and received is dependent upon an imputed promise to pay is still not finally determined. (See per Lord Radcliffe, *Boissevain v. Weil*, [1950] A.C. 327 at 341, [1950] 1 All E.R. 728, and per Lord Porter, *Reading v. A.G.*, [1951] A.C. 507 at 513, [1951] 1 All E.R. 617.)

50 American authority has recognized that the rule that money paid under a mistake is recoverable "is equitable and may be defeated where to allow the recovery would be inequitable": *U.S. v. National Park Bank of N.Y.* (1881), 6 F. 852 at 853-54.

51 The Restatement of Restitution states:

> The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

52 The statements of Lord Wright in the *Fobrosa* case, which I have quoted, were cited, with approval, by Cartwright J. (as he then was), delivering the reasons of the majority of the Court in *Degleman v. Guaranty Trust Co. and Constantineau*, [1954] S.C.R. 725 at 734, [1954] 3 D.L.R. 785, and by Hall J., who delivered the reasons of the Court in *Carleton (County) v. Ottawa*, [1965] S.C.R. 663 at 669, 52 D.L.R. (2d) 220.

53 In my opinion it should be open to the municipality to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money. Accordingly I have reviewed the evidence to ascertain whether there was such a change of circumstances. I have concluded that there was not. The evidence of Mrs. Gauthier, the secretary-treasurer of the municipality, was that the moneys received from Mobil were put in the general account along with tax moneys to pay general everyday expenses.

There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the municipality altered its position in any way because these moneys were received. The mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment. If the municipality is required to refund the moneys to Mobil it will be in the position of having had the use of the moneys, over a period of time, without any obligation to pay interest.

54 I have given careful consideration to the suggestion that the municipality incurred a detriment in having been deprived of the opportunity to seek to obtain another lessee, following the surrenders, because the payments might have caused it to believe that Mobil was still asserting its rights under the lease. There are, however, two difficulties in adopting this contention, which I consider are sufficient to prevent its acceptance.

55 In the first place, on the evidence, the municipality did not regard the lease of the two subdivisions as continuing in existence after the surrenders were made. I have already cited the evidence of Mrs. Gauthier as to her understanding of the meaning of the surrender notices, namely, that in the future Mobil would not have the right to come in and drill on those lands. Later in her evidence she said that this was the interpretation placed on the letters by the council of the municipality. The municipality was therefore aware that Mobil had surrendered its right to drill, and there is no evidence that this view was in any way altered because of the receipt of the subsequent payments.

56 The other difficulty is that, on the evidence, it is clear that there would have been no possibility of the municipality leasing the two subdivisions to another lessee after the surrenders were made. The two leases together leased the petroleum and natural gas rights and the right to drill for recovery of the same in a quarter section of land. After Mobil had successfully drilled on the drilling unit laterally adjoining legal subdivisions 15 and 16, in October 1963, it complied with cl. 8(b) of the leases and made compensatory royalty payments. It then continued its drilling program, by drilling a well on the leased lands on legal subdivision 10. This well was completed on 27th April 1964. It was a dry hole. It then obtained a permit to drill a second well on the same drilling unit, this time on legal subdivision 9. This well was completed on 30th June 1964. It was also a dry hole. These two dry holes were located on the two legal subdivisions immediately adjoining legal subdivisions 15 and 16, to the south. Mobil then concluded, in the light of this exploration, that there were not economic prospects for production from legal subdivisions 15 and 16, and it was for that reason that they were surrendered.

57 In view of this background it is my opinion that even if the municipality had considered that its receipt of the payments from Mobil precluded it from seeking to obtain a new lessee, though there is no evidence that it did, there would have been no possibility of effecting a new lease because the drilling history on the leased lands had established that such a lease would be worthless.

58 In my opinion, therefore, the municipality has failed to establish that it had so altered its position as a result of the receipt of the payments that it would be inequitable to require it to repay.

59 The last argument presented on behalf of the municipality is that of estoppel. In my opinion this submission also fails.

60 Whatever representation might be spelled out of Mobil's conduct in continuing to forward the cheques after the surrenders were made, it is incumbent on the municipality to show that it acted to its prejudice upon the basis of such representation. The municipality contends that such prejudice arose because it spent the money and would have to levy higher taxes to repay the same. We were not referred to any authority for the proposition that where money is paid under a mistake of fact the payer is estopped from recovering it merely because the recipient has spent it. There is authority to the contrary.

61 In *Jones (R. E.) Ltd. v. Waring & Gillow Ltd.*, previously cited, the defence of estoppel was sought to be raised in a claim for the recovery of money paid under a mistake of fact. The defence did not succeed, but there were two

dissents. Lord Cave, who wrote the dissenting reasons upholding the defence, said, at p. 684:

> It is true that, where the payee has done nothing more than to expend the money on his own purposes, that has been held to afford no defence: *Standish v. Ross* [supra]; *Baylis v. Bishop of London* [supra], but this may be because the payee has suffered no real detriment.

62 There was no disagreement with this proposition in the majority reasons.

63 Denning L.J. (as he then was), in *Larner v. London County Council*, [1949] 2 K.B. 683 at 688, [1949] 1 All E.R. 964, puts the matter in this way:

> It is next said, however, that Mr. Larner did change his position for the worse before the council asked for the money. He spent the money on living expenses — or his wife spent it for him — and he spent it in a way which he would not otherwise have done. This defence of estoppel, as it is called — or more accurately, change of circumstances — must, however, not be extended beyond its proper bounds. Speaking generally, the fact that the recipient has spent the money beyond recall is no defence unless there was some fault, as, for instance, breach of duty — on the part of the paymaster and none on the part of the recipient. In both *Skyring v. Greenwood* (1825), 4 B. & C. 281, 107 E.R. 1064, and *Holt v. Markham*, [1923] 1 K.B. 504, there was a breach of duty by the paymaster and none by the recipient. See *Jones (R. E.) Ltd. v. Waring & Gillow Ltd.*, per Lord Sumner, [1926] A.C. 670 at 693.

64 It may also be noted that in the case of *Holt v. Markham* the recipient of the money, believing that he was entitled to it, had invested it in a company which, prior to the trial, had gone into liquidation. In the present case, as has previously been noted, the funds received by the municipality were expended for its ordinary municipal purposes, of which it has had the benefit.

65 I have already dealt with the suggestion that the municipality might have been prejudiced by assuming that by receiving the payments it was precluded from seeking to obtain another lessee for legal subdivisions 15 and 16. Those reasons apply equally to the defence of estoppel. I would only add that there is no evidence that the municipality regarded the continuing payments as affecting the surrender notices. The municipality misinterpreted the full impact of the surrenders, but it did regard them as having terminated Mobil's right to drill on the surrendered land.

66 For these reasons I am of the opinion that the appeal should be dismissed with costs.

END OF DOCUMENT

TAB 2

2002 CarswellOnt 218, 111 A.C.W.S. (3d) 169

2002 CarswellOnt 218, 111 A.C.W.S. (3d) 169

Pinnacle Bank, N.A. v. 1317414 Ontario Inc.

Pinnacle Bank, N.A. (Plaintiff / Respondent) and 1317414 Ontario Inc., cob as Jay-B Conversions and William Gibbs (Defendants / Appellants)

Ontario Court of Appeal

Carthy J.A., Weiler J.A. and Austin J.A.

Heard: January 8, 2002
Judgment: January 29, 2002
Docket: CA C35982

Counsel: *Randolph D. Mills*, for Appellants

Christine Tabbert, for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure; Restitution

Restitution --- Benefits conferred under mistake — Mistake of fact — General

Plaintiff bank had client which did business with corporate defendant — Client bought goods and services from corporate defendant and paid for them by having bank wire funds from its account to corporate defendant's account — Client directed bank to transfer $60,101 U.S. to corporate defendant's account and bank carried it out — Bank then wired identical amount three days later as result of clerical error — Error was discovered two weeks later and bank requested individual defendant, who was principal of corporate defendant, to return second payment — Corporate defendant refused, taking position that client owed additional sum in any event and that it had been used to pay suppliers of goods which had been sold to client — Bank brought motion for summary judgment against defendants — Motion granted — Defendants appealed — Appeal dismissed as against corporate defendant; appeal allowed as against individual defendant — Where money is paid on supposition that specific fact is true which would entitle other to receive it, and fact is untrue and money would not have been paid if that had been known, money can be recovered and it is against conscience to retain it — To have defence against bank's claim for recovery of money corporate defendant must have had some claim against bank, and none was disclosed on evidence — No basis for finding personal as opposed to corporate liability was demonstrated.

Cases considered by *Austin J.A.*:

Royal Bank v. R., [1931] 1 W.W.R. 709, [1931] 2 D.L.R. 685, 1931 CarswellMan 20 (Man. K.B.) — considered

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

APPEAL by defendants from judgment granting summary judgment against them.

***Austin J.A.*:**

1 The defendants appeal from the decision of Kerr J. granting summary judgment with costs against all defendants.

2 The facts are not complex. The plaintiff ("Pinnacle") is a bank in Georgia, U.S.A. One of Pinnacle's clients is Kustom Marketing Inc. ("Kustom"). Kustom did business with 1317414 Ontario Inc. carrying on business as Jay-B Conversions ("Jay-B"). William Gibbs ("Gibbs") is a principal of Jay-B.

3 The nature of the business was that Kustom bought goods and services from Jay-B and paid for such goods and services by having Pinnacle wire funds from Kustom's account at Pinnacle to Jay-B's account at the Royal Bank of Canada ("RBC").

4 On the occasion in question Kustom directed Pinnacle to transfer $60,101. U.S. to Jay-B's account at RBC. Pinnacle carried out this direction on December 24, 1999. As a result of its own purely clerical error Pinnacle wired a further sum in precisely the same amount on December 27, 1999 to Jay-B's account at RBC. About two weeks later Pinnacle discovered its error and requested Gibbs to return the second payment. It was not returned. Jay-B's position is that Kustom owed the additional $60,101. U.S. to Jay-B in any event and that the money has been used to pay the business that supplied the goods which Jay-B sold to Kustom.

5 The motion judge found that the state of accounts as between Kustom and Jay-B was in issue but that that fact did not provide the defendants with any defence. He ordered the defendants to repay the second payment of $60,101. U.S. to the plaintiff together with costs and pre-judgment interest.

6 The defendants ask for the dismissal of the action as against all defendants, in the alternative for dismissal as against Gibbs and in the further alternative that the summary judgment be set aside and the action proceed to trial.

7 The motion judge rested his decision in favour of the plaintiff on two different bases. The first was the decision of Dysart J. in *Royal Bank v. R.*, [1931] 2 D.L.R. 685 (Man. K.B.). The second was the decision of the Supreme Court of Canada in *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.). As the latter is binding upon this court and in the circumstances, of clearer application, it should be dealt with first.

8 Mobil held oil and gas leases pursuant to which it paid royalties to the municipality in which the lands were located. In error, Mobil continued to pay royalties after surrendering the leases. When it discovered its error, Mobil demanded repayment. The municipality refused the claim and Mobil sued. The trial judge dismissed the action basing his decision on the fact that an officer of Mobil was aware of the surrender of the leases. The Alberta Court of Appeal allowed Mobil's claim and appeal upon the ground that the monies were paid under mistake of fact. The Supreme Court of Canada dismissed the appeal upon the ground that:

> . . . where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it." (p. 159)

9 That authority is sufficient to dispose of this appeal.

10 *Royal Bank v. R.* is a somewhat more complicated case but in it Dysart J. purported to set out the law with respect to the right to recover money paid under mistake of fact in the form of four principles as follows:

> First: that the mistake is honest. There must be on the part of the person paying the money the genuine *bona fide* belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have learned. His last laches or negligence will not of themselves affect his belief. Knowledge will not be imputed to him, however ample may be the means of knowledge which he has on hand, however readily accessible those means may be, they do not constitute knowledge; and knowledge will not be imputed to him or inferred against him, unless he wilfully abstains from enquiry. [Authorities omitted.]
>
> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it : 21 Hals., p. 30; *Skyring v. Greenwood*, 4 B. & C. 281, 107 E.R. 1064; *Chalmers v. Miller*, 32 L.J.C.P. 30; *Pollard v. Bank of England*, L.R. 6 Q.B. 623; *Thomson v. Clydesdale Bank, Ltd.*,[1893] A.C.282.
>
> The third condition is that the facts, as they are believed to be, impose an obligation to make the payment. This obligation must be legal or equitable or moral, as will appear from a reading of the cases already referred to. It is not enough that the payment is desirable or advantageous, the compulsion must at least be practical. [Authority omitted.]
>
> The fourth condition to recover is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer. This proposition is not the exact converse of the third condition. The money may be owing to the receiver from a third person who has induced the payment,, but the existence of such a debt is not enough to defeat recovery : see *John v. Dodwell & Co.* and *Reckitt v. Barnet, Pembroke & Slater Ltd., supra.* Thus, the mere volunteering cannot defeat recovery : *Banque Belge v. Hambrouck*, [1921] 1 K.B. 321. As was stated in *O'Grady v. Toronto* (1916), 31 D.L.R. 632, 37 O.L.R. 139, the money ought not to be retained if it cannot be retained honestly and conscionably.

11 Counsel in the instant case, both here and below, were agreed that conditions one and three had been met. Counsel for the appellants argued that conditions two and four had not been met. The motion judge found that all four conditions had been met.

12 As to condition four, the appellants rely upon the evidence of Gibbs that Kustom owed even more than the two payments of $60,101. U.S. and on the finding of the motion judge that there was in fact a difference of opinion as to what debt was owing by Kustom to Jay-B.

13 The motion judge went on to find that that difference of opinion did not afford the defendants any defence to this action. He did not say why but I agree with his conclusion because Kustom is not a party to these proceedings. The fourth condition requires that the receiver of the money has no legal, equitable or moral right to retain the money as against the payer. The payer is Pinnacle, not Kustom. To constitute a defence, Jay-B must have some claim against Pinnacle and none is disclosed on the evidence. Accordingly condition four is met.

14 This leaves for consideration the second condition which Dysart J. set out as follows:

> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it.

TAB 3

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

Garland v. Consumers' Gas Co.

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

Supreme Court of Canada

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

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

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

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Christopher M. Rupar for intervener Attorney General of Canada

Thomson Irvine for intervener Attorney General for Saskatchewan

Alan H. Mark and Kelly L. Friedman for intervener Toronto Hydro-Electric System Limited

Mark M. Orkin, Q.C., for intervener Law Foundation of Ontario

Patricia D.S. Jackson and M. Paul Michell for intervener Union Gas Limited

Subject: Criminal; Public; Restitution

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

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

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

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

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

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

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

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

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

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

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

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

Held: The appeal was allowed.

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

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

The proper approach to the juristic reason analysis has two parts. First, the plaintiff must show that there is no juristic reason from an established category, such as a contract or a disposition of law, to deny recovery. If there is no juristic reason, then the plaintiff has made out a prima facie case. The prima facie case can be rebutted if the defendant demonstrates another reason to deny recovery. A de facto burden of proof is placed on the defendant to show why the enrichment should be retained.

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

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

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

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

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

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

Because the gas company was not a government official acting under colour of authority, it could not rely on the de

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facto doctrine to exempt it from liability. The underlying purpose of the de facto doctrine is to preserve law and order and the authority of the government. Those interests were not at stake in this litigation.

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

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

Le fait que, à partir de 1981 jusqu'en 1994, la compagnie se soit fondée sur les ordonnances inopérantes de la CEO

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

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

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

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

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

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

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

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

Cases considered by *Iacobucci J.*:

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

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

Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275, 8 C.P.C. 100, 90 D.L.R. (3d) 481, 23 N.R. 298, 1978 CarswellOnt 462, 1978 CarswellOnt 596 (S.C.C.) — considered

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

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

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

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

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

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

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

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

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

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

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

R. v. Jorgensen, 43 C.R. (4th) 137, 102 C.C.C. (3d) 97, 129 D.L.R. (4th) 510, 189 N.R. 1, 87 O.A.C. 1, 32 C.R.R.

(2d) 189, *(sub nom. R. v. Hawkins)* 25 O.R. (3d) 824, 1995 CarswellOnt 1185, [1995] 4 S.C.R. 55, 1995 CarswellOnt 985 (S.C.C.) — followed

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

art. 1493 — referred to

art. 1494 — referred to

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

s. 91 ¶ 19 — referred to

s. 91 ¶ 27 — referred to

s. 92 ¶ 13 — referred to

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

Generally — referred to

s. 15 — considered

s. 347 — referred to

s. 347(1) — considered

s. 347(1)(b) — referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55

Generally — referred to

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

Generally — referred to

s. 18 — considered

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

s. 25 — considered

Rules considered:

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

Generally — referred to

R. 45.02 — considered

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

Iacobucci J.:

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

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

I. Facts

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

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

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

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

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

II. Relevant Statutory Provisions

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

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

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

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

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

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

III. Judicial History

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

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

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

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

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

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

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

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

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

mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

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

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

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

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

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

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

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not

provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

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

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

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

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

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

IV. Issues

28

1. Does the appellant have a claim for restitution?

    (a) Was the respondent enriched?

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

2. Can the respondent avail itself of any defence?

    (a) Does the change of position defence apply?

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

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

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

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

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?

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

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

V. Analysis

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

A. Unjust Enrichment

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

(a) Enrichment of the Defendant

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

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated," he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

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

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

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

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

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

(b) Absence of Juristic Reason

(i) General Principles

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

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

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

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

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. . . The test is flexible, and the factors to be considered may vary with the situation before the court.

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

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

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely, the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model, where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

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

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations

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(*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

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

(ii) Application

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

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

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

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

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders, which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The

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scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference*, *supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he writes, at para. 149:

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

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

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

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.)). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

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

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

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

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

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

59 However, in 1994 when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LLPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble." After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

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

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

B. Defences

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

(a) Change of Position Defence

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

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

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

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

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

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

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 OEBA. The

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former and the present sections are identical and read:

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

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

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

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

(c) Exclusive Jurisdiction and Collateral Attack

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

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

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

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

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

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

(d) The Regulated Industries Defence

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

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

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

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

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

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

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.). In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse' " (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes; therefore, it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal

charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

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

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

(e) De Facto Doctrine

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

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

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

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

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

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

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

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

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

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

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

C. Other Orders Requested

(a) Preservation Order

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

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

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

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

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

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

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

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

(b) Declaration that the LPPs Need Not Be Paid

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

(c) Costs

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

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

VI. Disposition

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

Appeal allowed.

2004 CarswellOnt 1558, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), REJB 2004-60672, J.E. 2004-931, 42 Alta. L. Rev. 399

Pourvoi accueilli.

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

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TAB 4

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

Peter v. Beblow

CATHERINE PETER v. WILLIAM BEBLOW

Supreme Court of Canada

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

Heard: November 12, 1992
Judgment: March 25, 1993
Docket: Doc. 22258

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

Counsel: *G. William Wagner* and *R.C. Bernhardt*, for appellant.

Nuala J. Hillis and *Jessie MacNeil*, for respondent.

Subject: Family; Insolvency; Estates and Trusts; Property

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Family law — Unmarried couples — Property — Constructive and resulting trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Trusts — Constructive trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Restitution — Unjust enrichment — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment —

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

The man and woman lived together in a common law relationship in the man's house for over 12 years. The woman cared for both sets of children while they remained at home. She cooked, cleaned, washed clothes, looked after the garden and worked on the property. The man did not pay the woman for her work. Both contributed to the purchase of groceries and supplies, the man contributing a greater share. The woman worked outside the home part-time during the summers, and purchased a property elsewhere. The man paid off his mortgage on the house and bought a houseboat and a van. After the parties separated, the house remained vacant. The woman brought an action claiming that the man had been unjustly enriched by her work. She sought to have a constructive trust imposed respecting the house or, alternatively, damages. The trial judge found that the man had been unjustly enriched since he had obtained the woman's services without compensation. He also found that the woman was under no obligation to perform the work without reasonable expectation of compensation, and that the man ought to have known that. He concluded that she had conferred a proprietary benefit upon the house in an amount just over its assessed value. As the man was living elsewhere and a monetary judgment would be impracticable since he was living on his pension, the fairest apportionment would be to transfer the house to the woman. The British Columbia Court of Appeal allowed the man's appeal on the grounds that the woman was not deprived, that she had no reasonable expectation of compensation, and that there was insufficient nexus between her contribution and the property. The woman appealed.

Held:

Appeal allowed.

Per MCLACHLIN J. (LA FOREST, SOPINKA and IACOBUCCI JJ. concurring): Unjust enrichment has three elements: 1) an enrichment; 2) a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment. One remedy for unjust enrichment is a monetary award. The remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. Here the three elements necessary to establish a claim for unjust enrichment were established. The woman's housekeeping and child-care services constituted a benefit to the man. Those services constituted a corresponding detriment to the woman. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment, there was no juristic reason for the enrichment.

In determining whether there is an absence of juristic reason for the enrichment, the test is flexible. The fundamental concern is the legitimate expectation of the parties. In family cases, this concern may raise certain subsidiary matters: whether the plaintiff conferred the benefit as a valid gift, or obligation owed the defendant; whether the plaintiff submitted to, or compromised, the defendant's honest claim; whether public policy supports the enrichment. Here the first and third factors could be argued. The law presumes no duty on a common law spouse to perform work and services for her partner. As the trial judge found on the facts that the woman was under no obligation to perform the work without reasonable expectation of compensation, the woman's services were neither performed pursuant to obligation nor were they a gift. Concerning public policy, there is no logical reason to distinguish domestic services from other contributions. Refusing to put a price on these services systematically devalues women's contributions to the family economy and contributes to the feminization of poverty. Today courts regularly recognize the value of domestic services. Although the legislature has excluded unmarried couples from matrimonial property legislation, it is precisely where an injustice arises without a legal remedy that equity finds a role. Accordingly, there were no juristic arguments that would justify the unjust enrichment.

In determining the proper remedy for unjust enrichment the same general principles apply in both commercial and in family cases. The first step is to determine whether a monetary award is insufficient and whether sufficient nexus between the contribution and the property has been made out. In considering whether a monetary award is insufficient the court may consider the probability of the award being paid as well as the special interest in the property acquired by the contributions. The extent of the interest is to be determined on the basis of the actual value of the matrimonial

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

property — the "value-survived" approach. The "value-received" approach applies only to a monetary award. Where the claim is for an interest in the property one must necessarily determine what portion of the property's value is attributable to the plaintiff's services. A "value-received" approach to property would present practical problems with calculation. Moreover, a "value-survived" approach would accord best with the expectations of most parties, who expect to share in the wealth generated by their partnership. The trial judge's approach accorded with these principles. He assessed the value received by the woman, held that a monetary judgment would be inadequate, and concluded that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust. Considering the woman's proper share of all the family assets, the evidence supported the trial judge's conclusion that the woman had established a constructive trust entitling her to title to the family home. Her services helped preserve the property and saved the man large sums of money which he used to pay off his mortgage and to purchase a houseboat and a van.

Per CORY J. (concurring) (L'HEUREUX-DUBÉ and GONTHIER JJ. concurring):

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if he or she were permitted to retain it. The constructive trust may be applied where the spouse has contributed either to the acquisition of property or to its preservation, maintenance or improvement. This remedy may be applied to common law relationships. Here the trial judge specifically found that the woman's services had enriched the man.

Particularly in a matrimonial or long-term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other. The constructive trust is used to redress gains made through a breach of trust in a commercial or business relationship. Parties involved in long-term common law relationships will also base their actions on mutual trust. They too are entitled, in appropriate circumstances, to the remedy of constructive trust. In today's society it is unreasonable to assume that the presence of love automatically implies the gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour to share in the parties' property when the relationship is ended. The balancing of benefits in a matrimonial or common law relationship cannot be accomplished with the precision possible in a commercial relationship. The trial judge must consider the nature of the relationship, its duration and the contributions of the parties. Here there was ample evidence to justify the trial judge's finding that the woman had suffered deprivation. As a result of the relationship, including the efforts of the woman, the house was looked after and maintained. A 12-year relationship was long enough to provide a strong presumption that the services provided by the woman would not be used solely to enrich the man. The woman worked to create a home for the man, which involved many hours of work per week.

The test regarding juristic reasons for the enrichment is an objective one. In a common law relationship, it is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. Here the trial judge appropriately drew the inference that the woman would reasonably have had an expectation of sharing the wealth she helped to create. All the conditions for unjust enrichment were made out.

While there is a need to limit the use of the constructive trust remedy in a commercial context, the same proposition should not be rigorously applied in a family relationship. Unlike a commercial relationship, in a family relationship the work, services and contributions provided by one of the parties need not be directly linked to a specific property. As long as there was no compensation provided for one party's services then it can be inferred that the provision of those services permitted the other party to acquire lands or to improve them. It follows that in a quasi-marital relationship where third party rights are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. Where the relationship is short or there are no assets surviving its dissolution, a monetary award should be made. A monetary payment might also be more appropriate than a constructive trust if the plaintiff's entitlement is small or could be satisfied apart from the property, if the defendant

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

has any special attachment to the property, or if an award to the plaintiff of an interest in the property might cause hardship to the defendant. Here the woman contributed to the maintenance and preservation of the house. The trial judge was correct in finding that a monetary award would be impracticable. The property was vacant and the woman might have formed an emotional attachment to it. It was both reasonable and appropriate to choose the house for a constructive trust.

The two methods of evaluating the contribution of a party in a matrimonial relationship are the "value received" approach and the "value surviving" approach. While the former has traditionally been used in constructive trust cases, there is no reason why the latter approach could not be used. The remedy should be flexible. Nevertheless, the value surviving approach will often be preferable. This method will usually be more equitable and will more closely accord with the parties' expectations. Further, this method will avoid the difficult task of putting a dollar value on domestic services. Here the trial judge used a value received approach. Awarding the house to the woman reflected a fair assessment of her contribution to the relationship.

Cases considered:

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

Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd., [1981] Ch. 105, [1980] 2 W.L.R. 202, [1979] 3 All E.R. 1025 — *considered*

Davidson v. Worthing (1986), 9 B.C.L.R. (2d) 202, 6 R.F.L. (3d) 113, 26 E.T.R. 60 (S.C.) — *referred to*

Everson v. Rich (1988), 16 R.F.L. (3d) 337, 31 E.T.R. 26, 53 D.L.R. (4th) 470, 71 Sask. R. 133 (C.A.) — *applied*

Grant v. Edwards, [1986] Ch. 638, [1986] 3 W.L.R. 114, [1986] 2 All E.R. 426 (C.A.) — *not followed*

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

Houghen v. Monnington (1991), 37 R.F.L. (3d) 279, 9 B.C.A.C. 222 (C.A.) — *overruled*

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

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

Hyette v. Pfenniger (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44 (B.C.S.C.) — *overruled*

Kshywieski v. Kunka Estate, [1986] 3 W.W.R. 472, 39 Man. R. (2d) 8, 21 E.T.R. 229, 50 R.F.L. (2d) 421 (C.A.) — *overruled*

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

Lawrence v. Lindsey (1982), 21 Alta. L.R. (2d) 141, 28 R.F.L. (2d) 356, 38 A.R. 462 (Q.B.) — *referred to*

Moge v. Moge, [1992] 3 S.C.R. 813, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1 — *considered*

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

Murdoch v. Murdoch, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367 — *referred to*

Murray v. Roty (1983), 41 O.R. (2d) 705, 34 R.F.L. (2d) 404, 14 E.T.R. 237, 147 D.L.R. (3d) 438 (C.A.) — *referred to*

Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762 — *referred to*

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

Prentice v. Lang (1987), 10 R.F.L. (3d) 364 (B.C.S.C.) — *overruled*

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

Rawluk v. Rawluk, [1990] 1 S.C.R. 70, 23 R.F.L. (3d) 337, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81 — *distinguished*

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

White v. Central Trust Co. (1984), 54 N.B.R. (2d) 293, 140 A.P.R. 293, 7 D.L.R. (4th) 236, 17 E.T.R. 78 (C.A.) — *considered*

Statutes considered:

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

Words and phrases considered:

constructive trust

Appeal from judgment of British Columbia Court of Appeal, [1991] 1 W.W.R. 419, 50 B.C.L.R. (2d) 266, 39 E.T.R. 113, 29 R.F.L. (3d) 268, reversing judgment of Arkell L.J.S.C. awarding common law wife matrimonial home under constructive trust.

***McLachlin J. (La Forest, Sopinka and Iacobucci JJ.* concurring):**

1 I have had the advantage of reading the reasons of Justice Cory. While I agree with his conclusion and with much of his analysis, my reasons differ in some respects on two matters critical to this appeal: the issues raised by the requirement of the absence of juristic reason for an enrichment and the nature and application of the remedy of constructive trust.

2 In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs where one person makes a substantial contribution to the property of another person without compensation. The doctrine has been applied to a variety of situations, from claims for payments made under mistake to claims arising from conjugal relationships. While courts have not been adverse to applying the concept of unjust enrichment in new circumstances, they have insisted on adhering to the fundamental

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principles which have long underlain the equitable doctrine of unjust enrichment. As stated by La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, at p. 246, "... the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them."

3 The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

4 Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms as sociated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

5 Such difficulties have to some degree complicated the case at bar. At the doctrinal level, the simple question of "benefit" and "detriment" became infused with moral and policy questions of when the provision of domestic services in a quasi-matrimonial situation can give rise to a legal obligation. At the stage of remedy, the trial judge proceeded as if he were making a monetary award, and then, without fully explaining how, awarded the appellant the entire interest in the matrimonial home on the basis of a constructive trust. It is only by a return to the fundamental principles laid out in cases like *Pettkus v. Becker* and *Lac Minerals*, that one can cut through the conflicting findings and submissions on these issues and evaluate whether in fact the appellant has made out a claim for unjust enrichment, and if so what her remedy should be.

1. Is the Appellant's Claim for Unjust Enrichment Made Out?

6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment — an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment — are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

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7 The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.

8 The first question is: where do these arguments belong? Are they part of the benefit — detriment analysis, or should they be considered under the third head — the absence of juristic reason for the unjust enrichment? The Court of Appeal, for example, held that there was no "detriment" on these grounds. I hold the view that these factors may most conveniently be considered under the third head of absence of juristic reason. This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289]; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

10 In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

11 (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?

12 (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

13 (iii) Does public policy support the enrichment?

14 In the case at bar, the first and third of these factors were argued. It was argued first that the appellant's services were rendered pursuant to a common law or equitable obligation which she had assumed. Her services were part of the bargain she made when she came to live with the respondent, it was said. He would give her and her children a home and other husbandly services, and in turn she would look after the home and family.

15 This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan*, supra, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land." So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.

16 Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant was "under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. The central element of a gift at law — intentional giving to another without expectation of remuneration — is simply not present.

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17 The third factor mentioned above raises directly the issue of public policy. While it may be stated in different ways, the argument at base is simply that some types of services in some types of relationships should not be recognized as supporting legal claims for policy reasons. More particularly, homemaking and childcare services should not, in a marital or quasi-marital relationship, be viewed as giving rise to equitable claims against the other spouse.

18 I concede at the outset that there is some judicial precedent for this argument. Professor Marcia Neave has observed generally that "analysis of the principles applied in English, Australian and Canadian courts sometimes fails to confront this question directly ... Courts which deny or grant remedies usually conceal their value judgments within statements relating to doctrinal requirements." (Marcia Neave, "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, at p. 251). More pointedly, Professor Farquhar has observed that many courts have strayed from the framework of *Sorochan* for public policy reasons: "the courts ... have, after *Sorochan*, put up warning signs that there are aspects of relationships that are not to be analyzed in the light of unjust enrichment and constructive trust." (Keith B. Farquhar, "Causal Connection in Constructive Trust After *Sorochan v. Sorochan*" (1989), 7 Can. J. of Family Law 337, at p. 343). The public policy issue has been summed up as follows by Professor Neave at p. 251: "whether a remedy, either personal or proprietary, should be provided to a person who has made contributions to family resources." On the judicial side, the view of the respondent is pointedly stated in *Grant v. Edwards*, [1986] 2 All E.R. 426, at p. 439, per Browne-Wilkinson V.C.:

> Setting up house together, having a baby and making payments to general housekeeping expenses ... may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.

Proponents of this view, Professor Neave, at p. 253 argues, "regard it as distasteful to put a price upon services provided out of a sense of love and commitment to the relationship. They suggest it is unfair for a recipient of indirect or non-financial contributions to be forced to provide recompense for those contributions." To support this position, the respondent cites several cases. *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421 [[1986] 3 W.W.R. 472] (Man. C.A.); *Houghen v. Monnington* (1991), 37 R.F.L. (3d) 279 (B.C.C.A.); *Prentice v. Lang* (1987), 10 R.F.L. (3d) 364 (B.C.S.C.); *Hyette v. Pfenniger*, B.C.S.C., Dec. 19, 1991 [now reported (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44].

19 It is my view that this argument is no longer tenable in Canada, either from the point of view of logic or authority. From the point of view of logic, I share the view of Professors Hovius and Youdan [*The Law of Family Property*] that "there is no logical reason to distinguish domestic services from other contributions" (at p. 146). The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly thirty years ago: "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it" ("With All My Worldly Goods," *Holdsworth Lecture* (University of Birmingham, 20th March 1964), at p. 32). The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481], per L'Heureux-Dubé J., at pp. 853-54.

20 Moreover, the argument cannot stand with the jurisprudence which this and other courts have laid down. Today courts regularly recognize the value of domestic services. This became clear with the Court's hold ing in *Sorochan*, leading one author to comment that "the Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial contribution in trusts of property in the familial context" (Mary Welstead, "Domestic Contribution and Constructive Trusts: The Canadian Perspective," [1987] Denning L.J. 151, at p. 161). If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*, supra. While that case arose under the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), the value of the services does not change with the legal remedy invoked.

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21 I cannot give credence to the argument that legal recognition of the value of domestic services will do violence to the law and the social structure of our society. It has been recognized for some time that such services are entitled to recognition and compensation under the *Divorce Act* and the provincial Acts governing the distribution of matrimonial property. Yet society has not been visibly harmed. I do not think that similar recognition in the equitable doctrine of unjust enrichment will have any different effect.

22 Finally, I come to the argument that, because the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship, the court should not use the equitable doctrine of unjust enrichment to remedy the situation. Again, the argument seems flawed. It is precisely where an injustice arises without a legal remedy that equity finds a role. This case is much stronger than *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, where I dissented on the ground that the statute expressly pronounced on the very matter with respect to which equity was invoked.

23 Accordingly, I would agree with Cory J. that there are no juristic arguments which would justify the unjust enrichment, and the third element is made out. Like him, I conclude that the plaintiff was enriched, to the benefit of the defendant, and that no justification existed to vitiate the unjust enrichment claim. The claim for unjust enrichment is accordingly made out and it remains only to determine the appropriate remedy.

2. Remedy — Monetary Judgment or Constructive Trust?

24 The other difficult aspect of this case is the question of whether the remedy which the trial judge awarded — title to the matrimonial home — is justified on the principles governing the action for unjust enrichment. 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.

25 In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, supra, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, supra.

26 My colleague Cory J. suggests that, while a link between the contribution and the property is essential in commercial cases for a constructive trust to arise, it may not be required in family cases. He writes [pp. 31-32]:

> ... La Forest J. concluded [in *Lac Minerals*, supra] that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property.
>
> I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship.

27 I doubt the wisdom of dividing unjust enrichment cases into two categories — commercial and family — for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence. Neither *Pettkus*, nor *Rathwell* [*Rathwell v. Rathwell*, [1978] 2 W.W.R. 101], nor *Sorochan* suggest such a departure. Moreover, the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust. Finally, the creation of special rules for special situations might have an adverse effect on the development of this

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emerging area of equity. The same general principles should apply for all contexts, subject only the demonstrated need for alteration. Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385], at p. 519 (adopted by La Forest J. in *Lac Minerals*, supra, at p. 675), warns against confining constructive trust remedies to family law cases stating that: "to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles." The same result, I fear, may flow from developing special rules for finding constructive trusts in family cases. In short, the concern for clarity and doctrinal integrity with which this Court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

28 Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given her a special link to the property, in which case a constructive trust arises.

29 For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 28 [p. 32] 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.

30 The next question is the extent of the contribution required to give rise to a constructive trust. A minor or indirect contribution is insufficient. The question, to quote Dickson C.J. in *Pettkus v. Becker*, supra, at p. 852, is whether "[the plaintiff's] contribution [was] sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the ... property." Once this threshold is met, the amount of the contribution governs the extent of the constructive trust. As Dickson C.J. wrote in *Pettkus v. Becker*, supra, at pp. 852-53:

> Although equity is said to favour equality, as stated in *Rathwell*, it is not every contribution which will entitle a spouse to a one-half interest in the property. *The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.* [Emphasis added.]

Cory J. advocates a flexible approach to determining whether a constructive trust is appropriate; an approach "based on common sense and a desire to achieve a fair result for both parties" (at p. 28 [p. 32]). While agreeing that courts should avoid becoming overly technical on matters which may not be susceptible of precise monetary valuation, the principle remains that the extent of the trust must reflect the extent of the contribution.

31 Before leaving the principles governing the remedy of constructive trust, I turn to the manner in which the extent of the trust is determined. The debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the "value received" approach), or whether regard should be had to the amount by which the property has been improved (the "value survived" approach). Cory J. expresses a preference for a "value survived" approach. However, he also suggests, at p. 31 [pp. 33-34], that "there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust." With respect, I cannot agree. It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.

32 From the point of view of doctrine, "the extent of the interest must be proportionate to the contribution" to the property: *Pettkus v. Becker*, supra, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For a monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one

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must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.

33 I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see *Davidson v. Worthing* (1986), 6 R.F.L. (3d) 113 [9 B.C.L.R. (2d) 202] (S.C.), McEachern C.J.S.C.; Hovius and Youdan at pp. 136ff). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.

34 To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in *Lac Minerals*. The value of that trust is to be determined on the basis of the actual value of the matrimonial property — the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

35 I turn now to the application of these principles to the case at bar. The trial judge began by assessing the value received by the respondent (the quantum meruit). He went on to conclude that a monetary judgment would be inadequate. The respondent had few assets other than his houseboat and van, and no income save for a War Veteran's Allowance. The judge concluded, as I understand his reasons, that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust, stating that "[the appellant] has shown that there was a positive proprietary benefit conferred by her upon the Sicamous property." Accordingly, he held that the remedy of constructive trust was made out. This approach accords with principles discussed above. In effect, the trial judge found the monetary award to be inadequate on the grounds that it would not be paid and on the ground of a special contribution to the property. These findings support the remedy of constructive trust in the property.

36 The remaining question is the quantification of the trust. The trial judge calculated the quantum meruit for her housekeeping for 12 years at $350 per month and reduced that figure by 50% "for the benefits she received." The final amount was $25,200. He then reasoned that, since the services rendered amounted to $25,200 after appropriate deductions, it follows that the appellant should receive title to the respondent's property, valued at $23,200. The missing step in this analysis is the failure to link the value received with the value surviving. As discussed above, a constructive trust cannot be quantified by simply adding up the services rendered; the court must determine the extent of the contribution which the services have made to the parties' property.

37 Notwithstanding the trial judge's failure to make this link, his conclusion that the appellant had established a constructive trust entitling her to title to the family home can be maintained if a trust of this magnitude is supported on the evidence. This brings me to a departure from the methods used below. The parties and the Court of Appeal appear to have treated the house as a single asset rather than as part of a family enterprise. This led to the argument that the appellant could not be entitled to full ownership in the house because the respondent had contributed to its value as well. The approach I would take — and the approach I believe the trial judge implicitly to have taken — is to consider the appellant's proper share of all the family assets. This joint family venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*.

38 With this in mind, I turn to the evidence on the extent of the contribution. The appellant provided extensive household services, over a period of 12 years, including care for the children while they were living at the house and

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

maintenance of the property. The testimony of the plaintiff's son provides a general idea of her contribution to the family enterprise:

> Q. What sort of things did she do?
>
> A. She did all the motherly duties for all of us ...
>
> A. When [the defendant's] two sons and my brother and I were there still, even when my sisters were there, that was quite a long time ago, I was quite young, so there was nothing really bad then, but after the sisters left, she took care of all the duties, cooking and stuff like that, cleaning, laundry. She had her ringer washer, she would do the laundry, she'd worked in the garden, things like that. She took care of all things around the house, when he was gone especially ...
>
> Q. Do you remember what work your mother did in the yard outside?
>
> A. M'hm, they both got together doing the garden, he would do the roto-tilling, they would both take care of the planting and stuff; when he was gone, she would do all the weeding and keeping up. They would share the watering of the garden. She put together three or four flower gardens all herself, except for the hard heavy work, like lifting rocks, when she first started, that was shared by all of us, including the kids.

Of all the chores performed around the property, the son states that the various siblings had minor chores, such as chopping wood and making beds. "Everything else, the major stuff, she would take care of." Other evidence, including testimony from Catherine Peter and William Beblow, supports this picture of the appellant's contribution. The trial judge held that while the respondent worked in the construction business:

> ... he would be away from home during the week and would return on the weekend whenever possible. While he was absent, the plaintiff would care for the property in the home and care for the children while he was away ...
>
> In effect, the plaintiff by moving into the respondent's home became his housekeeper on a full-time basis without remuneration except for the food and shelter that she and the children received until the children left home.

39 The respondent also contributed to the value of the family enterprise surviving at the time of breakup; he generated most of the family income and helped with the maintenance of the property.

40 Clearly, the appellant's contribution — the "value received" by the respondent — was considerable. But what then of the "value surviving"? It seems clear that the maintenance of the family enterprise through work in cooking, cleaning, and landscaping helped preserve the property and saved the respondent large sums of money which he was able to use to pay off his mortgage and to purchase a houseboat and a van. The appellant, for her part, had purchased a lot with her outside earnings. All these assets may be viewed as assets of the family enterprise to which the appellant contributed substantially.

41 The question is whether, taking the parties' respective contributions to the family assets and the value of the assets into account, the trial judge erred in awarding the appellant a full interest in the house. In my view, the evidence is capable of supporting the conclusion that the house reflects a fair approximation of the value of the appellant's efforts as reflected in the family assets. Accordingly, I would not disturb the award.

42 I would allow the appeal with costs.

Cory J. **(concurring) (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

43 The issue in this appeal is whether the provision of domestic services during 12 years of cohabitation in a common law relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the partners in the relationship. Further, consideration must be given to the extent to which the remedy of constructive trust should be applied in terms of amount or proportion.

Factual Background

44 In April 1973, the respondent asked the appellant to come and live with him. That same month, the appellant together with her 4 children moved into the respondent's home in Sicamous, B.C. At the time, 2 children of the respondent were living in the home. The parties continued to live together in a common law relationship for over 12 years, separating in June 1985. During this entire time the appellant acted as the wife of the respondent. She was a stepmother to his children until 1977 while they remained in the home. As well, she cared for her own children, the last one leaving in 1980.

45 During the 12 years, the appellant cooked, cleaned, washed clothes and looked after the garden. As well, she worked on the Sicamous property, undertaking such projects as painting the fence, planting a cedar hedge, buying flowers and shrubs for the property and building a rock garden. She built a pig pen. She kept chickens for a few years, butchering and cooking them for the family. During the winters, the appellant shovelled snow, chopped wood and made kindling. The respondent did not pay the appellant for any of her work. Both the appellant and the respondent contributed to the purchase of groceries and household supplies, although the respondent contributed a greater share.

46 In the first year of the relationship the appellant did not undertake outside work and spent 8 hours a day doing housework and work on the Sicamous property. In subsequent years, she took part-time work as a cook from June to October. During these months she worked some six hours a day at a rate of $4.50 per hour. Except for one winter when she worked at a bakery, the appellant received unemployment insurance benefits in the winter months.

47 Throughout the relationship, the respondent worked on a more or less full-time basis as a grader operator. His work frequently took him out of town to various locations in British Columbia.

48 Before he met the appellant, the respondent had lived in a common law relationship with another woman for 5 years. When she left his home he hired housekeepers. The last housekeeper he had before the appellant came to his home was paid at a rate of $350 per month.

49 The trial judge accepted the appellant's testimony that the respondent had asked her to live with him because he needed someone to care for his 2 children. This need arose when the welfare authorities expressed some concern that the respondent left the children alone when he was working away from home.

50 When the parties met, the appellant had savings of $100. In 1976, she purchased a property in Saskatchewan for $2,500. She sold this property in 1980 for $8,000 and purchased a property at 100 Mile House for $6,500. She used the remainder of the sale proceeds for a trip to Reno. At the time of trial, the appellant still owned the 100 Mile House property.

51 The respondent had purchased the Sicamous property in 1971 for $8,500. Some $900 was paid in cash and the balance of $7,600 was secured by a mortgage. The respondent was able to pay off the mortgage in 1975. The estimated market value of the Sicamous property as of 1987 was $17,800. The property's assessed value in that year was $23,200. In that same year, the respondent rented the property. The tenants were given an option to purchase it for $28,000. The option was not exercised.

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

52 With the passage of time, the respondent began to drink heavily and became verbally and physically abusive to the appellant. As a result, the appellant moved out of the Sicamous home on June 7, 1985. At the time of the trial, she was on welfare and lived in a trailer court in Sicamous. The respondent by that time had retired and was living on a houseboat in Enderby, B.C. The Sicamous house and property were vacant.

53 The appellant brought an action claiming that the respondent had been unjustly enriched over the years of the relationship as a result of the work which she performed in his home without payment of any kind. She sought to have a constructive trust imposed on her behalf in respect of the Sicamous property or in the alternative, monetary damages as compensation for the labour and services she provided to the respondent.

Courts Below

Trial Judgment

54 On the basis of *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289], the trial judge determined that in order to establish an unjust enrichment, the plaintiff must prove:

(1) enrichment;

(2) a corresponding deprivation; and

(3) the absence of any juristic reason for the enrichment.

55 He decided there must also be a clear causal connection between the spousal contribution founding the unjust enrichment and the property which is alleged to be the subject of the constructive trust.

56 The trial judge found that there had been an enrichment since the respondent had obtained the services of a housekeeper, homemaker and stepmother to his children without compensation. He further found that the plaintiff was deprived of any compensation from her labour since she devoted the majority of her time and energy and some of the monies which she earned for the benefit of the respondent, his children and his Sicamous property. Lastly, he found that there was no juristic reason for the enrichment, that is to say the appellant was under no obligation to perform the work and assist in the home without some reasonable expectation of compensation. He found that she was entitled to receive something other than the drunken physical abuse to which she had been subjected by the respondent. He concluded that the respondent ought to have known that the appellant would have a reasonable expectation that she would be compensated. He also concluded that she had shown that there was a proprietary benefit conferred by her upon the Sicamous property.

57 The trial judge then considered what would be a fair and equitable compensation. He took into account the realities of the relationship and the assets and income of the parties in order to fashion the appropriate relief. He observed that if the appellant had been employed as a housekeeper for 12 years at $350 per month, the amount the respondent had paid his last housekeeper before the appellant moved in, she would have earned $50,400. He allowed a 50 percent reduction for the benefits the appellant had received in the relationship and settled on the amount which should be paid to her as $25,200.

58 He then concluded that the fairest disposition of the case would be to award the Sicamous property to the appellant. He noted that the respondent was living in Enderby, on a houseboat. He noted that the respondent also had a van. The respondent was living on a War Veteran's Allowance and was retired. It was obvious to the trial judge that a monetary judgment would be impracticable, probably unrealistic and would not be reasonable under the circumstances. He therefore concluded that the fairest apportionment would be to have the house and land in Sicamous transferred to the appellant free and clear of encumbrances.

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

Court of Appeal

59 The respondent on the appeal [(1990), 50 B.C.L.R. (2d) 266, [1991] 1 W.W.R. 419] contended that, the trial judge had erred first in finding that there had been an unjust enrichment of the respondent, and secondly, that even if there had been an unjust enrichment, that he had erred in ordering the transfer of the Sicamous property to the appellant.

60 Macdonald J.A., writing on behalf of the court, observed that it had been conceded that the respondent had indeed been enriched by receiving the benefit of the appellant's labour and services. Thus, the first condition of *Sorochan* had been met. However, he found that the remaining conditions had not been fulfilled. The Court of Appeal disagreed with the trial judge's finding that there had been any deprivation suffered by the appellant. It found that the appellant had not been deprived as she and her children had lived in the respondent's home rent-free with the respondent's contributing more for the family's groceries than she had. He noted that the appellant had been able to acquire property and he took this as evidence that the appellant had not suffered any deprivation.

61 Macdonald J.A. further concluded that even if there was an imbalance sufficient to support a finding of deprivation, the unjust enrichment claim did not meet the third condition, namely the absence of any juristic reason for the enrichment. In his view, the appellant had failed to establish, as required by *Sorochan*, that she had prejudiced herself on the reasonable expectation of receiving something in return for her work and services. He stressed that there was not, as in other cases, the holding out of a promise to marry. Even though the respondent would, when he was drinking, ask the appellant to marry him, she never took those requests seriously.

62 Finally, even if all the conditions of unjust enrichment had been met, Macdonald J.A. disagreed with the trial judge's disposition. In his view, there was not a sufficient nexus between the appellant's contribution and the Sicamous property to entitle the appellant to receive, by way of relief, the property itself rather than a monetary judgment. He decided at p. 272 that the "relatively minor gardening activities and household tasks and expenditures over the 12 years of cohabitation" fell short of establishing a positive contribution to the acquisition, preservation, maintenance or improvement of the property. As a result, it was held that there was no legal ground upon which an order could be made transferring the property to the appellant. The appeal was allowed and the appellant's action was dismissed.

Position of the Respondent

63 The respondent conceded that there was an unjust enrichment but contended that there was no corresponding deprivation suffered by the appellant. It was said that she was adequately compensated for her services by the respondent's provision of free shelter and a large portion of the groceries.

64 Second, it was argued that the domestic services provided by the appellant did not establish any causal link to or proprietary interest in the Sicamous property.

65 The Court of Appeal clearly agreed with the respondent on these issues. With respect, I believe they erred in reaching these conclusions.

Should the Doctrines of Unjust Enrichment and Constructive Trust be Applied to "Common Law" Relationships?

66 It may be helpful to review once again the application and extension of the doctrine of constructive trust. In Scott, *The Law of Trusts*, vol. 5 (4th ed. 1989) at p. 304 the following definition appears:

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Footnote omitted.]

67 This definition, which appeared in the same form in earlier editions, was cited with approval in the dissenting reasons of Laskin J. (as he then was) in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 [[1974] 1 W.W.R. 361]. In later decisions of this Court the definition has provided a basis for the application of the constructive trust remedy in matrimonial situations.

68 In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, Dickson J. (as he then was) writing for the majority, applied the doctrine of constructive trust to a common law relationship. He noted that a court must first determine whether a claim for unjust enrichment has been established. If it has, then a court must determine whether, in the circumstances presented, a constructive trust is the appropriate remedy to apply to redress the unjust enrichment. In order to determine that there has been an unjust enrichment, the following three conditions must be fulfilled:

69 (1) there has been an enrichment;

70 (2) a corresponding deprivation has been suffered by the person who supplied the enrichment; and

71 (3) there is an absence of any juristic reason for the enrichment itself.

72 The importance of *Pettkus v. Becker*, was emphasized in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385]. There at p. 471 Dickson C.J. wrote:

> The constructive trust has existed for over two hundred years as an equitable remedy for certain forms of unjust enrichment ... Until the decision of this Court in *Pettkus v. Becker*, the constructive trust was viewed largely in terms of the law of trusts, hence the need for the existence of a fiduciary relationship. In *Pettkus v. Becker*, the Court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment.

73 Subsequently, this Court made it clear that the constructive trust remedy may also be applied in circumstances where the spouse has contributed not to the acquisition of property but rather to its preservation, maintenance or improvement. In *Sorochan v. Sorochan*, supra, Dickson C.J. gave the reasons for a unanimous Court. There the parties had never married but had cohabited on a farm in Alberta from 1940 to 1982. It is significant that before the parties began living together the defendant was, together with his brother, the owner of the farmland. Thus the lands were not acquired during the period of cohabitation. During the time they lived together the parties had 6 children. The plaintiff did all the domestic work associated with running the household and caring for the children. Both parties worked on the farm. It was conceded that the plaintiff did substantial and arduous work. For many years the defendant worked as a travelling sales representative and during those periods the plaintiff frequently assumed sole responsibility for the work on the farm.

74 It was held that the defendant had been unjustly enriched. That enrichment resulted from his receiving the benefit of the plaintiff's years of labour in the home and on the farm. This obviously resulted in valuable savings. It was pointed out that through the plaintiff's years of labour, the farm was maintained and preserved and did not deteriorate through neglect or disuse. It was found that the plaintiff's maintenance and preservation of the land coffered a significant benefit to the defendant.

75 Thus, it can be seen that the remedy provided by the constructive trust may, in appropriate cases, be applied to common law relationships where the plaintiff's contribution to the land was directed only to its maintenance and preservation. Those contributions which have been considered sufficient to justify the application of a constructive trust have been indirect financial contributions as in *Pettkus v. Becker*, supra, and work on the property which con-

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

tributed to its maintenance as in *Sorochan*.

Should the Remedy of Constructive Trust be Applied to the Case at Bar?

1. Enrichment

76 It should not be forgotten that the trial judge specifically found that there had been an enrichment to the respondent "since he obtained the services of the plaintiff as a housekeeper, homemaker and in fact stepmother without compensation." Indeed, it was conceded before us that the respondent was enriched by the work and contributions of the appellant.

2. A Corresponding Deprivation

77 It is again important to first consider the finding of the trial judge on this issue. He stated:

> ... the plaintiff was deprived of any compensation for her labour since she devoted the majority of her time and energy and some of the monies she earned towards the benefit of the respondent, his children and his property.

78 That finding would seem sufficient in itself to warrant the conclusion that the appellant suffered a deprivation which corresponds to the enrichment of the respondent.

79 Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. There is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic. In *Sorochan*, supra, Dickson C.J. suggested that benefit and deprivation are essentially two sides of the same coin. He wrote at pp. 45-46:

> Moreover, the case law indicates that the full-time devotion of one's labour and earnings without compensation can readily be viewed as a deprivation. In *Murray v. Roty* (1983), 41 O.R. (2d) 705 (Ont. C.A.), for example, a case involving a joint business and farm operation, Cory J.A., commented (at p. 710): "For eight years of her life she devoted all of her time and energy and almost all of her wages for the benefit of Roty. The deprivation is obvious".

In *Everson v. Rich* (1988), 16 R.F.L. (3d) 337, the Saskatchewan Court of Appeal, applying *Sorochan*, stated at p. 342:

> The spousal services provided by the appellant were valuable services and did constitute a benefit conferred upon the respondent. The provision of those services was a detriment to the claimant by virtue of the use of her time and energy.

80 I agree with his reasoning. 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. As Professor James McLeod pointed out ((1988), 16 R.F.L. (3d) 338) in his annotation of *Everson v. Rich*, supra, "the deprivation requirement is satisfied by showing the plaintiff expended effort or does not have what he/she had or might have had." Particularly in a matrimonial or long term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other.

81 Business relationships concerned with commercial affairs may, as a result of the conduct of one of the corporations involved, result in a court's granting a constructive trust remedy. The constructive trust has been appropriately used to redress a gain made through a breach of trust in a commercial or business relationship (See for example:

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592). Yet how much closer and trusting must be a long term common law relationship. In marriages or marriage-like relationships commercial matters and a great deal more will be involved. Clearly, parties to a family relationship will, in a commercial sense, share funds and financial goals. More importantly, couples such as the parties to this case will strive to make a home. By that I mean a place that provides safety, security and love and which is as well frequently the place where children may be cared for and nurtured. In a relationship that involves living and sleeping together, couples will share their worst fears and frustrations and their fondest dreams and aspirations. They will plan and work together to achieve their goals. Just as much as parties to a formal marriage, the partners in a long term common law relationship will base their actions on mutual love and trust. They too are entitled, in appropriate circumstances, to the relief provided by the remedy of constructive trust.

82 This remedy should be granted despite the fact that family will seldom keep the same careful financial records as business associates. Nonetheless, fairness requires that the constructive trust remedy be available to them and applied on an equitable basis without a minute scrutiny of their respective financial contributions. Indeed, in a situation such as the one presented in this case, it may be very difficult to assess the value of making a house a home and of sharing the struggle to raise children to become responsible adults.

83 In the present case, although there was no formal marriage, the couple lived and worked together in the most intimate of relationships. They shared work and the monies which they earned. The amount of the contributions may have been varied and unequal. Yet the very fact that in addition to her household work the appellant contributed something of the income from her outside employment indicates that there was a real sharing of income. As a result of the relationship, the Sicamous property was looked after and maintained. None of this could have been achieved without the efforts of the appellant.

84 Certainly, it cannot be said that the relationship was so short-lived that it should not give rise to mutual rights and obligations. Twelve years is not an insignificant period of time to live in a relationship based on mutual trust and confidence. In those circumstances, there is a strong presumption that the services provided by one party will not be used solely to enrich the other. Both the reasonable expectations of the parties and equity will require that upon the termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship.

85 The respondent asserts that because the appellant loved him she could not have expected to receive compensation or an interest in the property in return for the contributions she made to the home and family. However, in today's society it is unreasonable to assume that the presence of love automatically implies a gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour required to create a home to expect to share in the property of the parties when the relationship is terminated. Women no longer are expected to work exclusively in the home. It must be recognized that when they do so, women forgo outside employment to provide domestic services and child care. The granting of relief in the form of a personal judgment or property interest to the provider of domestic services should adequately reflect the fact that the income earning capacity and the ability to acquire assets by one party has been enhanced by the unpaid domestic services of the other. Marcia Neave in "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), lucidly sets out the position in this way at p. 254:

> The characterization of domestic services as gifts reflects a view of family relationships which is now out-dated and has a differential impact on women, since they are the main providers of such services. Women no longer work exclusively in the home. Those who do so sacrifice income that could otherwise be earned in paid work. Couples who decide that one partner, usually the woman, will forgo paid employment to provide domestic services and provide child care, presumably believe that this arrangement will maximize their economic resources. Grant of relief, whether personal or proprietary, to the provider of domestic services would recognize that the income-earning capacity of one partner and his ability to acquire assets have been enhanced by the unpaid services of the other and that those services were only provided free because it was believed that the relationship would continue.

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

86 This same reasoning has been recently applied in the context of divorce in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481]. It is appropriate to recognize that the same principle should be applied to long term common law relationships.

87 In the present case it cannot be said, as the respondent suggests, that the contributions of the appellant were minor or that they were compensated by the provision of free accommodation. It is true that the appellant did not devote all of her energy to the home or family business as did Mary Sorochan or Charlotte Murray. However, the mere fact that the appellant was able to engage in part-time employment does not detract from the fact that she provided extensive and valuable services to the respondent for which she was not compensated.

88 It cannot be forgotten that the trial judge recognized that the appellant worked to create a "home" for the respondent. The nature and extent of her efforts were clear from the evidence, but one rather touching indication of her dedication is that she helped the children to make Christmas gifts. The value of the commitment of a homemaker such as the appellant should not be underestimated. The partner who provides domestic services often works far in excess of 40 hours per week in order to provide a "home". Women who work in the home may have given up a career or a type of work which would enable them to improve their earning capacity. These are matters which should be taken into account when considering both the benefits conferred and the deprivation suffered by a claimant who has been a partner in a long term common law relationship.

89 The balancing of benefits conferred and received in a matrimonial or common law relationship cannot be accomplished with precision. Although it may well be essential in a commercial relationship to closely scrutinize the contributions made by each of the business partners to the acquisition of property, such an approach would be unrealistic and unfair in the context of a family relationship. Ordinarily, the trial judge will be in the best position to assess all the evidence presented and to estimate the contribution made by each of the parties. The nature of the relationship, its duration and the contributions of the parties must be considered. Equity and fairness should form the basis for the assessment. There was ample evidence presented in this case to justify the finding of the trial judge that there had been a deprivation suffered by the appellant.

Absence of Juristic Reason for the Enrichment

90 In *Pettkus v. Becker*, supra, Dickson J. had this to say at p. 849 with regard to juristic reasons for the enrichment:

> ... I hold 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.

91 The test put forward is an objective one. The parties entering a marriage or a common law relationship will rarely have considered the question of compensation for benefits. If asked, they might say that because they loved their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end.

92 *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421, [[1986] 3 W.W.R. 472], is a decision of the Manitoba Court of Appeal. It determined that, in the absence of evidence of a promise of marriage, a promise of compensation or an expectation on the part of the plaintiff that she would be remunerated for her services, it was not unjust for the defendant or his estate to retain the benefit of the spousal service conferred upon him by the plaintiff. Professor

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

McLeod in his annotation ((1986), 50 R.F.L. (2d) 421) summarized the conclusion in this case in these words at p. 422:

> Without some prejudicial conduct such as request, inducement, acquiescence or the holding out of future benefit, no restitutionary relief could be awarded.

93 In the case at bar the British Columbia Court of Appeal relied on the *Kshywieski* decision. It concluded that because the respondent's promises to marry the appellant were made when he was drunk, she could not have taken them seriously. As a result, it was found that there was no prejudice occasioned by the appellant. In my view, the Court of Appeal was in error in this conclusion.

94 It is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. This was the approach properly taken by the Saskatchewan Court of Appeal in *Everson v. Rich*, supra.

95 In the case at bar, the trial judge appropriately drew the inference that, in light of the duration of the relationship and the appellant's contribution to the home and property, she would reasonably have had an expectation of sharing the wealth she helped to create. He concluded that:

> ... there is no juristic reason for the enrichment. She was under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent.

96 When a claimant is under no obligation contractual, statutory or otherwise to provide the work and services to the recipient, there will be an absence of juristic reasons for the enrichment. See *Murray v. Roty* (1983), 41 O.R. (2d) 705; *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, supra.

97 In summary then, there was unjust enrichment of the respondent by the work of the appellant. The appellant suffered a corresponding deprivation. There was no juristic reason for the enrichment, that is to say there was no obligation of any kind upon the appellant to provide the services to the respondent. It follows that the trial judge was correct in his finding that there had been an unjust enrichment, a corresponding deprivation and no juristic reason for providing the enriching services. It remains to be considered what remedy should have been provided in the circumstances. Would a monetary judgment have been appropriate or should the remedy of constructive trust have been granted?

The Appropriate Remedy

98 In *Sorochan v. Sorochan*, it was noted that although the constructive trust provides an important judicial means of remedying unjust enrichment, there are other remedies available, such as monetary damages. The first question to be resolved is which remedy is appropriate in the circumstances of this case? In *Sorochan* it was said that: the court must consider whether there is a causal connection between the deprivation suffered by the plaintiff and the property in question, because in order to justify the imposition of a constructive trust a court must be satisfied that there is a "clear proprietary relationship" between the services rendered and the disputed assets. The same case confirmed that a flexible approach should be taken in applying the constructive trust remedy and specifically approved of the position adopted by other courts in *Murray v. Roty*, supra; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.). At p. 50, Dickson C.J. wrote:

> In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

> link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.

99 In addition to the causal connection requirement Dickson C.J. stated that the claimant must have reasonably expected to receive an interest in the property and that the respondent ought to have been aware of that expectation. He also observed that in considering whether a constructive trust is the appropriate remedy the duration of the relationship should be taken into account.

100 The difficulty of establishing a causal connection between unjust enrichment arising from the provision of domestic services and the property has been the subject of scholarly debate (See for example: Ralph E. Scane "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 Can. Bar Rev. 260; Keith B. Farquhar, "Causal Connection in Constructive Trusts" (1986-88), 8 Est. & Tr. Q. 161; Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (1991); Ian Narev, "Unjust Enrichment and De Facto Relationships" (1991), 6 Auckland U.L. Rev. 504). As Professor Ralph Scane (at p. 289) put it, the difficulty with looking for a causal connection in such cases is "that the unjust enrichment created by receipt the benefit of [domestic] services ... seeps throughout all of the assets of the defendant". Thus, the contributions which indirectly created accumulated family wealth for the parties cannot be traced to any one property. However, I do not think that the required link between the deprivation suffered and the property in question is as difficult to establish as it may seem.

101 This Court has specifically recognized that indirect financial contributions to the maintenance of property will be sufficient to establish the requisite property connection for the imposition of a constructive trust. In *Pettkus v. Becker*, supra, the fact that Ms. Becker paid the rent, purchased the food and clothing and looked after other living expenses, enabled Mr. Pettkus to save his entire income, a goodly amount of money which he later used to purchase property. Even though Ms. Becker's financial contributions did not directly finance the purchase of the property, it was held that her indirect financial contribution was sufficient to entitle her to a proprietary interest in the property purchased by Mr. Pettkus upon the dissolution of the relationship.

102 It seems to me that in a family relationship the work, services and contributions provided by one of the parties need not be clearly and directly linked to a specific property. As long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire lands or to improve them. In this case the work of the appellant permitted the respondent to pay off the mortgage and, as well, to purchase a houseboat and a cabin cruiser. In the circumstances, the trial judge was justified in applying the constructive trust to the property which he felt would best redress the unjust enrichment and would treat both parties in a just and equitable manner.

103 Goff and Jones support the imposition of a constructive trust in family situations where the plaintiff's contributions cannot be traced to a particular property (*The Law of Restitution* (3rd ed., 1984)). They rely on the case of *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105, where the plaintiff paid under a mistake of fact over $2 million to the defendants, who discovered the mistake within two days, did nothing to correct it and went into liquidation some four weeks later. Goulding J. held that the defendant was a constructive trustee of the money paid under mistake. But he left open the question whether equity's traditional tracing rules should be applied in order to identify the plaintiff's payment. Goff and Jones maintain that if the tracing rules were applied then it is extremely unlikely that the plaintiff's claim would succeed. Yet, as they point out, it would seem unjust to allow the defendant's general creditors to benefit from the mistaken payment when the defendant knew of the mistake and did nothing to correct it. Therefore, the authors argue on p. 80 of their book that:

> To protect a plaintiff the court will have to impose a trust on, or a lien over, the defendant's unencumbered assets for the plaintiff's benefit even if those assets cannot be "identified" through the application of traditional equitable tracing rules. If a court reaches this conclusion it will do so because it recognises that a trust or lien should be imposed simply because the defendant's assets were swollen by the mistaken payment.

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

104 In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, it was determined that the constructive trust is not reserved to situations where a right of property is recognized. As a remedy, the constructive trust may be used to *create* a right of property and this obviates the need to find a pre-existing property right by means of equitable tracing rules. However, La Forest J. indicated that a restitutionary proprietary remedy should not automatically be granted. He found that, since proprietary rights give the plaintiff priority over the legitimate claims of third party creditors, further guidance was needed for determining those situations in which it would be appropriate to award a proprietary remedy. Thus, La Forest J. concluded that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.

105 I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship. In a marital or quasi-marital relationship, the expectations the parties will have regarding their contributions and interest in the assets acquired are, I expect, very different from the expectation of the parties engaged in a commercial transaction. As I have said, it is unlikely that couples will ever turn their minds to the issue of their expectations about their legal entitlements at the outset of their marriage or common law relationship. If they were specifically asked about their expectations, I would think that most couples would probably state that they did not expect to be compensated for their contribution. Rather, they would say, if the relationship were ever to be dissolved, then they would expect that both parties would share in the assets or wealth that they had helped to create. Thus, rather than expecting to receive a fee for their services based on their market value, they would expect to receive, on a dissolution of their relationship, a fair share of the property or wealth which their contributions had helped the parties to acquire, improve, or to maintain. The remedy provided by the constructive trust seems to best accord with the reasonable expectations of the parties in a marriage or quasi-marital relationship. Nevertheless, in situations where the rights of bona fide third parties would be affected as a result of granting the constructive trust remedy it may well be inappropriate to do so. (See: Berend Hovius and Timothy G. Youdan, *The Law of Family Property*, at p. 146.)

106 It follows that in a quasi-marital relationship in those situations where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. Ordinarily both partners will have an interest in the property acquired, improved or maintained during the course of the relationship. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. It too should be based on common sense and a desire to achieve a fair result for both parties.

107 There will of course be situations where an award for a monetary sum may be the most appropriate remedy. For example where the relationship is of short duration or where there are no assets surviving its dissolution, a monetary award should be made. Professors Berend Hovius and Timothy G. Youdan (*Law of Family Property*, at p. 147) provide the following list of factors which I think are helpful in determining that a monetary distribution may be more appropriate than a constructive trust:

108 (a) is the "plaintiff's entitlement ... relatively small compared to the value of the whole property in question";

109 (b) is the "defendant ... able to satisfy the plaintiff's claim without a sale of the property" in question;

110 (c) does "the plaintiff [have any] special attachment to the property in question";

111 (d) what "hardship might be caused to the defendant if the plaintiff obtained the rights flowing from [the award] of an interest in the property."

112 In this case the appellant contributed to the maintenance and the preservation of the home. She painted the

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

fence, planted the cedar hedge, installed the rock garden and built the chicken coop. Nevertheless, her principal contribution was made through the provision of domestic services. Her work around the house and in caring for the children saved the respondent the expense of hiring a housekeeper and someone to care for the children. As a result he was able to use the money which he had saved to purchase other property and to pay off the mortgage on the Sicamous property.

113 The trial judge found, that since the respondent was now retired and living on a War Veteran's Allowance, a monetary award would be "impracticable, probably unrealistic and would not be reasonable under the circumstances" and imposed a constructive trust upon the Sicamous property. I think he was correct in doing so. It could reasonably be inferred that given the work she had done, the appellant would expect to receive a share in the Sicamous property when the relationship ended. Further, although there was no specific evidence that the appellant had formed an emotional attachment to the property, it would not have been unreasonable for the trial judge to have inferred this in light of the work which she had done on the property. In addition, the property was vacant at the time of the trial and the respondent was retired and living on his veteran's pension in another community. Clearly, he has no particular attachment to the property. A monetary award would be meaningless. Therefore, it was both reasonable and appropriate to choose the Sicamous property as the object of the constructive trust. In the circumstances of this case, the application of the constructive trust remedy was eminently suitable.

Was the Amount of the Appellant's Interest Reasonably Determined?

114 There are, generally speaking, two methods of evaluating the contribution of a party in a matrimonial relationship. The first method is based upon the value received. This can be thought of as quantum meruit, that is the amount the defendant would have had to pay for the services on a purely business basis to any other person doing the work that was provided by the claimant. Alternatively, it can be based upon what is termed "value surviving" which apportions the assets accumulated by the couple on the basis of the contributions made by each. Value surviving is the approach that has been traditionally employed in cases of constructive trust. However, there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust. The remedy should be flexible so that it can be readily adapted to the situation presented in any given case. In many cases the cost of retaining and presenting expert evidence as to the value of the property may be beyond the reach of the parties and at times clearly impractical. This in itself indicates the need for maintaining flexibility in the remedy.

115 Here, the trial judge undertook the same type of quantum meruit analysis employed in *Herman v. Smith* (1984), 42 R.F.L. (2d) 152 (Alta. Q.B.). That is, he calculated the appellant's contributions on the basis of what the respondent would have been required to pay a housekeeper. It has to be noted that his calculations were favourable to the respondent in that he used the amount paid prior to the commencement of the common law relationship as a basis for the calculation and then reduced it by 50 percent to allow for the value of the accommodation that the appellant received from the respondent. This was a fair means of calculating the amount due to the appellant.

116 Nonetheless, I would observe that the value surviving approach will often be the preferable method of determining the quantum of a claimant's share. This method will usually be more equitable and will more closely accord with the expectation of the parties as to how the assets which they have accumulated should be divided upon termination of the relationship. Further, the utilization of the value surviving method will avoid the difficult task of assigning a precise dollar value to the services provided by someone who has dedicated him- or herself to raising children and caring for a home. Instead, the contributions of the parties can more accurately be expressed as a percentage of the accumulated wealth existing at the termination of the relationship. Thus, for pragmatic reasons, the value surviving method may be the preferable one in many cases. No matter which method is used, equity and fairness should guide the court in determining the value and contributions made by the parties. In this case awarding the Sicamous property to the appellant reflected a fair assessment of her contribution to the relationship.

Disposition

1993 CarswellBC 44, 77 B.C.L.R. (2d) 1, [1993] 3 W.W.R. 337, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, [1993] R.D.F. 369, J.E. 93-660, EYB 1993-67100

117 In the result, I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The appellant should have her costs throughout these proceedings.

Appeal allowed.

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TAB 5

2011 CarswellOnt 3908, 2011 ONSC 3129, [2011] W.D.F.L. 4226, 79 C.B.R. (5th) 315, 70 E.T.R. (3d) 34

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2011 CarswellOnt 3908, 2011 ONSC 3129, [2011] W.D.F.L. 4226, 79 C.B.R. (5th) 315, 70 E.T.R. (3d) 34

Canada (Revenue Agency) v. TNG Acquisitions Inc. (Trustee of)

In the Matter of the Bankruptcy of TNG Acquisitions Inc. (successor estate of Nexinnovations Inc., a bankrupt) of the City of Mississauga, in the Province of Ontario

Canada Revenue Agency (Applicant) and A. Farber & Partners as Trustee in Bankruptcy of the Estate of TNG Acquisitions Inc. (Respondent)

Ontario Superior Court of Justice [Commercial List]

Newbould J.

Heard: May 19, 2011
Judgment: May 24, 2011[FN*]
Docket: 32-157407

Counsel: Shahana Kar, Angela Shen for Applicant

David S. Ward for A. Farber & Partners, Trustee in Bankruptcy of TNG Acquisitions Inc.

Subject: Insolvency; Estates and Trusts; Family; Property

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

Registrant filed monthly GST returns from January to July 2007 (relevant period); included in input tax credits for that period was $1,554,854.80 said to have been GST paid to its suppliers — Canada Revenue Agency (CRA) accepted returns and paid GST refunds for that period totalling $2,699,387.91, which included claim for $1,554,854.80 — Registrant also filed claim with MRQ requesting refunds due to having paid QST to its suppliers — For relevant period its input tax refunds claimed included sum of $1,554,854.80, representing QST paid to its suppliers — MRQ contacted CRA and advised it that during audit it discovered that registrant had recorded $1,554,854.80 on its books as GST having been paid to its suppliers and that was incorrect as that amount was QST that had been paid to suppliers — MRQ determined that registrant was entitled to refund of QST; result was that registrant had improperly received GST refund of $1,554,854.80 — CRA issued notice of application naming registrant and MRQ as respondents in which declaration was sought that QST refund owed was CRA's property — Registrant was adjudged bankrupt, without prejudice to CRA's constructive trust claim respecting GST refund — Little over $1 million was paid by MRQ to trustee in trust pending determination of appeal — Trustee took position that there could be no claim by CRA under s. 81 of Bankruptcy and Insolvency Act (BIA) because s. 81 permits claim on property that was in possession of bankrupt at time of bankruptcy — CRA appealed under s. 81(2) of BIA from disallowance — Appeal dismissed —

Trustee's position was rejected — MRQ made its determination that registrant was entitled to QST refund before bankruptcy of registrant; this was not simply accounting entry — Account receivable was asset of registrant, thus property to which CRA made claim was account receivable of registrant which was in existence prior to bankruptcy — Three tests for unjust enrichment were met: registrant was enriched, CRA was deprived of refund paid to registrant, and there was no juristic reason for payment — However, there was insufficient link between overpayment made by CRA to registrant and receivable owing by MRQ that would impose constructive trust — Unjust enrichment was not caused by registrant being entitled to QST refund from MRQ.

Estates and trusts --- Trusts — Constructive trust — General principles

Registrant filed monthly GST returns from January to July 2007 (relevant period); included in input tax credits for that period was $1,554,854.90 said to have been GST paid to its suppliers — Canada Revenue Agency (CRA) accepted returns and paid GST refunds for that period totalling $2,699,387.91, which included claim for $1,554,854.80 — Registrant also filed claim with MRQ requesting refunds due to having paid QST to its suppliers — For relevant period its input tax refunds claimed included sum of $1,554,854.80, representing QST paid to its suppliers — MRQ contacted CRA and advised it that during audit it discovered that registrant had recorded $1,554,854.80 on its books as GST having been paid to its suppliers and that was incorrect as that amount was QST that had been paid to suppliers — MRQ determined that registrant was entitled to refund of QST; result was that registrant had improperly received GST refund of $1,554,854.80 — CRA issued notice of application naming registrant and MRQ as respondents in which declaration was sought that QST refund owed was CRA's property — Registrant was adjudged bankrupt, without prejudice to CRA's constructive trust claim respecting GST refund — Little over $1 million was paid by MRQ to trustee in trust pending determination of appeal — Trustee took position that there could be no claim by CRA under s. 81 of Bankruptcy and Insolvency Act (BIA) because s. 81 permits claim on property that was in possession of bankrupt at time of bankruptcy — CRA appealed under s. 81(2) of BIA from disallowance — Appeal dismissed — Trustee's position was rejected — MRQ made its determination that registrant was entitled to QST refund before bankruptcy of registrant; this was not simply accounting entry — Account receivable was asset of registrant, thus property to which CRA made claim was account receivable of registrant which was in existence prior to bankruptcy — Three tests for unjust enrichment were met: registrant was enriched, CRA was deprived of refund paid to registrant, and there was no juristic reason for payment — However, there was insufficient link between overpayment made by CRA to registrant and receivable owing by MRQ that would impose constructive trust — Unjust enrichment was not caused by registrant being entitled to QST refund from MRQ.

Cases considered by *Newbould J.*:

Ascent Ltd., Re (2006), 2006 CarswellOnt 116, 9 P.P.S.A.C. (3d) 176, 18 C.B.R. (5th) 269 (Ont. S.C.J.) — distinguished

Barnabe v. Touhey (1995), 1995 CarswellOnt 1167, 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.) — distinguished

Credifinance Securities Ltd., Re (2010), 2010 CarswellOnt 830, 2010 ONSC 984, 63 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]) — distinguished

Credifinance Securities Ltd., Re (2011), 74 C.B.R. (5th) 161, 2011 ONCA 160, 2011 CarswellOnt 1218 (Ont. C.A.) — referred to

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

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

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 81 — considered

s. 81(1) — pursuant to

s. 81(2) — pursuant to

s. 187(11) — considered

APPEAL by Canada Revenue Agency pursuant to s. 81(2) of *Bankruptcy Insolvency Act* from disallowance by trustee of its claim to interest in property of bankrupt made under s. 81(1).

***Newbould J.*:**

1 The Canada Revenue Agency ("CRA)" appeals under s. 81(2) of the BIA from the disallowance by the trustee of its claim to an interest in property of the bankrupt made under s. 81(1) of the BIA.

2 Because the appeal from the trustee's disallowance of the claim was not made within fifteen days after the trustee had sent the notice disputing the claim, CRA also requested an order under s. 187(11) of the BIA extending the time for this appeal.

3 The trustee's disallowance of the claim was served on November 25, 2008. Because of a mix up in delivery procedures at the CRA, it was not received by the responsible person in CRA until December 18, 2008, more than the fifteen days permitted for an appeal. Once the responsible person received the trustee's disallowance, the appeal was made on December 22, 2008. Counsel for the trustee said he had no authority to consent to an extension of the time but left the matter in the hands of the court. In the circumstances, I made an order extending the time for the appeal.

Relevant facts

4 This appeal arises from GST refunds claimed and received by the bankrupt ("Nex") from CRA prior to the bankruptcy. It also involves refund claims made by Nex to the Ministry of Revenue in Quebec for QST refunds.

5 Nex, a GST registrant, filed GST returns with CRA on a monthly basis. A GST registrant is required to report and remit the GST which it charged and collected on sales to its customers. It is entitled to claim input tax credits which represent the GST that the registrant was charged on goods and services that it purchased to carry out its commercial activities. If the input tax credits exceed the GST that the registrant charged and collected on sales to its customers, the registrant is entitled to a refund of the net amount.

6 Nex carried on business in Quebec and was required to file QST returns. The same situation as with GST pertains with respect to a Quebec sales tax refund claim. A QST registrant is entitled to a refund if its input tax refunds, the term used in the QST regime for amounts of QST paid by the registrant to its suppliers, exceed the QST charged and collected by the registrant on sales to its suppliers.

7 Nex filed monthly GST returns for January through July 2007. Included in the input tax credits for that period claimed by Nex was the amount of $1,554,854.80, said to have been GST paid by Nex to its suppliers. That turned out to be wrong. CRA accepted the returns and paid the GST refunds claimed by Nex for that period, totalling $2,699,387.91, which included the claim for $1,554,854.80.

8 Nex also filed a claim with MRQ requesting refunds due to having paid QST to its suppliers. For the months January to June 2007, its input tax refunds claimed included the sum of $1,554,854.80, representing QST paid to its suppliers. On October 10, 2007, MRQ contacted CRA in connection with Nex's claim for a QST refund and advised CRA that during an audit by MRQ of Nex's QST refund claims, it discovered that Nex had recorded $1,554,854.80 on its books as GST having been paid to its suppliers. That was incorrect as the $1,554,854.80 was QST that had been paid by Nex to its suppliers and MRQ realised that Nex had incorrectly claimed that amount as an input tax credit on the GST returns that had been made by Nex.

9 MRQ determined that Nex was entitled to a refund of QST based on these input tax refunds of $1,554,854.80.

10 The result was that Nex had improperly received a GST refund of $1,554,854.80. The CRA issued an assessment to reduce the GST refund claimed by Nex in that amount and Nex did not make any objection to that assessment. Nex filed an amended GST return to correct the error.

Property claim by Nex

11 Nex obtained creditor protection under the CCAA on October 2, 2007. It was shortly after that date that MRQ informed CRA of the mistaken GST claim by Nex.

12 On January 17, 2008 Nex brought a motion in the CCAA proceedings for an order approving the distribution of sales proceeds to creditors, including CRA. The portion dealing with this payment to CRA was adjourned.

13 On May 20, 2008, CRA issued a notice of application naming Nex and MRQ as respondents in which a declaration was sought that the QST refund owed by MRQ to Nex in the amount of $1,554,854.80 was CRA's property, and it requested a mandatory order requiring MRQ to pay that amount directly to CRA on the grounds that MRQ held the QST refund owing to Nex as constructive trustee for CRA.

14 On April 8, 2008, the CCAA proceedings were terminated and Nex was adjudged a bankrupt, without prejudice to CRA's constructive trust claim respecting the QST refund.

15 On June 6, 2008, CRA's counsel was advised by MRQ's counsel that MRQ had offset the entire QST refund against QST debt owed by Nex with the result that Nex was said to have owed MRQ $207,000. On October 31, 2008, the trustee's counsel advised CRA's counsel that a QST refund in the amount of approximately $900,000 was payable to Nex but that MRQ was reluctant to pay it in light of the outstanding application against it. By agreement, MRQ later paid the outstanding amount owing to Nex to the trustee in trust pending the determination of this appeal. The amount paid was a little in excess of $1 million. It is this amount in which CRA claims to have a property interest.

Analysis

16 The trustee takes the position that there can be no claim by CRA under s. 81 of the BIA because s. 81 permits a claim on property that was in the possession of the bankrupt at the time of the bankruptcy. The trustee asserts that the money later paid by MRQ was not property in the possession of the bankrupt at the day of the bankruptcy.

17 I do not accept this position of the trustee. The MRQ made its determination that Nex was entitled to a QST refund of $1,554,854.80 sometime prior to the bankruptcy of Nex. That is, Nex had an account receivable from MRQ. That is not, as asserted by the trustee, simply an accounting entry. The account receivable was an asset of Nex. Thus the property to which CRA has made a claim was the account receivable of Nex that was in existence prior to the bankruptcy.

18 CRA's claim is based on a claim for unjust enrichment and the imposition of a constructive trust as a remedy for the unjust enrichment. If successful, the MRQ refund payment being held in trust would go to CRA rather than to the unsecured creditors of Nex, one of which is CRA. The position of the trustee is that there is no basis for the imposition of a constructive trust and that it would inequitable and contrary to the scheme of distribution under the BIA for CRA to be paid in priority to the other unsecured creditors.

19 The test for unjust enrichment is well established in Canada. The cause of action has three elements: i) an enrichment of the defendant; ii) a corresponding deprivation of the plaintiff; iii) an absence of juristic reason for the enrichment. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.) at para 30.

20 There is little doubt that these three tests have been met. Nex was enriched when it received the GST refund based upon its incorrect GST return. CRA was deprived of that refund paid to Nex and there was no juristic reason for the payment.

21 A constructive trust is a remedy that may be ordered in appropriate cases for compensating an unjust enrichment. It is a propriety concept. In *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), McLaughlin J. (as she then was) stated:

> 22. In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, *supra*, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, *supra*.
>
> 26. For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.

22 It does not appear to be a bright line test as to whether the link between the contribution of a plaintiff and the disputed asset is sufficient to permit the imposition of a constructive trust. In *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), Dickson CJC stated the following:

> 21. ...in *Pettkus*, however, one also finds articulations of the causal connection test in more general terms. It is suggested simply that there should be "a clear link between the contribution and the disputed asset" (p. 852). The question of a connection between the deprivation and the property is further explained as "an issue of fact". That is, courts must ask whether the contribution is "sufficiently substantial and direct" to entitle the plaintiff to an interest in the property in question.

> 22. In a number of cases, this more general formulation of the causal connection test has been adopted and courts have held that constructive trusts can be imposed in situations where the contribution does not relate to the acquisition of property. See, for example, *Pierce v. Timmons*, Ontario Court of Appeal, Feb. 26, 1985, unreported; *Murray v. Roty, supra*; *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.) Nevertheless, in each of these cases, some reasonable connection did exist between the contribution or deprivation and the property (i.e. property improvement, maintenance or preservation).

23 A critical issue, therefore, is whether there is a direct link between the plaintiff's contribution and the subject of the trust being claimed.

24 In this case, the asset being claimed by CRA to be subject to a constructive trust is the account receivable of Nex from MRQ that existed prior to the bankruptcy. That account receivable was based upon the QST input tax refunds of Nex resulting from its purchase of goods and services on which it paid QST. It was those same purchases of goods and services by Nex on which it paid QST that Nex incorrectly claimed GST input tax credits and received a refund in the same amount.

25 Thus, the CRA asserts that because the same expenditures were used to claim GST and QST refunds, albeit incorrectly, there is a direct link between the payment by CRA of the GST refund and the payment by MRQ of the QST refund.

26 CRA relies upon two recent decisions, one being a decision of the Registrar in Bankruptcy in *Ascent Ltd., Re* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.) and the other being *Credifinance Securities Ltd., Re* (2010), 63 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]); aff'd at 2011 ONCA 160 (Ont. C.A.). Both cases were examples in which a constructive trust was imposed upon property that resulted in the property claimant being paid ahead of the unsecured creditors of a bankrupt. In *Credifinance Securities Ltd.*, the bankrupt had obtained a loan of $400,000 from the claimant based on fraudulent misrepresentations made to the claimant. Part of the loan was used by the bankrupt but the claimant had managed to obtain an order freezing the remaining funds of $310,500. It was held that those funds were directly traceable to the $400,000 loan. Thus, a constructive trust was imposed on the very property obtained by fraud. While the facts in *Ascent Ltd.* are somewhat unclear, LaForme J.A. in *Credifinance Securities Ltd.* viewed *Ascent Ltd.* as a case in which the misconduct by the bankrupt was a basis upon which property was obtained and that to permit the bankrupt estate to retain that property would amount to an unjust enrichment and permit a constructive trust being imposed.

27 I do not think these cases assist CRA and I do not think it can be said that there is a sufficient link between the overpayment made by CRA to Nex and the receivable owing by MRQ to Nex that would permit the imposition of a constructive trust on the MRQ payable. There was nothing improper that led to the MRQ payable. It was the result of a proper claim by Nex for a QST refund. To permit Nex to receive that refund from MRQ is not to permit Nex to gain from any wrongdoing. Unlike *Ascent Ltd.* or *Credifinance Securities Ltd.*, there was nothing improper at all on the part of Nex that gave rise to the QST refund payable by MRQ. The wrongdoing was in Nex making an incorrect claim on CRA.

28 Put in another way, the unjust enrichment was not caused by Nex being entitled to a QST refund from MRQ. It was caused by Nex making an improper claim against CRA and receiving a refund from CRA based on that improper claim. The refund of QST from the MRQ when paid to Nex, or now to its trustee in bankruptcy, is entirely proper and does not result in Nex, or now its trustee, receiving anything to which it was not entitled.

29 There is not a nexus between the improper CRA refund claim made by Nex and the QST refund that was based on a proper claim. The GST refunds that went into Nex's general accounts were paid out of that account over a period of time and in the course of its business. There is no connection to those funds received by Nex from CRA and the

funds owing by MRQ and thus no basis to impose a constructive over the MRQ refund.

30 What the CRA seeks here is to obtain a constructive trust over assets of Nex to which it provided no contribution. This appears to be precisely the situation that the Ontario Court of Appeal held in *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (Ont. C.A.) to be improper. In that case it was stated that the constructive trust imposed by the motion judge over all of the property of the bankrupt was contrary to clear law which required that a constructive trust be imposed over a specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest. While the order sought by CRA is not to have a constructive trust over all of the assets of the bankrupt, but only over the amount ultimately paid by MRQ, I do not see how CRA could ever have expected to have obtained a property interest in that MRQ rebate. It is seeking the constructive trust to advance its interest ahead of the creditors. What was stated in *Barnabe v. Touhey* as follows appears apt:

> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

31 In the circumstances, the appeal from the disallowance of the property claim by the trustee is dismissed. CRA is limited to its unsecured claim.

32 The trustee is entitled to its cost. If costs cannot be agreed, brief written submissions by the trustee along with a cost outline in accordance with the rules may be made within ten days and CRA shall have ten further days to reply to it.

Appeal dismissed.

FN* Additional reasons at *Canada (Revenue Agency) v. TNG Acquisitions Inc. (Trustee of)* (2011), 2011 ONSC 5960, 2011 CarswellOnt 10572 (Ont. S.C.J. [Commercial List]).

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TAB 6

1924 CarswellNS 1, 5 C.B.R. 58

C

1924 CarswellNS 1, 5 C.B.R. 58

Inverness Railway & Colliery Ltd., Re

In re Inverness Railway & Collieries Limited

Nova Scotia Supreme Court, In Bankruptcy

Mellish, J.

Judgment: May 19, 1924

Counsel: *J. McG. Stewart* , for trustee.

W. C. Macdonald, K.C. , for National Trust Company.

L. A. Forsyth , for Royal Bank.

V. J. Paton, K.C. , for Workmen's Compensation Board.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Priorities of claims — Secured claims — Forms of secured interests — Conditional sales agreements.

Bankruptcy --- Priorities of claims — Preferred claims — Workers' Compensation Board — Statutory liens.

Extent of Lien.

The Workmen's Compensation Board is a secured or preferred creditor within the meaning of *The Bankruptcy Act* for assessments made by it under the *Workmen's Compensation Act* , R.S.N.S., 1923, ch. 129, sec. 79(2) such assessments being assessments referred to under sec. 51(6) of *The Bankruptcy Act* , or at any rate being in the nature of a tax imposed by provincial authority upon employers of labor. Under the *Workmen's Compensation Act, supra* , sec. 79(2) such assessment or any judgment with respect to same, is a first lien on all the property used in connection with the industry with respect to which the employer is assessed subject only to municipal taxes.[FN1]

Rights of Parties.

Where insurance on company property has been effected in part performance of an agreement which it is contemplated will extend over a number of years, for the sale and purchase of such prop erty, and the purchaser assigns his rights under the agreement to a new company which afterwards makes an assignment in bankruptcy, the unexpired portion of the insurance premium properly belongs to the original selling company and the bankrupt purchasing company is not

entitled to a refund of this sum, or to have it set-off against its indebtedness under the purchase agreement prior to the date of the bankruptcy.

Application to determine whetheer the Workmen's Compensation Board is a secured or preferred creditor for arrears of payments of assessments made under the provisions of *The Workmen's Compensation Act*, R.S.N.S., 1923, ch. 129, sec. 79, and also the right to certain unexpired insurance moneys. The facts and circumstances are fully set out in the judgment following.

Mellish, J. :

1 The National Trust Company is the trustee for the bondholders of the Inverness Railway and Coal Company, a bankrupt company in the hands of the Eastern Trust Company as receiver. On June 6, 1920, this company and the trustee entered into an agreement for sale of the company's property to Myron E. C. Henderson for $250,000 of which $100,000 was paid on the date of the agreement, $100,000 when the purchaser went into possession, and the balance agreed to be paid in fourteen quarterly instalments of $75,000 each with interest — the purchaser to have the right of anticipating any payment. Possession was given on July 21, 1920, by the receiver to the purchaser as provided in the agreement. The purchaser covenanted by the agreement to maintain insurance on the premises, loss if any payable to the trustee. In pursuance of this covenant, insurance was effected on the premises. Default having been made in the payments required of the purchaser under this agreement on February 7, 1921, the National Trust Company as such trustee went into possession of the property and by an order of this Court made on the following day, February 8, 1921, the said Eastern Trust Company became receiver and manager and carried on thereafter the company's operations.

2 It is to be noted that on February 21, 1921, the said Henderson assigned his rights under said agreement to a new company, The Inverness Railway and Collieries, Limited, which company on February 26 made an assignment in bankruptcy to the said Eastern Trust Company.

3 On the said February 7, 1921, the National Trust Company, through its trustee, the Eastern Trust Company, received assignments from workmen amounting to $30,564.96 which amount, I understand was paid as consideration for said assignments to the workmen.

4 I think the National Trust Company is entitled to all the rights of the workmen in respect of this sum.

5 On September 28, 1920, the Workmen's Compensation Board made a provisional assessment on the Collieries Company for $9,000 in respect of the year 1920, and on January 5, 1921, a further assessment in respect of the same year for $7,080 and on February 9, 1921, a further assessment of $3,000 in respect of the year 1921. On February 16, 1921, the Board entered judgment against said company in respect of these assessments for $20,308.55, on which there remained due on March 26, 1923, $16,884.77 which with interest at five per cent. is still unpaid.

6 In respect to this claim the questions submitted are: whether the Board is a secured or preferred creditor within the meaning of *The Bankruptcy Act;* and if so, in respect of what assets of the Collieries Company, and in what order of priority.

7 Under sec. 51(1) of *The Bankruptcy Act* [1 C.B.R. 55] by an amendment made in 1921 [1 C.B.R. 577] all indebtedness "under any *Workmen's Compensation Act* " ranks with employees' wages and salaries. It is contended that the assessments in question are (a) not provided for in the Act which is applicable and in force in 1920 and (b) that even if provided for in the later Act they are on the same footing with wages and salaries.

8 Section 51(6) [1 C.B.R. 56] however provides that nothing in this section shall interfere with the collection of any assessments under any provincial law nor prejudice nor affect any lien or charge created by any such laws, and the *Workmen's Compensation Act*, R.S.N.S., 1923, ch. 129, sec. 79(2) provides that

> The amount of any assessment and any judgment with respect to same shall be a first lien upon all the property, real, personal or mixed, used in or in connection with *** the industry with respect to which the employer is assessed *** subject only to municipal taxes.

9 Section 51 of *The Bankruptcy Act* is dealing with priorities on the distribution of a bankrupt estate and I cannot see how the lien created by the section just quoted will not be "prejudiced or affected" within the meaning of sec. 51(6) if it is to be postponed in accordance with the other provisions of that section.

10 I think that the Compensation Board, notwithstanding the provisions of *The Bankruptcy Act* , is secured by a first lien as provided in the section quoted above and I think that the exception contained in sec. 51(6) must be read as modifying the provisions of sec. 51(1) even although the latter refers specially to "indebtedness" under any Workmen's Compensation Act. Such Acts differ in character. See *In re West & Co.* (1921), 2 C.B.R. 3, 50 O.L.R. 631, 62 D.L.R. 207 .

11 I am not without doubt, but I think that the "assessment" under *The Compensation Act* is an assessment referred to under sec. 51(6) of *The Bankruptcy Act, supra* . At any rate, I think it is in the nature of a tax imposed by provincial authority upon employers of labor and I cannot conclude it was the intention of the Dominion Parliament to assume the power of rendering its provisions under any conditions ineffective. And the competency of the Provincial Legislature to make such provisions has not been questioned before me and I think I must give effect to it. The Board's lien will be restricted to the property described in *The Workmen's Compensation Act* , sec. 79(2), quoted above.

12 On the said February 7, 1921, the day on which the National Trust Company went into possession for said default, there was insurance on the property effected under the provisions of said agreement of the unexpired premium value of $14,776.34 and on said date the said Eastern Trust Company, as receiver for the old company, the Inverness Railway and Coal Company, credited the new company, the Inverness Railway and Collieries, Limited, on the books of the said receiver with the said sum. Apparently there was no actual refund of premium but, although no actual transfer of the insurance was ever effected, it seems to have been kept alive for the benefit of the National Trust Company, the bondholders' trustee. The Inverness Railway and Collieries, Limited, seems to have operated the property from the said February 21, 1921, under its said assignment from Henderson and as his agent until possession was taken for default as aforesaid.

13 One of the questions submitted to me herein is

> whether the Eastern Trust Company Trustee of the property of the Inverness Railway and Collieries, Limited, is entitled to the unexpired portion of insurance premiums and if so whether the National Trust Company is entitled to set the amount thereof off against the sums due to the said National Trust Company prior to the said 26th day of February, 1921.

14 I have come to the conclusion that this credit $14,776.34 cannot properly go into the estate of the Collieries Company, but that it belongs to the National Trust Company, as trustee for the bondholders of the original railway company, and that the National Trust Company should not set it off as against the indebtedness of the Collieries Company. The insurance was effected in part performance of the agreement which it was doubtless contemplated would extend over a number of years, and if as I assume the underwriters are willing to continue the risk notwithstanding any change in the situation of the Collieries Company, I do not think the latter company is in a position to claim a refund from the parties for whose protection the insurance was effected any more than it would be entitled to claim a refund of any payments made under the agreement. The entry in the books of the Eastern Trust Company in my opinion does not alter the situation. In a certain sense the Collieries Company may have been a creditor for that amount as a matter of bookkeeping, but the entry, I think, under the circumstances, should be taken as indicating nothing more than the source from which the amount became available — it could be offset by the purchaser's whole liability under

the agreement.

15 The claim of the Royal Bank remains now to be considered. The bank, I think, is a secured creditor and that the questions proposed in respect to this claim must be answered in the affirmative.

Judgment accordingly.

FN1 See case of *Workmen's Compensation Board v. Edgar, post* p. 63, where Hyndman, J.A., who alone dealt with this point on the merits, came to an opposite conclusion to that of Mellish, J.

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TAB 7

THE 2012 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

The Honourable L. W. Houlden, B.A., LL.B.
Formerly a Judge of the Court of Appeal for Ontario

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

STATUTES OF CANADA ANNOTATED

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persons other than travelling salesperson, expenses are a proper claim for preference, but there is no additional $1,000 allowable: the wages and expenses combined must not exceed $2,000. This view was taken by the Registrar in Bankruptcy for Manitoba in *Re Winnipeg Citizen Co-Operative Publishing Co.* (1949), 31 C.B.R. 41 (Man. K.B.).

(v) — Claim for Balance Owing

If a wage-earner is not entitled to a preference or has money still remaining owing after receiving his or her preferential claim, the claimant is entitled to rank as an ordinary creditor for the amount owing: s. 136(3).

(4) — Assignment of Wage Claims and Subrogation

It is not uncommon for a trustee in bankruptcy to pay wages of wage-earners and to take assignments of their claims. A trustee who acts in this fashion is entitled to all the rights of the wage-earners: *Re Inverness Railway & Colliery Ltd.* (1924), 5 C.B.R. 58 (N.S. T.D.). Similarly, a person who, prior to bankruptcy, has paid employees' wages and has taken an assignment of the employees' claims, is entitled to the preferential rights of the employees: *Porterfields v. Hodgins* (1913), 29 O.L.R. 409, 14 D.L.R. 832; affirmed (1914), 30 O.L.R. 651, 17 D.L.R. 859 (Ont. C.A.).

A director who had paid wages because of statutory liability is entitled to any preference that the employee was entitled to. See, for example, s. 119(5) of the *Canada Business Corporations Act*.

(5) — Relatives of the Bankrupt

See *post* G§157 "Postponement or Restriction of Claims of Creditors Under Sections 137 and 140".

(6) — Directors and Officers of Limited Companies

Section 140 excludes any claim by directors or officers to a preferential claim.

If a claimant has acted as a director of a bankrupt company until bankruptcy, he or she will not be allowed to allege that his or her appointment as a director was improper in order that he or she may be preferred for his or her wages: *Re Can. Casket Co.* (1933), 14 C.B.R. (N.S.) 148 (Ont. S.C.).

Although an officer or director of a corporation cannot have a preferential claim for work done or services rendered to a bankrupt corporation, an officer or director may claim as an ordinary creditor for such work or services, provided it is not work or services that only a director can perform, *e.g.*, attending meetings of the board of directors. There is no necessity for a by-law to be passed authorizing the payment for such services: *Re Continental Publishing Co.* (1924), 4 C.B.R. 462, 25 O.W.N. 610 (Ont. S.C.); *Petersen v. Sigurdson* (1967), 10 C.B.R. (N.S.) 254, 60 W.W.R. 103 (B.C. S.C.).

If, prior to bankruptcy, payments have been made to directors and officers as wages for services rendered to the debtor corporation, similar to services rendered by employees, the trustee in bankruptcy of the corporation cannot attack the payments on the grounds that they were not fair and reasonable. The trustee in bankruptcy steps into the shoes of the bankrupt and has no greater right to attack the payments than the corporation, unless such right is given by some provision of the *BIA*: *Canadian Credit Men's Trust Assn. v. Reaume* (1931), 12 C.B.R. 429 (Ont. C.A.); reversing (1930), 12 C.B.R. 209 (Ont. H.C.).

TAB 8

Bennett Jones

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Gavin H. Finlayson
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October 26, 2012

Dear Sir/Madam:

We are the lawyers for DashRx, Inc. ("**DashRx**").

Dash Rx is the purchaser of the assets of PCAS Patient Care Automation Services Inc. ("**PCAS**") and 2163279 Ontario Inc. doing business as Touchpoint ("**Touchpoint**" and, together with PCAS, the "**Companies**").

On June 7, 2012, the Companies each filed an assignment in bankruptcy pursuant to the provisions of the *Bankruptcy Insolvency Act* (the "**BIA**"). PwC was named as trustee in bankruptcy of the Companies (the "**Trustee**").

Enclosed is the Motion Record of DashRx relating to a mistaken payment made by DashRx. This mistaken payment was distributed through the payroll administrator of the Companies to former employees such as yourself on account of vacation pay entitlements.

You are being served with these materials because you are a former employee of the Companies and you have received part of the mistaken payment reflecting your personal entitlement to certain vacation pay.

It is important to note that you are not being asked to return any monies.

In simple terms, DashRX has paid these monies twice, once to you personally, and once to the Trustee.

On this motion DashRX is simply asking the Court to assist it in rectifying the mistake by allowing the Trustee to return to DashRx the money it paid to the Trustee.

You are not required to do anything as a result of receiving these materials; however, you are welcome to appear at the hearing of this matter should you wish to do so.

If you would like further information, the Trustee's Second Report will be filed in the next 7-10 days and the Trustee will post a copy of its Report on its website for this matter, http://www.pwc.com/ca/en/car/pcas/trustee-reports.html. Creditors who are interested in reviewing

the Trustee's Second Report are advised to monitor the Trustee's website. If you have any questions about this matter, please do not hesitate to contact the Trustee.

The Trustee's contact information can be found on the aforementioned website.

Yours truly,

Lawyers for DashRx, Inc.

BENNETT JONES LLP

TAB 'B'

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Priority of claims

136.(1) Subject to the rights of secured creditors, the proceeds realized from the priority of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 or 81.4 that was not paid (...).

***Canada Business Corporations Act*, R.S.C. 1985, c C-44**

119. (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

Conditions precedent to liability

(2) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

Limitation

(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.

Amount due after execution

(4) Where execution referred to in paragraph (2)(*a*) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Subrogation of director

(5) A director who pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings is entitled to any priority that the employee would have been entitled to and, if a judgment has been obtained, the director is

(a) in Quebec, subrogated to the employee's rights as declared in the judgment; and

(b) elsewhere in Canada, entitled to an assignment of the judgment.

Contribution

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

***Business Corporations Act*, R.S.O. 1990, c.B.16**

Directors' liability to employees for wages

131. (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation. R.S.O. 1990, c. B.16, s. 131 (1).

Limitation of liability

(2) A director is liable under subsection (1) only if,

(a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or

(b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy*

and Insolvency Act (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved. 2002, c. 24, Sched. B, s. 27 (1).

Idem

(3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. R.S.O. 1990, c. B.16, s. 131 (3).

Rights of director who pays debt

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained the director is entitled to an assignment of the judgment. R.S.O. 1990, c. B.16, s. 131 (4).

SERVICE LIST

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AND TO:	**PRICEWATERHOUSECOOPERS INC.** PwC Tower 18 York Street, Suite 2600 Toronto, ON M5J 0B2 *Trustee in Bankruptcy*	**Attention: Paul van Eyk** Tel: 416-687-8101 Fax: 416-814-3210 Email: paul.vaneyk@ca.pwc.com
AND TO:	**OSLER HOSKIN HARCOURT LLP** 1 First Canadian Place 100 King Street West, Suite 6100 Toronto, ON M5X 1B8 *Lawyers for Trustee in Bankruptcy*	**Attention: Marc Wasserman** Tel: 416-862-4908 Fax: 416-862-6666 Email: MWasserman@osler.com
AND TO:	**MINDEN GROSS LLP** 145 King Street West, Suite 2200 Toronto, ON M5H 4G2 *Lawyers for Royal Bank of Canada*	**Attention: Kenneth Kallish** Tel: 416-369-4124 Fax: 416-864-9923 Email: kkallish@mindengross.com
AND TO:	**GRUNDY, CASS & CAMPBELL PROFESSIONAL CORPORATION** Toronto-Dominion Centre 100 Wellington Street West, Suite 3150 Toronto, ON M5K 1A1 *Lawyers for 2320714 Ontario Inc.*	**Attention: Douglas Grundy** Tel: 416-849-8003 Fax: 416-849-8004 Email: dgrundy@grundycass.com
AND TO:	**THORNTON GROUT FINNIGAN LLP** Suite 3200, 100 Wellington Street West P.O. Box 329, Toronto-Dominion Centre Toronto, ON M5K 1K7 *Lawyers for 2320714 Ontario Inc.*	**Attention: Robert Thornton** Tel: 416-304-0560 Fax: 416-304-1313 Email: rthornton@tgf.ca

AND TO:	**MINDEN GROSS LLP** 145 King Street West, Suite 2200 Toronto, ON M5H 4G2 *Lawyers for 2725312 Ontario Inc.*	**Attention: Timothy Dunn** Tel: 416-369-4335 Fax: 416-864-9223 Email: tdunn@mindengross.com
AND TO:	**CAVALLUZZO HAYES SHILTON MCINTYRE & CORNISH LLP** 474 Bathurst Street, Suite 300 Toronto, ON M5T 2S6 *Lawyers for Ken Smith*	**Attention: Michael D. Wright** Tel: 416-964-5513 Fax: 416-964-5895 Email: mwright@cavalluzzo.com
AND TO:	**BAKER & McKENZIE LLP** Brookfield Place 181 Bay Street, Suite 2100 Toronto, ON M5J 2T3 *Lawyers for Walgreen Co.*	**Attention: Chris Besant** Tel: 416-863-1221 Fax: 416-863-6275 Email: Chris.Besant@BakerMcKenzie.com
AND TO:	**MILLER THOMSON LLP** Scotia Plaza 40 King Street West, Suite 5800 Toronto, ON M5H 3S1 *Lawyers for Lanworks Inc.*	**Attention: Arthi Sambasivan** Tel: 416-595-8636 Fax: 416-595-8695 Email: asambasivan@millerthomson.com
AND TO:	**GOODMANS LLP** Bay Adelaide Centre 333 bay Street, Suite 3400 Toronto, ON M5H 2S7 *Lawyers for CastCan Investments Inc.*	**Attention: Derek Bulas** Tel: 416 597-5914 Fax: 416 979-1234 Email: dbulas@goodmans.ca
AND TO:	**KOHL & FRISCH LIMITED** 7622 Keele Street Concord, ON L4K 2R5	**Attention: Shaun McDonnell** Tel: 905 660-7622 ext. 599 Email: smcdonnell@kohlandfrisch.com
AND TO:	**MINISTRY OF THE ATTORNEY GENERAL (ONTARIO)** McMurtry-Scott Building 720 Bay Street, 11th Floor Toronto, ON M7A 2S9	

AND TO: **MINISTRY OF HEALTH AND LONG TERM CARE**
M-1B114, 900 Bay Street
Toronto, Ontario M7A 2S9

AND TO: **SCIENTIFIC RESEARCH & EXPERIMENTAL DEVELOPMENT**
1 Front Street West, Suite 100
Toronto, ON M5J 2X6

AND TO: **2440 WINSTON PART DRIVE LIMITED PARTNERSHIP**
Sunstone Industrial Advisors Inc.
1250 King Street West, Suite 2420
Toronto, ON M5H 1J9

AND TO: **DEPARTMENT OF JUSTICE**
The Exchange Tower
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Toronto, ON M5X 1K6

Attention: Diane Winters
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Email:diane.winters@justice.gc.ca

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE**
P.O. Box 620
33 King Street West, 6th Floor
Oshawa, ON L1H 8E9

Attention: Kevin J. O'Hara
Email:Kevin.ohara@ontario.ca

AND TO: **SERVICE CANADA**
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Cornwell, ON K6H 6X5

Attention: Steven Carrier, Team Leader

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PCAS PATIENT CARE AUTOMATION SERVICES INC. AND 2163279 ONTARIO INC. (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Estate File No. 32-1633386
Court File No. CV-12-9656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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