Trusts & Equity
Fall Term 2023

Lecture Notes – No. 12

X. INTRODUCTION TO CONSTRUCTIVE TRUSTS AND UNJUST ENRICHMENT

Chase Manhattan Bank v. Israel-British Bank
[1981] Ch 105

This was a mistaken payment case between two banks, with the issue being whether the mistaken payment could be made subject of a constructive trust in favour of the trustee in bankruptcy of the insolvent payor. It was held that that a person who paid money to another under a factual mistake retained an equitable property in it, and, the conscience of that recipient was subjected to a fiduciary duty to respect his proprietary right; that the plaintiff had a right to trace the money was founded on a persistent equitable proprietary interest. Goulding J reviewed the American law on point in some detail (both banks were in New York) and held that a constructive trust arose on institutional grounds in such a case – automatically and not remedially – and on the day of the mistaken payment.

The case highlights the need for a principled approach to recovery and the limitations of relying on 'conscience'.

'*Unjust Enrichment*': A Guide for the Perplexed

Restitution and *Unjust Enrichment* are concepts that often occur together and are often confused; indeed, at the level of theory, there is much that is contentious in the area of law, even taxonomy. In the past, substantive grounds for a remedy and the remedy itself have often been conflated, especially in respect of proprietary remedies in equity. We now try to draw distinctions. *Restitution* is the response which consists in causing one person to give up to another an enrichment received at his expense (the property itself) or its value in money. We use the term to describe the remedies which have that common function. The prototypical example is a constructive trust over profits taken by a trustee in breach of fiduciary duty. *Unjust enrichment* is not the same as restitution, but is a reason for making restitution or compensation; other reasons might be that there is an enforceable contract or the defendant has committed a wrong.

If our understanding is that unjust enrichment is somehow as foundational to the law as contract or wrongs, and is different from each, then the principle must be prescriptive and capable of being stated with some degree of precision. On the other hand, perhaps the principle is still developing such that it is premature to expect a precise statement at this stage of its evolution and a descriptive approach is sufficient.

The Canadian Supreme Court has dealt with principles of unjust enrichment and restitution as such since ***Degleman v Guaranty Trust Co. of Canada*, [1954] SCR 725** a case featuring a disappointed nephew who was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the oral contract. The Supreme Court of Canada held that the *quantum meruit* claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This is, of course, sounds like very familiar territory – *Equity Will Not Allow a Statute to be Used as an Instrument of Fraud* and the law doesn't allow for the benefits to be retained upon the traditional equitable standard of conscience. Given that the contract was unenforceable, however, what is the ultimate rationale for liability in *Degleman*? It can't be the contract and thus 'implied contract' or 'quasi contact' was rejected by both the majority and the concurring minority. Unjust enrichment (the retention of a benefit without valid reason) best rationalized liability in the Court's view. One instantly appreciates the potential for an elegant solution rather than some soft standard like conscience or fairness, but then it becomes necessary to develop how the standard is more intellectually coherent than the traditional devices by which equity achieves a more fair result in the circumstances.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. **There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action.** We can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
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> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.

The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations. All of this is set out in the *Garland* case.

Garland v Consumers Gas Co.
2004 S.C.C. 25 (S.C.C.)

Here the Court set out a more detailed method for the application and development of the action for unjust enrichment. This was a class action against a utility company for charging late payment penalties at a rate contrary to the Criminal Code notwithstanding that the penalties were authorized by the Ontario Energy Board. The action for unjust enrichment was successful and the defendant was ordered to repay the amounts received. At issue in *Garland v Consumers Gas Co.* was less the presence of benefit and deprivation (which was clear) and more the nature and method of analysis of the juristic reason that might justify retention. Iacobucci J. held:

> 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"… 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" …
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> 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… 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.
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> 44 … 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… The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
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> 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.
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> 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.

This is both a significant and a substantial development in the Canadian law of unjust enrichment, and the action as an autonomous non-parasitic claim is now undeniable. If we proceed from the understanding that what a court will not countenance is a view of '*unjust* enrichment' as an idiosyncratic weighing of the equities of an individual case on subjective criteria ('palm-tree justice' to use the familiar phrase), then *Garland v Consumer's Gas Co.* identifies a principle that is both pragmatic (existing categories that would not interfere with the defendant's retention of the benefit are preserved despite their own inherent frailties) and dynamic (new categories can be created, but on a principled basis). The interim state – 'there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category' – does pose a concern but also clarifies the still developing normative core of the action. That is, unjust enrichment is bound up with a treatment of subjective expectations that are objectively reasonable and where no public policy bars recovery.

Alberta v Elder Advocates of Alberta Society
2011 SCC 24

This was a class action brought against the Crown in right of Alberta by a class of 12,500 long-term care residents, half of whom were over age 85 and all of whom were disabled or mentally incapable and had extensive physical needs. A variety of claims were brought to challenge the level of 'accommodation charges' levied by the provincial government for housing and meals arguing, in essence, that the charges were so excessive that they represented a subsidy of medical services in contravention of the regime established under the Canada Health Act.

While the class action claim was held to be unsustainable as a matter of law on three of the claims, the litigation was allowed to go forward based on the claim of unjust enrichment. The claim is interesting as the plaintiffs argued that the level of accommodation charges were in excess to the cost to the Crown of providing the services in question or reasonable charges representing the necessary equivalencies of enrichment and deprivation. Given that the level of charges were fixed through a legislative act (which was important in the Court holding that no fiduciary duty arose), one might anticipate that no unjust enrichment claim could succeed as a matter of law. Moreover, in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, the Court had held that public law principles rather than a private law action for restitution was to be the preferred mode of redress whether taxes were collected pursuant to *ultra vires* legislation. Enter the Charter, s.15.

McLachlin C.J.C. held at para. 91-92, 97-98:

> In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust

enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.

With respect to whether or not a juristic reason exists, Alberta argues that the regulation setting the maximum allowable accommodation charge is a complete answer to any claim in restitution. However, the claim that the regulation is itself invalid is a *Charter* claim, subject to *Charter* remedies.

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The plaintiffs plead that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter*. They say the charges were imposed solely on the basis of the class members' age, mental disability, physical disability, or some combination thereof, and the consequent infringement of their equality rights is not demonstrably justified under s. 1 of the *Charter*. They seek restoration of the accommodation charges and damages under s. 24(1) of the *Charter*, and a declaration that the listed provisions are of no force or effect to the extent of their inconsistency with s. 15(1).

My understanding is that the plea for relief under s. 15(1) is not directly challenged by the Province. Although the Province argues that a class action is not the preferable procedure for the *Charter* claim or its remedy, the Crown does not seek to strike the plea of discrimination itself; instead, it asks that we order it to proceed in another form. In light of my other conclusions, especially the survival of the plea of unjust enrichment, and without commenting on its merits, I would permit the s. 15 claim to proceed as part of the class action.

Kerr v. Baranow
2011 SCC 10

Vanasse v. Seguin:
The couple was in a 12-year cohabitational relationship and had 2 children. Spousal and child support were ordered in addition to compensation for unjust enrichment of close to $1 million. The claim was successful at trial on the basis that during a 3-year period the plaintiff moved from Ottawa to Halifax, that she left her employment and took up sole responsibility for the household so that her partner could devote himself to developing his business. The business was sold at the end of the three-year period for $11 million. How to value the benefits conferred? The 'value received' approach looks to the value of the services alone, the 'value survived' approach traces the services into an asset which may grow as a result of the contribution. At trial, the 'value survived' approach was taken. The Court of Appeal held that the approach was wrong and should have been based on value received on a quantum meruit basis.

Kerr v. Baranow:
Here the cohabitational relationship was 15 years. The woman was awarded, inter alia, a resulting trust over part of a real property valued to be $315,000. One issue was the provision of benefits in the form of extensive personal care by the man to the woman following a stroke during the course of the relationship. She required extensive care made more difficult by a personality change that included persistent anger towards the man. The trial judge considered both parties' financial contributions to the acquisition of property but largely ignored the man's provision of services.

Cromwell J. held:

> [84] It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.
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> [85] I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality. Thus, as appropriate, the law can address the unjust enrichment of one partner (or is or her estate) who leaves the relationship with a disproportionate share of accumulated assets.

Furthermore, Cromwell J. held that the law shall not look to artificial constructions of doctrine unsuited to this context. Thus, the Court has explicitly held that the law of resulting trusts shall no more play a role in this area – '[t]he point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset

which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property.' Rather what is required is an approach that is principled and speaks to the realities of the context:

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

For ease, it may be easiest to consider the law in the practical steps of the action.

(1) Has there been an enrichment and corresponding deprivation?

The essence of the action in unjust enrichment builds upon a correspondence between enrichment and deprivation. This is an economic analysis that looks to the presence of a real benefit (whether proprietary or in services) from the plaintiff that remains with the defendant. See generally *Belvedere v Brittain Estate*, 2009 ONCA 1**.**

(2) Is there a traditional juristic reason that allows the defendant to retain?

The crux of the action in unjust enrichment is whether there is a valid reason at law for the benefit to be retained; if not, there should be a remedy to return it (compensation), and perhaps make restitution (e.g. disgorging gains made with the property).The judgment of the Court in Garland v Consumers Gas Co., 2004 S.C.C. 25, puts the onus on the plaintiff to show that no 'no juristic reason from an established category exists to deny recovery, the burden shifts to the defendant to show that recovery by the plaintiff should not be ordered in the circumstances of the case based on the reasonable expectations of the parties and public policy considerations. Although inelegantly couched in the negative, the clear message is that the court can order a return of the enrichment (and even create new categories of juristic reasons of general application) based on the expectations of the parties and policy.

(3) If there is no traditional juristic reason, is the defendant allowed to retain based on the reasonable expectations of the parties?

Kerr v Baranow identifies a new doctrine, the 'joint family venture'. One would think that it would be relevant at this point of the analysis if a new juristic reason of general application has been established. However, it is precisely the case that it is not as there is no presumption that a cohabtitational relationship should give rise to a presumption of sharing wealth. However, the same considerations that are relevant as to whether there is a 'joint family venture' are relevant to making out whether there were reasonable expectations of the parties to share acquired and accumulated wealth. Thus, this is a fact-specific exercise based on the circumstances of the individuals and policy arguments respecting the fairness of wealth sharing in those circumstances.

Where there was no actual expectation of sharing, the defendant has a good defence to the claim unless the court (presumably) interferes to imply such an expectation as a matter of policy. In this respect the Court approaches the matter as an exercise of its equitable jurisdiction (which does seem odd given the removal of the question to unjust enrichment from the law of trusts):

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

(4) If there is no juristic reason and the parties shared no realistic expectation to allow the defendant to retain, can the plaintiff claim a proprietary remedy?

The majority of the discussion in *Kerr v Baranow* is dedicated to the remedial response to a good claim in unjust enrichment. The most problematic part of the unjust enrichment analysis where the claim is made based on contributions by the plaintiff to the acquisition or maintenance of property in the hands of the defendant in the form of money or services or both is the remedial response. This is particularly so in the family law context where the contributions may be indirect. As such, guidance is to be welcomed.

Proprietary remedies are controversial ones. Obviously the plaintiff would prefer to have property which is available immediately rather than an order for a monetary payment in most cases, but there is always the risk of prejudice to third parties are difficulties in recognizing proprietary interests accruing to both the plaintiff and the defendant in any given case. Hence the traditional reluctance to order a remedy in the form of a constructive trust rather than a monetary award.

In *Kerr v Baranow*, the Court continues the cautious approach to proprietary relief. If 'the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour.' A minor or indirect contribution will not suffice, and, a monetary award is insufficient. No new ground is broken here. Rather, we continue on with a traditional remedial orientation.

(5) If the plaintiff's remedy is not proprietary but rather a monetary one, was there a 'joint family venture'?

If the award it to be a monetary one, then obviously there must be a method to value the plaintiff's contributions and provide restitution to him or her on that basis. Here the Court reiterates that the context is not commercial in character and thus one must have regard for that context in determining the nature of the remedy. Past cases have struggled with how to determine the nature of the contributions made by both cohabitational partners and how to value those contributions – on a fee-for-service basis (quantum meruit) or with reference to the value of the property now in

the hands of the defendant ('value survived')? At the outset, Cromwell J. makes a key holding – limiting recovery to valuation based on quantum meruit is inappropriate:

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

Aside from institutional values (flexibility in remedial response), precedent (*Peter v Beblow*), and evolution of legal doctrines, it really is the first reason that is the core of the judgment – the creation of a new model predicated on the existence of a 'joint family venture'. Cromwell J. explains:

> [60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in Peter, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.
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> [61] There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in Clarke v. Clarke, 1990 CanLII 86 (SCC), [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's Matrimonial Property Act), ". . . the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. . . . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).
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> [62] Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

Thus, the presence of a joint family venture really does tilt towards equal sharing where one is present in the facts of the case. To that end the Court went on to consider what sorts of factors are relevant in recognizing that one exists in the circumstances:

> **[87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?**
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> **[88] It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their ex post facto assertions or the court's view of how they ought to have done so.**
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> **[89] In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.**

Cromwell J. went on to consider four such relevant factors: 'mutual effort', 'economic integration', 'actual intent', and 'priority of the family'. Where the joint family venture is present, it is not quantum meruit that is appropriate but rather a proportionate share of the asset in the hands of the defendant that is appropriate:

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

> treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling quantum meruits". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.
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> [101] As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?
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> [102] The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

Thus, the fact that the parties conferred mutual benefits upon one another is relevant to determining the fairness of the wealth being divided to reflect that fact as well as showing that there was a joint family venture in the first place. Rather than trying to value services on a quantum meruit basis, the court will have to consider fairness in recognizing proportional contributions – absent strong evidence to the contrary, one would think equality will rule here.

(6) If there was no 'joint family venture', what is the value of the contributions of the plaintiff on a fee-for-service basis? Is there any set-off for the defendant's services to the plaintiff?

Absent the new considerations respecting a joint family venture, and given the flexibility that should be shown at the remedial stage of an unjust enrichment claim, it is apparent that the court considering such a claim will be able to return to traditional quantum meruit and 'value survived' approaches as are appropriate to the circumstances.