A RETURN TO FIRST PRINCIPLES IN UNJUST ENRICHMENT: *KERR v. BARANOW*

1. Introduction

Broadly considered, the cause of action in unjust enrichment is fairly simple.[1] The action is animated by the desire to reverse unjustified transfers. The constituent elements of proof invariably consist of (1) the defendant's enrichment, (2) the plaintiff's corresponding deprivation, and (3) the absence of any juristic reason for the impugned transfer.[2] And finally, while it may be awarded personally or proprietarily, the only possible remedy is restitution. The defendant must give back the benefit received from the plaintiff. In contrast to tort and contract, however, the principle of unjust enrichment is relatively unknown. It seldom is taught in law school and it frequently is overlooked in practice. Not surprisingly, errors occasionally occur and debates that ought

1. The phrase "unjust enrichment" is, unfortunately, sometimes used in reference to an entirely distinct phenomenon. In such circumstances, the animating rationale is not to reverse unwarranted transfers, but rather to strip wrongful profits. Furthermore, the cause of action consists not of the three-part claim with which this note is concerned, but rather some species of civil wrongdoing, such as trespass (*Edwards v. Lee's Administrators*, 96 S.W. 2d 1028 (1936, Ky. C.A.)), breach of fiduciary duty (*Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214, [1997] 2 S.C.R. 217), or breach of contract (*Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385, [2002] 2 S.C.R. 601). And finally, whereas true unjust enrichment invariably triggers the response of restitution that requires the defendant to give back a benefit received from the plaintiff, the wrongs-based remedy consists of disgorgement, which compels the defendant to *give up* any benefit (usually received from a third party) acquired as a result of violating the plaintiff's rights. *Attorney-General v. Blake (Jonathan Cape Ltd. Third Party)* provides a vivid illustration: [2001] 1 A.C. 268, [2000] 4 All E.R. 385 (H.L.). The defendant, a notorious double agent, published his memoirs (from a safe haven in Moscow) and thereby breached a lifelong contractual undertaking to refrain from disclosing information learned while he was a member of England's secret service. Because the Crown's losses were not quantifiable, compensatory damages were not available. As an alternative, however, the Crown was entitled to receive the £150,000 advance on royalties that a publisher had agreed to pay the defendant. That remedy was not restitution because it did not require the defendant to "give back" anything to the Crown. Though he had grievously wronged the Crown, the material source of his enrichment was the third-party publisher.
2. Significantly, the action in unjust enrichment involves true strict liability. Liability is imposed, despite the absence of any breach, simply because the defendant received an unwarranted benefit from the plaintiff: *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193, [1997] 2 S.C.R. 581.

to have been settled long ago sometimes remain alive. In recognition of that situation, the Supreme Court of Canada recently availed itself of an opportunity to restate many of the first principles of unjust enrichment. In a single, unanimous opinion involving the companion cases of *Kerr v. Baranow* and *Vanesse v. Seguin*,[3] Cromwell J. quite clearly wrote with a view to both resolving the appeals and re-establishing orthodoxy. With the exception of one point that applies exclusively within the family law context, the effort was a substantial success.

2. The Cases on Appeal

Because the focus of this note falls upon the action in unjust enrichment generally, rather than its application to cohabitational disputes specifically, a simplified description of the cases on appeal will suffice.

(a) *Kerr v. Baranow*

Kerr arose from a 25-year relationship that began in 1981. Although both parties initially contributed financially to the home, the plaintiff was unable to work after suffering a debilitating stroke in 1991. The defendant thereafter cared for the plaintiff and provided the only source of income. By 2006, the defendant experienced "caregiver fatigue" and the relationship collapsed. The plaintiff, having moved into an extended care facility, claimed an interest in the cohabitational home, to which the defendant held exclusive title. The defendant counterclaimed for his services.

The trial judge unfortunately did neither party justice. After misreading the evidence and essentially ignoring the counterclaim, he awarded the plaintiff $315,000, representing one-third of the value of the cohabitational home.[4] He explained that conclusion in terms of both unjust enrichment and resulting trust. The British Columbia Court of Appeal, in contrast, denied the possibility of a resulting trust, saw no basis for the plaintiff's action in unjust enrichment, and ordered a new trial regarding the defendant's restitutionary counterclaim.[5]

3. (2011), 328 D.L.R. (4th) 577, 2011 SCC 10.
4. (2007), 47 R.F.L. (6th) 103, 2007 BCSC 1863.
5. (2009), 66 R.F.L. (6th) 1, 2009 BCCA 111. On a non-restitutionary issue, the Court of Appeal overruled the trial judge and held that spousal support ought to have been available from the date of trial, as opposed to the date that proceedings were commenced. On further appeal, however, the Supreme Court of Canada restored the trial judgment.

The Supreme Court of Canada largely agreed with the Court of Appeal. An orthodox resulting trust was properly denied because the plaintiff proved neither a gratuitous transfer nor a contribution toward the acquisition of an asset held in the defendant's name. More dramatically, Cromwell J. further rejected, from a principled perspective, the uniquely Canadian notion of a common intention resulting trust. And finally, while confirming that the defendant was entitled to an effective airing of his counterclaim in unjust enrichment, Cromwell J. also held that, because of the Court of Appeal's erroneous analysis of the *mutual benefits* that passed between the parties, the plaintiff's restitutionary rights required re-hearing.

(b) *Vanesse v. Seguin*

The 12-year relationship in *Vanesse* contained three periods of roughly equal duration. During the first phase, both parties worked hard to develop a home and advance their respective careers. She served with the Canadian Security Intelligence Service (CSIS); he developed a network operating system. The arrival of children brought marked changes during the second phase. While the plaintiff gave up her position with CSIS in order to focus on the home, the defendant expanded his business before ultimately selling the company for $11,000,000 in profit. Finally, both parties largely stayed at home and enjoyed the trappings of success during the last part of their relationship. Sadly, however, personal problems persisted and the pair eventually split. The cohabitational home already was held in joint title, but the plaintiff claimed that her services entitled her to share in the proceeds from the sale of the defendant's business.

The threshold issue of liability was simple enough, but the lower courts split on the question of remedy. Previous cases revealed two possibilities. A successful claimant might be entitled to either personal relief calculated on a *quantum meruit* basis or proprietary relief (in the form of a constructive trust) effecting an equitable re-distribution of the accumulated assets. On the facts, however, precedent precluded the latter option because the plaintiff's services were not sufficiently connected to the defendant's company. The trial judge nevertheless refused to confine the plaintiff to the market value of her services and instead subjected the defendant to a debt equal to roughly half of the relevant profits

that he had generated.[6] The Ontario Court of Appeal disagreed. In its view, an *in personam* order must be quantified on a fee-for-services basis.[7]

The Supreme Court of Canada's decision undoubtedly will have a significant impact on practice in the area. Cromwell J. broke the relationship that traditionally existed between measures and forms of relief. Quantification, he held, should turn not on the choice between *in personam* and *in rem*, but rather on the nature of the parties' underlying relationship. If, as in *Vanasse v. Seguin*, the facts reveal a *joint family partnership*, then, whether or not the plaintiff's services are so closely connected to the defendant's assets as to warrant the imposition of a trust, the plaintiff may be entitled to a proportionate share in the wealth that survives the relationship. The trial judgment accordingly was restored.

3. Analysis

In the course of resolving the appeals, Cromwell J. clarified the court's position on four core issues within the law of unjust enrichment: (1) the *test of injustice*, (2) the nature of the plaintiff's *corresponding deprivation*, (3) the analysis of *mutual benefits*, and (4) the *measure of restitution*.

(a) The Test of Injustice

Cromwell J.'s most important comments pertain to the basis upon which transfers are adjudged "unjust" and hence reversible. The general issue has been examined in detail elsewhere.[8] A brief overview consequently will suffice for present purposes.

The common law traditionally answered the question of injustice by means of the *unjust factors*. The plaintiff had to prove a positive reason for recovering a benefit from the defendant. In the paradigm case of mistaken payment, for example, relief was available because the plaintiff had acted in error. Given the common law's commitment to individual autonomy and private property, a transferor was not held to the consequences of a vitiated intention. Canadian courts unequivocally employed that approach until 1980. In *Pettkus v.*

6. 2008 CanLII 35922, 168 A.C.W.S. (3d) 819 (Ont. S.C.J.).
7. (2009), 96 O.R. (3d) 321, 2009 ONCA 595.
8. M. McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment After *Garland v. Consumers' Gas Co.*" (2004), 42 Alta. L. Rev. 399; M. McInnes, "*B.M.P. Global Distributions Inc. v. Bank of Nova Scotia*: The Unitary Action in Unjust Enrichment" (2009), 48 C.B.L.J. 102.

Becker,[9] however, the Supreme Court of Canada began to reason in terms of an entirely different model of recoverability. Whereas the common law employed *unjust factors* to explain why the defendant had to *restore* a benefit, civil jurisdictions asked whether there was any *juristic reason* as to why the defendant should be entitled to *retain* an enrichment. The two tests effectively operate from opposing perspectives. The former says "restitution only if . . ."; the latter says "restitution unless . . ." It therefore was quite surprising to find the court, without explanation, suddenly asking whether there was "an absence of any juristic reason"[10] for the defendant's enrichment. Close examination, however, revealed that the shift was semantic, rather than substantive. While employing the civilian phrase, Dickson J. imposed liability in *Pettkus v. Becker* only because the plaintiff successfully invoked the unjust factor of *free acceptance*. Restitution (in the form of a constructive trust) was triggered by the fact that the defendant had accepted the plaintiff's services despite knowing that she reasonably expected, in exchange, to receive an interest in the assets held exclusively in his name.

Canadian law accordingly fell into the deeply disturbing habit of saying one thing and doing another. In both cohabitational and commercial contexts, courts routinely invoked the civilian terminology, but actually awarded relief only upon proof of the common law's unjust factors. At the same time, however, a much slimmer line of authority took the language of "juristic reason" seriously and presumptively reversed every transfer that did not fulfill some legal purpose. Consequently, though impossible to predict, the restitutionary analysis in any given case might proceed in one of two very different directions. That controversy finally came to a head in 2004. In *Garland v. Consumers' Gas Co.*,[11] Iacobucci J. acknowledged the inconsistency at the heart of the action in unjust enrichment, held that the "the distinctive Canadian approach . . . should be retained," and undertook a "redefinition and reformulation"[12] of the civilian-inspired model. The details of the resulting test certainly provided room for debate,

9. (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834. The civilian terminology first appeared in Dickson J.'s concurring opinion in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289, [1978] 2 S.C.R. 436; *cf. Cie Immobilière Viger Ltée. v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, 10 N.R. 277.
10. *Pettkus v. Becker*, *ibid.*, at p. 271 (D.L.R.).
11. (2004), 237 D.L.R. (4th) 385, [2004] 1 S.C.R. 629.
12. *Ibid.*, at p. 401 (D.L.R.).

but the basic issue appeared to be settled: the action in unjust enrichment turns upon juristic reasons, rather than unjust factors.

Unfortunately, not everyone agrees. The dean of Canadian restitution believes that *Garland* has had relatively little impact.[13] Professor McCamus insists that Iacobucci J.'s redefined and reformulated test of juristic reasons is confined to "novel cases," in which the issue of reversibility has not previously been decided. "Routine" claims in unjust enrichment, he says, continue to be governed by the common law's traditional unjust factors. Those propositions are startling. As explained elsewhere in detail,[14] they also are bereft of judicial support, wrong in principle, and potentially disastrous in practice. Most importantly for present purposes, the McCamus thesis was clearly rejected in *Kerr v. Baranow*.

That decision must be read in context. Although Professor McCamus' position was not explicitly acknowledged in the Supreme Court of Canada, Cromwell J. had openly addressed it shortly before his elevation from the Nova Scotia Court of Appeal.[15] His familiarity with the issue undoubtedly helped when it came time, in *Kerr v. Baranow*, to identify the precise basis upon which a person, having emerged from a cohabitational relationship, may demand relief. In the years following *Pettkus v. Becker*, of course, courts continued to employ the unjust factors. In one case after another, they considered the parties' reasonable expectations and imposed liability only if the defendant had freely accepted the plaintiff's services. That analysis applied as a matter of routine. Cromwell J., however, held that it no longer was correct. The "third element of an unjust enrichment claim," he explained, requires "that there is no reason in law or justice"[16] for the defendant's enrichment. Within a garden variety

13. J.D. McCamus, "Mistake, Forged Cheques and Unjust Enrichment: Three Cheers for *B.M.P. Global*" (2009), 48 C.B.L.J. 76; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Ontario, Canada Law Book) (looseleaf), at § 3:200.

14. M. McInnes, "The Unitary Test of Unjust Enrichment: A Response to Professor McCamus" (2011), 38 Advocates' Q. 165; C.D.L. Hunt, "The Civilian Orientation of Canadian Unjust Enrichment Law: A Reply to Professor McCamus" (2010), 48 C.B.L.J. 498; *cf.* C.D.L. Hunt, "The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada" (2010), 43 U.B.C. L. Rev. 173.

15. *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local 1* (2006), 273 D.L.R. (4th) 86 at p. 105, 2006 NSCA 100. Since neither party had argued the McCamus thesis, Cromwell J.A. refrained from authoritatively commenting upon the issue in *Imperial Oil*.

16. *Supra*, footnote 3, at para. 40.

cohabitational claim, that means that the common law model of unjust factors and "free acceptance" has "now been overtaken" by *Garland's* "juristic reason analysis."[17] The debate accordingly is over. The civilian-inspired model applied even though there was nothing "novel" about the claims in *Kerr v. Baranow*. The unjust factors no longer directly determine the availability of restitution under any circumstances.

That is not to say that the traditional precedents have become entirely irrelevant. While the third element of unjust enrichment no longer consists of unjust factors, the older cases do help to explain the availability of relief. Professor Birks viewed the situation in terms of a "pyramid of reconciliation."[18]

It obviously is insufficient simply to say that a transfer is "unjust." Without more, that conclusion is apt to reflect little more than "purely subjective"[19] intuition. It must be asked *why* the transfer is unjust. Under *Garland*, the more specific explanation consists of the absence of juristic reason. The enrichment is unjust because it lacks any legal basis. Occasionally, as in cases of theft, that explanation is sufficient. The defendant cannot possibly point to any ground for retention. More often, however, a benefit lacks juristic reason because it was transferred pursuant to a purpose that somehow failed. An aunt gives a birthday present to her nephew and then, forgetting what she had done, gives another the next day. The second transfer is reversible because the aunt's apparent donative intent is ineffective. Once again, however, there must be some explanation for that conclusion. *Why* is the donative intent ineffective? At a still more specific level, the absence of juristic reason typically is informed by the cases underlying the traditional unjust factors. The aunt's second transfer lacks juristic reason because it has been decided, by thousands of cases over hundreds of years, that mistaken gifts are ineffective. Given the common law's respect for personal autonomy and private property, a juristic reason based upon a vitiated intention is really no reason at all. Decisions involving unjust factors consequently remain relevant insofar as they allow a court to conclude that, notwithstanding initial appearances, the defendant's enrichment lacks legal basis.

17. *Supra*, footnote 3, at paras. 120-121.
18. P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford, Oxford University Press, 2005), at p. 116.
19. *Supra*, footnote 3, at para. 43.

Cromwell J. recognized the essence of that analysis in *Kerr v. Baranow*. The principle of unjust enrichment, he said, combines old and new. While courts historically developed

> categories in which retention of a conferred benefit was considered unjust [*e.g.*] benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; at the defendant's request[,] Canadian law does not limit unjust enrichment claims to these categories. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able to develop in a flexible way as require to meet the changing perceptions of justice.[20]

(b) Corresponding Deprivation

The second element of unjust enrichment is open to interpretation. In England, where courts speak of "the plaintiff's expense," it appears that while the claimant must be the material source of the defendant's enrichment, the former's loss ultimately need not economically equate with the latter's gain.[21] Consequently, while restoring the defendant's *status quo ante*, restitution may leave the claimant with a windfall.[22] In contrast, in requiring proof of a "corresponding deprivation," Canadian courts typically have insisted upon a zero sum game. The plaintiff must suffer by subtraction to the same extent that the defendant is enhanced by addition. The passing on defence is one (controversial)[23] manifestation of that proposition.[24] Liability is

20. *Supra*, footnote 3, at paras. 31-32, quoting in part *Peel (Regional Municipality) v. Ontario* (1992), 98 D.L.R. (4th) 140 at p. 155, [1992] 3 S.C.R. 762.

21. *Kleinwort Benson Ltd. v. Birmingham City Council*, [1996] 4 All E.R. 733, [1996] 3 W.L.R. 1139 (C.A.); *Kleinwort Benson Ltd. v. South Tyneside Metropolitan Borough Council*, [1994] 4 All E.R. 972.

22. The defensibility and desirability of that approach is open to debate: M. McInnes, "'At the Plaintiff's Expense': Quantifying Restitutionary Relief" (1998), 57 Cambridge L.J. 472.

23. Anglo-Australian courts have rejected the passing on defence on the ground that, in those jurisdictions, the plaintiff need merely be the material source of the defendant's enrichment: *Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001), 208 C.L.R. 516, [2001] HCA 68; *Commissioner of State Revenue (Vic) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51, [1994] HCA 61; *Mason v. New South Wales* (1959), 102 C.L.R. 108, [1959] HCA 5. However, even if, as in Canada, the defendant's enrichment and the plaintiff's deprivation ultimately must economically equate, the defence might be rejected as a matter of policy and practicality. The concept of passing on is notoriously difficult to apply, largely because it is generally impossible to determine the extent to which a business, having attempted to shift a burden onto its customers, loses sales as a result. See generally M. Rush, *The Defence of Passing On* (Oxford, Hart Publishing, 2006).

24. The issue may arise in other ways. Suppose, for instance, that the plaintiff, as a

reduced to the extent that the plaintiff, having *prima facie* unjustly enriched the defendant, successfully shifts the loss onto some third party, as when a company covers a new tax by raising the prices that it charges to its customers. As La Forest J. explained in *Air Canada v. British Columbia*,[25] the action in unjust enrichment "is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth . . . it is restored to him."

The Supreme Court of Canada, however, has not been entirely consistent. In 2007, it released *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*.[26] That decision, which involved the recovery of money paid pursuant to an *ultra vires* government demand, contained a number of unusual and worrying statements.[27] Significantly for present purposes, Bastarache J., in *dicta*, denied the need for a deprivation on the ground that "[r]estitution . . . is not founded on the concept of compensation for loss."[28] Contrary to precedent and without substantive analysis, a defining feature of the Canadian law of unjust enrichment seemed to be fundamentally re-conceived.

Kerr v. Baranow has now re-affirmed orthodoxy. Although it is to be hoped that he will revisit the issue in greater depth sometime soon, Cromwell J. clearly indicated the need for a matching plus and minus. Liability, he explained, presumes "not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered."[29]

(c) Mutual Benefits

A desire to reinforce orthodoxy similarly informs Cromwell J.'s treatment of the third issue. Within the context of cohabitation, benefits almost always exist alongside counter-benefits. It certainly is possible to imagine an entirely one-sided relationship in which

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result of an error, contractually pays a third party $500 to work on the defendant's car. The vehicle's value increases by $750. The third party, having been paid by the plaintiff, drops out of the picture. If the plaintiff sues the defendant in unjust enrichment, is restitution measured at $500 (the amount common to the enrichment and the corresponding deprivation) or $750 (the value of the benefit that the defendant acquired from the plaintiff)? The more generous response is indefensible: M. McInnes, "The Measure of Restitution" (2002), 52 U.T.L.J. 163.

25. (1989), 59 D.L.R. (4th) 161 at p. 194, [1989] 1 S.C.R. 1161.
26. (2007), 276 D.L.R. (4th) 342, [2007] 1 S.C.R. 3.
27. M. McInnes, "Restitution for *Ultra Vires* Taxes" (2007), 123 Law Q. Rev. 365.
28. *Supra*, footnote 26, at p. 363 (D.L.R.).
29. *Supra*, footnote 3, at para. 39.

every enrichment flows in the same direction. Typically, however, cohabitation involves an exchange of mutual, though not necessarily equal, benefits. Consequently, if the parties separate and an allegation of unjust enrichment arises, a court may be required to determine the proper approach to competing claims.

Kerr v. Baranow is illustrative. After the relationship ended and the plaintiff moved into an extended care facility, she demanded a beneficial interest in the cohabitational home, held exclusively in the defendant's name, as a result of her efforts during their time together. The defendant, having cared for the plaintiff after she was incapacitated by a stroke, counterclaimed. The trial judge effectively ignored the counterclaim and allowed the claim. The British Columbia Court of Appeal, on much firmer ground, followed the prevailing practice of off-setting the mutual benefits at the enrichment and deprivation stage of analysis. Other cases reveal alternative strategies. Some judges have addressed mutual benefits in terms of juristic reasons; some have dealt with the issue in terms of defences or remedies.

In the Supreme Court of Canada, Cromwell J. adopted the approach that best accords with established principle. Mutual benefits, he held, may be relevant in two ways. Though unlikely within a cohabitational context, an exchange of benefits may inform the issue of injustice by providing evidence of a juristic reason, such as contract or gift. Otherwise, mutual benefits ought to be examined in connection with defences (*e.g.*, change of position) or the quantification of relief (*i.e.*, off-setting liabilities).[30] That strategy best accords with a "straightforward economic approach"[31] to the issues of enrichment and deprivation. Moreover, as Cromwell J. explained, it prevents a judge from "short-circuiting the proper unjust enrichment analysis."[32] There often is a temptation, especially within the messy circumstances of cohabitation, to adopt a rough-and-ready approach to the evidence and to reach for a conclusion that intuitively seems to strike a fair compromise between the competing interests.[33] By

30. Interestingly, Cromwell J. directed lower courts to deal with mutual benefits in the prescribed manner "whether or not the defendant has made a formal counterclaim or pleaded set-off": *supra*, footnote 3, at para. 109.
31. *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980.
32. *Supra*, footnote 3, at para. 104.
33. See *e.g.*, *Nowell v. Town Estate* (1994), 19 O.R. (3d) 303, 5 R.F.L. (4th) 353 (Ont. Ct. (Gen. Div.)), revd 35 O.R. (3d) 415, 30 R.F.L. (4th) 107 (C.A.), leave to appeal to S.C.C. granted 111 O.A.C. 398*n*, 227 N.R. 282*n*, appeal discontinued 09/08/1998, Court File No. 26372.

requiring judges to proceed methodically through the various stages of unjust enrichment, *Kerr v. Baranow* protects the parties from the risk of palm tree justice.

(d) Quantification of Restitution

The final point for consideration — the quantification of relief — is the most complex. One source of complication lies in the fact that the issue inextricably is linked with doctrines and principles that exist outside of the principle of unjust enrichment. To the extent possible, those aspects of the problem will be addressed in outline, leaving the focus to fall on the elements of restitutionary liability. A second source of complication is not so easily managed. Cromwell J. dealt separately with the issues of resulting trusts and restitutionary relief. In fact, although Canadian courts have yet to recognize the point, those two issues are very closely connected.

(i) Common Intention Resulting Trust

Vanasse v. Seguin and *Kerr v. Baranow* involve the same social phenomenon that triggered a legal revolution of sorts in 1980. Sexual relations are such that, despite generally equal contributions to cohabitation, large assets often are held exclusively by men to the detriment of women. Moreover, given the economic realities of life, those assets (particularly land) frequently constitute the only substantial form of wealth to survive the failure of an intimate relationship. Consequently, as they became persuaded during the 1970s that justice required liability,[34] Canadian courts sought means by which female claimants might enjoy proprietary interests. As authoritatively established in *Pettkus v. Becker*,[35] the primary solution consisted of a constructive trust imposed in response to unjust enrichment. An alternative strategy, however, involved the resulting trust.

Broadly speaking, resulting trusts traditionally have been recognized in two situations. In either event, a beneficial interest is impressed upon property for the purpose of sending the asset back from whence it came. That is true if property is transferred upon an express trust that fails. The would-be trustee holds legal title, but the beneficial interest returns to the person who intended to act as settlor. Alternatively, a resulting trust may be imposed if a gratuitous transfer was not intended to confer a beneficial interest.

34. *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423; *Rathwell v. Rathwell*, *supra*, footnote 9.
35. *Supra*, footnote 9.

That possibility may take one of two forms. Since equity presumes bargains rather than gifts, a trust *prima facie* generally[36] arises if property is directly transferred between the parties. The same principles, under the guise of a "purchase money resulting trust," apply to an indirect transfer if one person pays the price, but title is taken in the name of another.

As traditionally conceived, the resulting trust offers little hope to former cohabitees. Intimate relationships seldom involve express trusts. Furthermore, while a beneficial interest undoubtedly may be available if a woman either directly conveys title to a man or contributes to the purchase of property held exclusively in his name, the female contribution to cohabitation often takes the form of services or household expenses. "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it."[37] Nevertheless committed to providing proprietary relief, the Supreme Court of Canada concocted the "common intention resulting trust." Property was impressed with a resulting trust if, although the plaintiff otherwise had no proprietary connection to the asset, both parties, by words or conduct, evinced a desire to share the beneficial interest.[38]

Though it lost some of its luster over time, that analysis continued to be applied until very recently.[39] It was one of the grounds upon which the trial judge in *Kerr v. Baranow* held in favour of the claimant. In the Supreme Court of Canada, however, Cromwell J. held that "the common intention resulting trust has no further role to play."[40] That decision undoubtedly was correct. As a matter of precedent, the concept had evolved from a misinterpretation of English cases involving constructive, rather than resulting, trusts.[41] As a matter of practice, the desire to

36. The countervailing presumption of advancement now applies if a parent conveys property to an infant child: *Pecore v. Pecore* (2007), 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795, 2007 SCC 17. A presumption of advancement also previously applied if a husband transferred property to a wife, but not *vice versa*. As between spouses, it seems that the same rule now applies in both directions, but Canadian courts have yet to decide whether they will presume a resulting trust or advancement.

37. Lord Simon, "With All My Worldly Goods," Holdsworth Lecture, University of Birmingham, March 20, 1964, as quoted in *Peter v. Beblow*, *supra*, footnote 31, at p. 647 (D.L.R.).

38. *Murdoch v. Murdoch*, *supra*, footnote 34.

39. *Warren v. Gilbert*, [2006] O.J. No. 1988, 148 A.C.W.S. (3d) 273 (S.C.J.), revd in part 154 A.C.W.S. (3d) 153 (C.A.); *cf. Mollot v. Mollot* (2006), 406 A.R. 167, 2006 ABQB 249, affd 283 D.L.R. (4th) 733, 2007 ABCA 183.

40. *Vanasse v. Seguin* and *Kerr v. Baranow*, *supra*, footnote 3, at para. 24.

41. *Pettitt v. Pettitt*, [1970] A.C. 777, [1969] 2 All E.R. 385 (H.L.); *Gissing v. Gissing*,

provide proprietary relief and the open-ended search for the requisite intentions frequently combined to generate artificial reasons and dubious results. Most significantly, however, the concept failed as a matter of principle. By its very nature, a resulting trust involves a beneficial interest that effectively causes property to be restored to its previous owner. The word "resulting" derives from the Latin "*resalire*," which means to "jump back." A device that fulfills a common intention, in contrast, looks forward. It gives the plaintiff not what she previously had, but rather what she expected to receive. The idea of a common intention resulting trust consequently is incoherent. That point is important in itself. For present purposes, it also helps to identify an error that the Supreme Court of Canada routinely commits when awarding "restitution" to former cohabitees.

(ii) Joint Family Venture

As previously observed, the appeal in *Vanasse v. Seguin* focused on the quantification of relief. The plaintiff claimed a share of the profits that the defendant earned by selling the company that he developed during the relevant period of cohabitation. A constructive trust typically is employed for such purposes, but that possibility was barred by the lack of a close connection between the plaintiff's services and the defendant's company. Liability therefore had to be expressed in terms of a personal order. Believing that the plaintiff nevertheless should be allowed to participate in the defendant's professional success, the trial judge awarded a sum representing a proportionate share of the couple's accumulated assets. The British Columbia Court of Appeal, in contrast, insisted that personal relief must be quantified as a *quantum meruit*. A new trial consequently was ordered to determine, on a fee-for-services basis, the benefits that each party received from the other.

On further appeal, Cromwell J. preferred the trial judge's approach. The proper measure of relief, he held, depends upon the nature of cohabitation in any given case. In the sad situation where one party effectively treated the other as hired help, then restitution should indeed be calculated on a fee-for-services basis. As in *Vanasse v. Seguin*, however, most relationships entail a *joint family venture*. The purpose of living together is not to secure a

[1971] A.C. 886, [1970] 2 All E.R. 780 (H.L.). That misinterpretation is explained in A.H. Oosterhoff, *et al.*, *Oosterhoff on Trusts: Text, Commentary, and Materials*, 7th ed. (Toronto, Carswell, 2009), at pp. 641-647.

ready source of market-value labour, but rather to share in life's benefits and burdens. Though not exhaustive, Cromwell J. suggested four indicia of such circumstances: (1) *mutual effort*, as when finances are pooled or child-rearing responsibilities are divided, (2) *economic integration*, as evidenced by "common purses" or joint bank accounts, (3) *actual intent*, as suggested by joint ownership of property or public declarations of permanence, and (4) *priority of the family*, as when one partner sacrifices career opportunities in order to build a lasting home. If those indicia are sufficiently satisfied, then a *quantum meruit* is not merely inappropriate, but insulting. The plaintiff in *Vanasse v. Seguin*, for instance, did not deserve to be treated, upon the dissolution of the relationship, as if she had served as the defendant's employee. Given the parties' shared expectations, as well as societal norms regarding the allocation of resources between the sexes, it was incumbent upon the court to fashion a remedy that fairly distributed the wealth that the couple generated during their time together. Cromwell J. accordingly ordered the defendant to pay a proportionate share of his profits to the claimant.

From a social justice perspective, *Vanasse v. Seguin* makes good sense. If the parties had been married, then the plaintiff presumptively would have enjoyed a statutory right to an equal share of the couple's accumulated assets. And while cohabitation cannot invariably be equated with marriage,[42] the parties before the court had been married in all but name. Their joint family venture operated on the assumption of an enduring, interdependent relationship. As a matter of legal principle, however, the result in *Vanasse v. Seguin* is deeply flawed.

A common intention resulting trust, it will be recalled, is incoherent because it fulfills expectations by means of a concept that reverses transfers. It combines diametrically opposed principles. One looks forward; the other look back. Precisely the same discordance occurs when unjust enrichment triggers a right to participate in accumulated assets. The gist of the underlying cause of action is that the defendant received a benefit from the plaintiff without justification. There is no question of wrongdoing. Liability is imposed merely because there is no legal explanation as to why the defendant should be enriched at the plaintiff's expense. The only coherent response is restitution. He received it; it came from her; he must give it back. Unfortunately, within most

42. *Nova Scotia (Attorney General) v. Walsh* (2002), 221 D.L.R. (4th) 1, [2002] 4 S.C.R. 325, 2002 SCC 83.

cohabitational relationships, such relief is hopelessly inadequate. The plaintiff in *Vanasse v. Seguin* certainly deserved much more than payment for her services. As the Supreme Court of Canada held, she was entitled, along with the plaintiff, to share in the benefits generated by the joint family venture. Her expectations were fulfilled. As with a common intention resulting trust, however, there is a fundamental difference between reversing an unwarranted transfer and realizing a shared intention.

The court's failure to recognize the similarities between resulting trusts and restitution is especially regrettable. Although the point cannot be pursued in this paper, Professor Chambers persuasively has argued that, semantic differences notwithstanding, a resulting trust actually constitutes proprietary restitution.[43] The equitable doctrine causes an unjustified enrichment to jump back *in specie*.

Finally, to say that the measure of relief awarded in *Vanasse v. Seguin* (and many other cohabitation cases) is not truly restitutionary is not to say that the remedy is unwarranted. The point, rather, is that causes of action and judicial responses must be properly aligned. Unjust enrichment ought to be available in cohabitation cases, just as it applies in commercial contexts, but it must never do more than reverse an unwarranted transfer. That analysis occasionally will be appropriate in connection with intimate relationships. At the same time, however, the Supreme Court of Canada ought to recognize an independent claim that sensitively addresses the unique aspects of cohabitational disputes. It is understandable that unjust enrichment — at the time, a seemingly reputable but amorphous concept — was pressed into service during the 1970s and early 1980s when, in the absence of legislative intervention, the courts felt compelled to devise some means of securing fair results for women. The situation today is different. The unjust enrichment principle is much better understood. Statutory relief is available across the country upon the dissolution of marriages and, in some provinces, marriage-like relationships. Societal values have changed dramatically. Those *sui*

43. R. Chambers, *Resulting Trusts* (Oxford, Clarendon Press, 1997); R. Chambers, "Resulting Trusts in Canada" (2000), 38 Alta. L. Rev. 378; *cf.* R. Chambers, "Constructive Trusts in Canada" (1999), 37 Alta. L. Rev. 173. See also P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed.), *Equity & Contemporary Legal Developments* (Jerusalem, Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem, 1992), at p. 335. The Chambers/Birks thesis has gained support in English courts: *Air Jamaica Ltd. v. Charlton*, [1999] 1 W.L.R. 1399 (P.C. Jam.), *per* Lord Millett; *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (H.L.), *per* Lord Millett; *Carlton v. Goodman*, [2002] EWCA Civ. 545 (C.A.).

generic circumstances demand a *sui generic* cause of action. Cromwell J.'s concept of a joint family venture, dissociated from unjust enrichment, points in precisely the right direction.

4. Conclusion

Kerr v. Baranow is an exceptionally important decision. By returning to first principles, Cromwell J. consolidated and clarified the advances that the Supreme Court of Canada has made in the law of unjust enrichment during the past 40 years. While some debates remain, courts are now better equipped to proceed appropriately when presented with restitutionary claims.

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