



Family Law News

Lauren Bale & Kanata Cowan

Kerr v. Baranow, a case from the Supreme Court of Canada: A New Twist on Unjust Enrichment in Common Law Domestic Partnerships

Justice Cromwell delivered a unanimous new judgment from the Supreme Court of Canada this past February 18, 2011. *Kerr v. Baranow*, [2011] S.C.J. No. 10, concerns two companion appeals, one from British Columbia and the second from Ontario. Both cases involved the issues of common law domestic partners and the proper treatment of resulting trust and unjust enrichment claims upon the breakdown of the domestic relationship. This judgment is a must read for family lawyers and those practitioners wishing to keep apprised on the current law of unjust enrichment and the calculation of the award. If you are bringing or defending a domestic unjust enrichment claim *Kerr* can act as your roadmap.

As family lawyers are aware, there is no legislative framework that deals with the property rights of parties who are cohabitating instead of those who are traditionally legally married. Lawyers representing common law domestic partners are left to argue cases based on the common law principles of resulting trust and unjust

enrichment. These words may bring back the vision of swarming bees and beekeepers' hats from the old case of *Pettkus v. Becker*, [1980] 2 S.C.R. 834. However, recently the law has been modified by our highest court. The Supreme Court has acknowledged that the resulting trust was unsatisfactory for many legal situations and altered the common law as it was by abolishing the doctrine of common intention in common law domestic partnership litigation.

In the *Kerr* appeal, the couple had lived together in a common law relationship for more than 25 years and were in their late-sixties when separating. Ms. Kerr claimed support and a share of the property held in her partner's name based on resulting trust and unjust enrichment principles. At trial, Ms. Kerr was awarded one third the value of the couple's residence along with monthly support. The resulting trust and unjust enrichment conclusions were set aside by the British Columbia Court of Appeal. The Supreme Court of Canada addressed the role of resulting trust law, and how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations should play in that analysis.

In the *Vanasse* appeal from Ontario, the parties lived together in a common law relationship for about 12 years and had two children together during that time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth resulted from Ms. Vanasse's efforts as an equal contributor to the family venture. The Court of Appeal set aside the finding and ordered a new trial based on the conclusion that Ms. Vanasse should have been treated on a *quantum meruit* basis as an unpaid employee, not as a co-venturer. The unanimous decision of the Supreme Court of Canada describes how to quantify a monetary award for unjust enrichment. At the end of the day, the court determined that the Order of the trial judge should be restored.

However, more interesting than the tales of Ms. Kerr and Ms. Vanasse is the new framework from which we should now assess our clients' claims. The Supreme Court of Canada sets out to resolve five main issues in the judgment, four of which will be summarized below as they alter the common law. The fifth issue will be left to those more interested in the specific facts of Ms. Kerr and her spousal support award:

1. The Role of the "common intention" resulting trust in claims by domestic partners;

A drastic change was made to the law by this decision as it abolished the doctrine of common intention. It was found to be doctrinally unsound that a resulting trust could only arise if the parties had a common intention by both parties that the non-owner party

was to have an interest in the property accumulated. The doctrine of common intention in resulting trust no longer has a role to play in the resolution of domestic cases. This lowers the bar for a party claiming a resulting trust, as it does not need to be proven that both parties intended that they would share the accumulated wealth.

2. The nature of the monetary remedy for a successful unjust enrichment claim;

The monetary award for an unjust enrichment claim is not limited to a fee-for service approach as was previously held by the Court of Appeal of Ontario. In a case where one party retains a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions. In order to be entitled to a monetary remedy of this nature, the claimant must show, that there was in fact a joint family venture and a link between his or her contributions to it and the accumulation of assets and/or wealth. Determining whether there was a joint family venture is a question of fact and is assessed based on all of the relevant circumstances including; a) mutual effort, b) economic integration, c) actual intent and d) priority of the family. This modification of the law assists in preventing a windfall or a disproportionate share being granted to one party. The Supreme Court of Canada judg-

ment alters the way a remedy is calculated in Ontario, and as lawyers we are no longer limited to a *quantum meruit* basis when arguing an unjust enrichment claim.


3. Clarification related to mutual benefit conferral;

Unjust enrichment analysis in family law problems is often complicated by the fact that there has been a mutual conferral of benefits between parties. According to the Supreme Court of Canada, mutual benefit conferral can be taken into account at the juristic reason stage of the unjust enrichment analysis, when it provides relevant evidence of the enrichment. When the appropriate remedy is a monetary award based on a fee-for services provided approach the mutual


exchange of benefits should be taken into account at the defence and/or remedy stage.

4. The role of the parties' reasonable or legitimate expectations play in the unjust enrichment analysis;

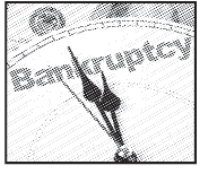
The Court found that the parties reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason but may be relevant evidence as to whether or not a juristic reason exists. The parties reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, i.e., when the defendant bears the burden of proving that he is retaining the benefit for a juristic reason which does not fall within an existing category.



TAYLOR LEIBOW INC.
TRUSTEE IN BANKRUPTCY



Proposals • Bankruptcy • Receiverships • Consulting



Kathy M. Lenart, BA, CA•CIRP, *President*
Julie A. Savage, BA, CIRP, *Vice President*
Les Mitchnick, BA, LL.B., *Associate*

No Charge for Initial Consultation.

HAMILTON *(Principal office)*
8th Floor, 105 Main St. E.
(905) 523-0003

BURLINGTON
1st Floor, 3410 South Service Rd.
(905) 637-0071

ST. CATHARINES
43 Church St., Unit 604
(905) 680-4728

Toll Free: **1-888-287-2525**

www.freshstartnow.ca

