

UNJUST ENRICHMENT AND *DE FACTO* SPOUSES

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UNJUST ENRICHMENT AND DE FACTO SPOUSES

Robert LECKEY*

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In *Kerr v. Baranow*, the Supreme Court of Canada substantially adapted the common law of unjust enrichment as it applies to unmarried cohabitants, injecting the spirit of the constructive trust into the rules for monetary orders.¹ What impact will that judgment have in Quebec, where the courts have no jurisdiction of equity and where unjust enrichment, as a source of obligation, generates a monetary claim (*in personam*) and never a proprietary remedy (*in rem*) such as the constructive trust? The relevance of this question is intensified by the prevalence of unmarried cohabitation in Quebec, coupled with the absence under its family law of any support or property provisions applicable to *de facto* spouses, a state of affairs upheld by the Supreme Court of Canada as constitutionally permissible.²

Moreover, Quebec courts have historically expressed hesitancy at deploying the general private law to remedy the economic fallout of *de facto* union.³ Indeed, in a way unmatched in the common-law provinces, some strands of legal discourse in Quebec regard the legislative abstinence regarding *de facto* spouses and the imperative of respecting their “choice not to marry” as conditioning any response to their claims by the *jus commune*.⁴ The Court of Appeal has expressed the view that it is not the judges’ role to create a partnership of acquests for *de facto* spouses where the legislature has not done so.⁵ That being said, many judges on the front lines abjure the strict view that *de facto* spouses are legal strangers one to another, even if not authorized to do so by legislation or by *opinio juris*.⁶ Furthermore, in rejecting the contention that *de facto* spouses’ exclusion from the law of matrimonial property was unjustifiably

1. 2011 SCC 10, [2011] 1 S.C.R. 269 [*Kerr*].

2. *Quebec (Attorney General) v. A*, 2013 SCC 5 [*Quebec v. A*].

3. Donald M. HENDY and Corina N. STONEBANKS, “Strangers at Law? The Treatment of Conjoint de fait in the Civil Law of Quebec and the Development of Unjust Enrichment”, (1995) 55 *R. du B.* 71.

4. As recently as 2006, respected doctrinal authors perceived a risk that the principles of unjust enrichment would be marshalled to palliate the absence of a family patrimony and matrimonial regime for “concubines” (*sic*). Jean PINEAU and Marie PRATTE, *La famille*, Montreal, Thémis, 2006, p. 571, para. 383.

5. *B. (M.) c. L. (L.)*, [2003] R.D.F. 539, paras. 31, 38 (C.A.).

6. Robert LECKEY, “Family outside the Book on the Family”, (2009) 88 *Can. Bar Rev.* 545.

discriminatory, justices of the Supreme Court of Canada have reaffirmed the role of unjust enrichment in assuring fairness when their unions unwind.⁷ A principled approach for understanding *Kerr*'s relevance to the civil law of Quebec is thus necessary.

This paper ventures a contribution to addressing that need. It consists of five parts. The Supreme Court of Canada's judgment rendered as *Kerr v. Baranow* resolved two joined appeals. The focus here is on the dispute from Ontario, *Vanasse v. Seguin*.⁸ Its facts are summarized, as is the Supreme Court's judgment as it concerns the quantification of monetary orders for unjust enrichment (1).⁹ The paper then exposes the judgment's novelty from the perspective of the common law of unjust enrichment. That novelty is critical to appreciating the need for care surrounding the judgment's potential reception in Quebec (2). The starting point regarding the possible impact of *Kerr* in Quebec is the current framework for unjust enrichment as it applies to *de facto* spouses. That framework combines general principles derived from the Civil Code's book on obligations with their judicial elaboration in the context of *de facto* unions (3). The integration into Quebec law of the Court's earlier leading judgment on cohabitants under the common law of unjust enrichment suggests that *Kerr*, too, will influence that jurisdiction's civil law (4). At a minimum, the view of cohabitation advanced by the Supreme Court of Canada mandates sensitivity to cohabitation as distinct from the commercial interactions paradigmatically regulated by the general private law of property and obligations. A bolder proposal for integrating *Kerr*'s insights into Quebec civil law would use the Supreme Court's criteria for identifying whether partners have engaged in a joint family venture. On that proposal, a claimant having established that there had been a joint family venture could access a fortified form of the inquiry developed by judges for the compensatory allowance (5).

7. LeBel J., who held that *de facto* spouses' exclusion from the legal framework applied to married and civil-union spouses was not discriminatory, held that the Civil Code's principles of unjust enrichment must be interpreted "cautiously but generously" (*Quebec v. A*, *supra*, note 2, para. 117); Deschamps J., who found discrimination which was justifiable, except concerning the obligation of support, called for interpreting the provisions on unjust enrichment "generously and in a manner consistent with the *Charter*" (*ibid.*, para. 402).

8. (2009), 96 O.R. (3d) 321 (C.A.) [*Vanasse* (C.A.)].

9. The other appeal was from British Columbia: *Kerr v. Baranow*, 2009 BCCA 111, 93 B.C.L.R. (4th) 201.

1. FACTS AND JUDGMENTS

The *Vanasse* appeal arose from a 12-year unmarried cohabitation, which began in 1993, during which the couple had two children. During the first four years of the relationship, Ms Vanasse worked for the Canadian Security Intelligence Service. She then took a leave in order to move with Mr. Seguin from Ottawa to Halifax. Further leave followed after the birth of the children, and she eventually ended her employment in 2003. For his part, Mr. Seguin developed a successful high-tech company. He resigned as its president and chief executive officer in 1998 and the family returned to Ottawa. In September 2000, the company was sold and Mr. Seguin received net proceeds of approximately \$11 million. The parties separated in March 2005, and Ms Vanasse filed an application in unjust enrichment against Mr. Seguin.¹⁰

Justice Blishen, the trial judge, divided the parties' cohabitation into three periods. She found that Mr. Seguin had been unjustly enriched during the 3.5 years between Ms Vanasse's departure from her job and the sale of Mr. Seguin's company.¹¹ Mr. Seguin could not have devoted his time to his company "but for" Ms Vanasse's assumption of childcare and household responsibilities.¹² Justice Blishen valued the services provided by Ms Vanasse to Mr. Seguin against the background of his accumulated assets and in the light of her reasonable expectation of sharing in his increased net worth. Characterizing Ms Vanasse as an "equal contributor to the family enterprise," the judge found her entitled to one-half of the prorated increase in Mr. Seguin's net worth during the period of unjust enrichment, valued at \$996,500.¹³

The Court of Appeal set aside the order on the basis that the trial judge had wrongly blurred the two approaches to valuing unjust enrichment: the value received (*quantum meruit*, the value of the services rendered by the plaintiff to the defendant) and the value surviving (the increase in value of the defendant's property as a result of the plaintiff's activity). Against the urging of counsel for

10. Facts in this paragraph come from *Vanasse v. Seguin*, 2008 CanLII 35922, paras. 2-4 (Ont. S.C.J.) [*Vanasse* (trial)].

11. *Ibid.*, paras. 90, 91.

12. *Ibid.*, para. 137.

13. *Ibid.*, paras. 139, 141, 232.

both parties, the Court of Appeal ordered a new trial for quantifying the restitution to which Ms Vanasse was entitled.¹⁴

From the joined appeals, Cromwell J. framed and resolved five main issues. This paper focuses on the quantification of the monetary remedy for reversing unjust enrichment.¹⁵ The starting point was the established proposition that unjust enrichment under the common law may lead either to proprietary restitution, in the form of a constructive trust, or to monetary restitution. Justice Cromwell addressed the quantification of a monetary order. A reading of the Court's leading judgment in *Peter v. Beblow* had arisen by which a monetary order was necessarily quantified by the value received by the defendant, not by the value surviving in his hands.¹⁶ In *Kerr*, the Court rejected what it called this "remedial dichotomy" on several bases: it failed "to reflect the reality of the lives of many domestic partners"; it was inconsistent with unjust enrichment's "inherent flexibility"; it ignored the historical basis of claims in *quantum meruit*; and *Peter* did not, after all, require it.¹⁷

While past cases had ordered restitution of the value of services performed without pay and used a constructive trust to share the value arising from contribution to the purchase or improvement of an identifiable property, Cromwell J. held that other arrangements might lead to unjust enrichment in the cohabitation context. That equitable doctrine, he held, "can and should respond to the social reality ... that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute."¹⁸ Accordingly, where parties have engaged in a joint family venture, and where there is "a clear link between the claimant's contributions to the joint venture and the accumulation of wealth," unjust enrichment may arise from one party's retaining an amount of that wealth that is "inappropriately disproportionate."¹⁹ In such circum-

14. *Vanasse (C.A.)*, *supra*, note 8, paras. 8, 9, 12, 13.

15. The other issues were the role of the "common intention" resulting trust in claims by former cohabitants; the place of the counter-claim by the defendant that the enrichment arising from the conferral of benefits was reciprocal; the role of the parties' reasonable or legitimate expectations in the analysis of unjust enrichment; and, in the appeal from British Columbia, the start date of the spousal support owing to Ms Kerr.

16. [1993] 1 S.C.R. 980 [*Peter*].

17. *Kerr*, *supra*, note 1, para. 58.

18. *Ibid.*, para. 62.

19. *Ibid.*, para. 81.

stances, the claimant's proportionate contribution to the wealth accumulation would determine the monetary award.²⁰

The Supreme Court nevertheless added an important qualification. The matrimonial-property regimes enacted by the provinces in the late 1970s and early 1980s mandate a presumption of equal sharing. In contrast, the law of unjust enrichment, even as elaborated in *Kerr*, does not presume that cohabitants were in a joint family venture. A claimant must substantiate with evidence that there was a joint family venture.²¹ In this respect, Cromwell J. flagged four factors as especially relevant to identifying where parties have engaged in a joint family venture: mutual effort, economic integration, actual intent, and priority of the family.²² Furthermore, even where a joint family venture is established, the law does not assume that the partners will share its fruits equally. The fact specificity of the exercise enabled Cromwell J. to declare that developing the law of unjust enrichment was "fully consistent" with the distinction between married and unmarried couples affirmed by *Nova Scotia (Attorney General) v. Walsh*.²³ That judgment had, in 2002, upheld the constitutional validity of legislative policy restricting the province's matrimonial-property legislation to married couples.²⁴ The majority in *Walsh* had spoken favourably of the constructive trust as "tailored to the parties' specific situation and grievances."²⁵

The Court then fitted the facts found by the trial judge in *Vanasse* into its freshly minted notion of a joint family venture and restored the trial judge's order.²⁶

2. *KERR* AND THE COMMON LAW

Kerr must be read against a complex backdrop, including legislation that, in a majority of provinces, confines the systematic shar-

20. *Ibid.*

21. *Ibid.*, para. 88.

22. *Ibid.*, para. 89. For exploration of the risk that these factors might fail to capture decisions and sacrifices subtler than Ms Vanasse's, see Robert LECKEY, "Developments in Family Law: The 2010–2012 Terms", (2012) 59 *Supreme Court L.R.* (2d) 193, 202–204.

23. *Kerr*, *supra*, note 1, para. 82; 2002 SCC 83, [2002] 4 S.C.R. 325 [*Walsh*].

24. Dominique GOUBAU, Ghislain OTIS and David ROBITAILLE, "La spécificité patrimoniale de l'union de fait : le libre choix et ses 'dommages collatéraux'", (2003) 44 *C. de D.* 3.

25. *Walsh*, *supra*, note 23, para. 61.

26. *Kerr*, *supra*, note 1, para. 128.

ing of family property to formalized conjugal partners, such as spouses by marriage or by civil union. Family statutes in the common-law provinces recognize a right to claim spousal support arising from cohabitation. That backdrop also includes the Supreme Court of Canada's decision in *Walsh* that such a restriction—at least in the Nova Scotian context—did not limit the right to equality under the *Canadian Charter of Rights and Freedoms* on the basis of marital status.²⁷ Many observers sympathetic to the economic difficulties engendered by unmarried cohabitation will welcome the Court's judgment in *Kerr* as a laudable testimony to the capacity of the general private law—at least the common law—to adapt to changing conditions in the hands of willing judges. On this view, *Kerr* addressed a social problem that many legislatures had ignored and which had, to date, eluded resolution via *Charter* litigation. In the common-law provinces, the judgment presumably increases the entitlements and liabilities of many former unmarried cohabitants.

The judgment's crucial innovation is that, where a cohabitation relationship passes the threshold of qualifying as a joint family venture, a court may make a monetary award with the aim of appropriately apportioning accumulated wealth.²⁸ While a "clear link" must

27. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Although in *Quebec v. A*, *supra*, note 2, a majority of five justices of the Supreme Court of Canada distanced themselves from *Walsh*, regarding it as overtaken by intervening developments in the equality jurisprudence, it remained officially part of the background against which they had issued judgment in *Kerr*.

28. A clarification may be in order. In *Kerr*, the notion of the joint family venture—rendered as "coentreprise familiale" in the French version—refers to the character of a relationship of unmarried cohabitation. It does so with a view to conditioning the discretionary application of the doctrine of unjust enrichment under the common law. The notion is distinct from the civil law's contract of undeclared partnership, discussed further below at note 101. The indicia of a joint family venture may overlap with the elements critical to establishing such a contract, but fact situations which would satisfy the test elaborated in *Kerr* would not necessarily meet the standard for finding a contract of undeclared partnership. Notably, disproportionate contributions by the parties weigh against the establishment of an undeclared partnership, whereas the indicia of a joint common venture in *Kerr*—especially economic integration and priority of the family—seem designed to catch the specialization of labour that will predictably cash out in respective contributions which vary significantly, at least monetarily. The lexicon of the civil law can sharpen further the distinction between the notion of the joint family venture and the contract of undeclared partnership. A contract of undeclared partnership is a juridical act, ostensibly "designed to produce effects in law" (QUEBEC RESEARCH CENTRE OF PRIVATE AND COMPARATIVE LAW, *Private Law Dictionary and Bilingual Lexicons*:
(continued...))

connect the claimant's past activities and the wealth accumulation, that link to the assets accumulated may be less concrete than the one required, in past judgments, between the claimant's contributions and a particular property in order for a constructive trust to have taken root. The link between Ms Vanasse's contributions to the conjugal union and the accumulation of wealth by Mr. Seguin, which the Court found sufficiently clear, is that her management of the household freed him to work in the exceptionally successful way that he did. It is not that she worked in his business without remuneration. Nor, as in path-breaking cases on unjust enrichment and the constructive trust, did she help to run a farm registered in his name. Rather, Cromwell J.'s approach in *Kerr* invites judges to situate the partners' respective efforts in the domestic and the commercial spheres within the larger category of the joint family venture, viewing its fruits globally. Concretely, the trial judge's finding—upheld by the Supreme Court—that Ms Vanasse was entitled to one-half of Mr. Seguin's increased wealth during the interval of unjust enrichment was not the result of detailed calculations based on the evidence. For example, the evidence did not provide the trial judge a basis by which she might have landed on 50/50 as opposed to 45/55 or 40/60.

It is too soon to know how *Kerr* will play out in the common-law provinces, particularly on facts less exceptional than those in *Vanasse*. Those facts are unusual regarding the extent of the wealth accumulated and Mr. Seguin's later retreat from paid work and greater involvement in domestic life. Time will tell, but, particularly for couples with children, judges may fairly easily find that unmarried partners have crossed the threshold of the joint family venture.²⁹ Furthermore, while the facts in *Vanasse* invited a periodization by which unjust enrichment ceased later in the relation-

(...continued)

Obligations, Cowansville, Yvon Blais, 2003, "juridical act", p. 162). Its terms are in principle judicially enforceable as a matter of right. By contrast, a relationship's quality as a joint family venture is a juridical fact, "to which the law attaches legal effects independently of the will of the persons concerned" (*id.*, "juridical fact", p. 162). The approach in *Kerr* may well lead to a sharing of the relationship's joint fruits that one partner would insist was contrary to his intentions. Moreover, under the common law of unjust enrichment, the judicially determined effects of a joint family venture are discretionary, in keeping with that doctrine's flexibility and equitable vocation.

29. Berend HOVIUS, "Property Disputes between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v. Seguin* and *Kerr v. Baranow*", (2011) 30 *Can. Fam. L.Q.* 129, 152.

ship, trial judges who apply *Kerr* so as to find a joint family venture may conclude in more ordinary cases that unjust enrichment ran throughout the parties' shared life. Without detailed evidence pointing to the proportion of contribution, the Supreme Court of Canada accepted the trial judge's finding, in respect of the period of unjust enrichment, that Ms Vanasse was entitled to one-half of the unusually large increase in Mr. Seguin's wealth. Might judges read the judgment, whatever its insistence on the fact specificity of each case, as implying a presumption of equal sharing of acquests during the relationship once a joint family venture has been found?³⁰ On that scenario, *Kerr* would divert claimants' litigation efforts from proving the value of services rendered to establishing that a joint family venture had arisen, thereby reducing the evidentiary burden for such claimants and perhaps improving the average outcome of such claims.

Despite the Supreme Court's characterization of its remedy, common-law scholars have observed the difficulty of characterizing the sharing of accumulated wealth in *Kerr* as restitution for unjust enrichment. That is, Ms Vanasse's million-dollar award under *Kerr* does not, in the classical manner of unjust enrichment and the restitution it triggers, require the defendant to "give back a benefit received from the plaintiff: no more and no less."³¹ In run-of-the-mill unjust enrichment cases, the law of property provides the baseline against which the idea of unjust enrichment operates. Thus, at least in the common law, the source of injustice in the case of a mistaken payment, by which the plaintiff transfers something to the defendant to which the latter has no right, is that the transferred money belonged to the plaintiff.³² Instead of reversing a transfer of wealth, be it in the form of money or services, the sharing of wealth amassed during a joint family venture distributes profits in a way that makes sense only from the starting point that such sharing is fair. In other words, *Kerr* replaces the pre-relationship baseline with "a base line of a fair sharing of the assets held in the joint family venture at the

30. HOVIUS, *ibid.*, 153, suggests that "[t]he natural tendency will be to split the gain attributable to the JFV equally because any alternative approach is too difficult and too controversial," although he acknowledges that such speculation finds little support in the judgment's text.

31. Mitchell McINNES, "Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada", (2011) 127 *L.Q. Rev.* 339, 342.

32. A freestanding source of obligation under the civil law of Quebec (art. 1491 C.C.Q.), reception of a thing not due cannot serve as the paradigmatic example of unjust enrichment in that jurisdiction.

time of the court decision.”³³ It is only from that new baseline that it might seem that one party would otherwise retain, to use the Court’s thickly evaluative expression, “an inappropriately disproportionate amount of wealth.”³⁴ This notion of proportionate sharing interjects into unjust enrichment a different logic from the ostensibly straight-forward restitution of what was always already the plaintiff’s by right.³⁵

The new baseline in *Kerr* diminishes the importance of a causal relationship between the claimant’s contributions and the defendant’s enrichment. Restitution is no longer a function of the value received by the defendant from the plaintiff or of the latter’s impoverishment. Nor is it a question of generosity on the court’s part in filling evidentiary gaps about the value of services rendered. Ms Vanasse was not found to be entitled to \$996,000 on the basis that she had transferred that value to Mr. Seguin, whether or not her evidence proved it. Rather, she was so entitled because, during the period of unjust enrichment, he earned double that amount, aided by her running their household and performing the lion’s share of the child rearing. The Supreme Court called for treating each partner in a joint family venture as a co-venturer, not “as the hired help.”³⁶

Whatever its distance from the common law’s principles of unjust enrichment, the approach leading to the order for Ms Vanasse may be understood as responsive to changing societal attitudes. Thus even a strict-minded scholar of restitution, insisting that *Kerr* is “deeply flawed” as a matter of legal principle, regards the judgment as sensible from a perspective of “social justice.”³⁷ Professor

33. D.W.M. WATERS, Mark R. GILLEN and Lionel D. SMITH, *Waters’ Law of Trusts in Canada*, 4th ed., Toronto, Thomson Carswell, 2012, p. 539.

34. *Kerr*, *supra*, note 1, para. 81. Does *Kerr* represent a shift from corrective to distributive justice? Despite its apparent descriptive traction, such an account would fail to grasp that, once one accepts the view of parties as co-venturers and its translation into Cromwell J.’s new baseline, the justice at issue remains corrective. I am indebted to Ruth Sefton-Green for discussion on this point.

35. The French translation supplements the Aristotelian idea of proportion with a notion of reasonableness: “l’allégation d’enrichissement injustifié naît de ce que la partie qui quitte avec une part disproportionnée de la richesse prive le demandeur d’une part raisonnable de la richesse accumulée pendant la relation grâce à leurs efforts conjoints.” *Ibid.* For a sense that even *Peter* had moved away from unjust enrichment towards a regime of sharing, see PINEAU and PRATTE, *supra*, note 4, p. 570, footnote no. 1855.

36. *Kerr*, *supra*, note 1, para. 7.

37. Mitchell McINNES, “A Return to First Principles in Unjust Enrichment: *Kerr v. Baranow*”, (2011) 51 *Can. Bus. L.J.* 275, 288.

McInnes calls for the Supreme Court, cognizant of the limits of unjust enrichment, “to recognize an independent claim that sensitively addresses the unique aspects of cohabitational disputes.”³⁸ He suggests that the Court’s concept of a joint family venture is promising in this respect.³⁹ The question in the more immediate term, however, is what reception the Supreme Court’s judgment might undergo in Quebec.

3. UNJUST ENRICHMENT IN QUEBEC

Unjust enrichment is a distinct source of obligation in the Civil Code.⁴⁰ On the prevailing view, it is restricted to indemnifying the creditor for the lesser of her impoverishment or the debtor’s enrichment. In other words, the extent of the restitution is determined by “[l]a règle du moindre montant.”⁴¹ The plaintiff would be unfairly enriched were she to receive the defendant’s enrichment in excess of her impoverishment.⁴² That being said, the indemnity is calculated with some “suppleness.”⁴³ Indeed, a critical reader might detect tension between the doctrinal insistence that article 1493 C.C.Q. precludes any indemnity beyond the lesser of the creditor’s impoverishment or the debtor’s enrichment and jurisprudential statements such as the following: “Les tribunaux supérieurs ont maintes fois répété qu’il était toujours difficile de faire un calcul mathématique précis et que le juge possède un large pouvoir discrétionnaire d’appréciation du choix de la réparation d’ordre pécuniaire.”⁴⁴ The

38. *Ibid.*, p. 289.

39. *Ibid.*, p. 290.

40. Arts. 1493 *et seq.* C.C.Q.

41. Didier LLUELLES and Benoît MOORE, *Droit des obligations*, 2d ed., Montreal, Thémis, 2012, p. 757, para. 1418. In one commentator’s words, “la fixation de l’indemnité n’est pas qu’une question d’enrichissement, elle renvoie aussi à la valeur de l’appauvrissement, comme l’indique l’article 1493 C.c.Q. Il faut donc en principe considérer les deux côtés de la médaille, même si les valeurs de l’enrichissement et de l’appauvrissement peuvent parfois être les mêmes et sans oublier que le processus d’évaluation comporte ‘souvent’ une part d’arbitraire”: Guy LEFRANÇOIS, “Famille”, (2011) 113 *R. du N.* 231, 246 [reference omitted]. See also, similarly, Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les obligations*, 6th ed. by Pierre-Gabriel JOBIN with the collaboration of Nathalie VÉZINA, Cowansville, Yvon Blais, 2005, p. 581, para. 589; Michel TÉTRAULT, *Droit de la famille*, 4th ed., Cowansville, Yvon Blais, 2010, vol. 1, p. 968; Jean PINEAU, Danielle BURMAN and Serge GAUDET, *Théorie des obligations*, 4th ed., Montreal, Thémis, 2001, pp. 489-90, para. 275.

42. JOBIN and VÉZINA, *ibid.*

43. PINEAU and PRATTE, *supra*, note 4, p. 575, para. 383. See also JOBIN and VÉZINA, *ibid.*

cohabitation context—described by distinguished commentators as “une véritable pépinière” for claims in unjust enrichment⁴⁵—appears especially trying for judges labouring to calculate the indemnity for unjust enrichment. Another author writes without mincing words that judges in such cases are determining the indemnity “plutôt arbitrairement.”⁴⁶ Whatever one’s views on the robust allocation contemplated by *Kerr*, then, a rationalization of *de facto* spouses’ indemnification for unjust enrichment under Quebec law appears to be in order.

Drawing on resources internal to Quebec civil law, the Court of Appeal has recently modified the approach to unjust enrichment when *de facto* spouses are involved. In the early 1990s, the Supreme Court of Canada had approved a flexible and generous approach to the compensatory allowance. That equitable measure was enacted to recognize that one married spouse might enrich the other’s patrimony in a way that a matrimonial regime, particularly conventional separation as to property, might fail to address adequately.⁴⁷ The Court’s approach to applying the rules on the compensatory allowance accepts a correlation between the claimant’s contribution and the other spouse’s patrimony even where the strictest standard for legal causation would not be met. It also recognizes that spouses in healthy marriages do not maintain strict accounts throughout their union.⁴⁸ More recently, the Court of Appeal has indicated—two months before *Kerr* was rendered—that, when resolving a *de facto* spouse’s claim in unjust enrichment, it is appropriate to use “une approche analogue à celle développée en matière de prestation compensatoire entre conjoints mariés.”⁴⁹ In Dalphond J.A.’s

44. *Cloutier c. Gaudet*, 2008 QCCQ 9150, para. 47, leave to appeal refused, 2008 QCCA 2192.

45. LLUELLES and MOORE, *supra*, note 41, p. 749, para. 1406.1.

46. TÉTRAULT, *supra*, note 41, vol. 1, p. 969.

47. Art. 427 C.C.Q.

48. *Lacroix v. Valois*, [1990] 2 S.C.R. 1259 [*Lacroix*]; *M. (M.E.) v. L. (P.)*, [1992] 1 S.C.R. 183. See also PINEAU and PRATTE, *supra*, note 4, pp. 169-70, para. 13; Mireille D.-CASTELLI and Dominique GOUBAU, *Le droit de la famille au Québec*, Sainte-Foy, Presses de l’Université Laval, 2005, p. 150.

49. *C.L. c. J.Le.*, 2010 QCCA 2370, para. 10, cited on precisely this point in *Droit de la famille – 121120*, 2012 QCCA 909, para. 65, the latter being then reproduced by LeBel J. in *Quebec v. A*, *supra*, note 2, para. 120. In support of this approach, Deschamps J. suggested in *Quebec v. A*, *ibid.*, para. 401, that the debates on the perceived failings of the compensatory allowance having led to the enactment of the family patrimony “should provide the courts with a sound basis for interpreting the *Civil Code*’s provisions on unjust enrichment in a manner consistent

(continued...)

words in *C.L. c. J.Le.*, the judge must undertake “une analyse libérale et globale de la situation des parties, prenant en compte tous les apports des conjoints durant la vie commune”; moreover, “[i]l ne s’agit pas d’un exercice de juricomptabilité.”⁵⁰ Given that judges had earlier made sense of the compensatory allowance by reference to unjust enrichment, this turn to the compensatory allowance when applying the rules on unjust enrichment makes a happy example of the circulation of ideas within the Civil Code, viewed as a seamless, integrated whole.⁵¹ It exemplifies the civilian judge’s capacity to adapt the Civil Code’s fixed provisions to changing circumstances by using analogical reasoning to extend legal rules.⁵²

Although adapted to some extent for claims by *de facto* spouses, unjust enrichment under the civil law of Québec seems unable, at present, to generate allocations such as *Kerr* contemplates for the common-law provinces. Sharing the earnings of a joint family venture without the impoverishment of the claimant serving as a ceiling—even measured flexibly or generously—outstrips any remedy provided by the legal sources of Québec. Consider the Court of Appeal’s judgment in *C.L. c. J.Le.*, which raised the indemnity owed by the defendant to his former *de facto* spouse from approximately \$14,000 to \$138,000. Justices Dalphond and Côté appreciated the claimant’s evidence more liberally than did the trial judge (and more than did their dissenting colleague, Hilton J.C.A.). Despite evidentiary gaps—including the absence of records from the claimant’s dance school and what seems to have been an underreporting of income to the tax authorities—they found that she had contributed

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with the concept of equality entrenched in the *Charter*.” For earlier observation of connections between the compensatory allowance and unjust enrichment for *de facto* spouses, notably the jurisprudence’s harmonization of the two regimes in the sense that a creditor’s heirs may continue an action but may not institute one (e.g. *Lussier c. Pigeon*, [2002] R.J.Q. 359, para. 31 (C.A.)), see JOBIN and VÉZINA, *supra*, note 41, p. 577, para. 585; see also TÉTRAULT, *supra*, note 41, vol. 1, pp. 698-99.

50. *C.L. c. J.Le.*, *ibid.*, para. 12.

51. *Lacroix*, *supra*, note 48; LLUELLES and MOORE, *supra*, note 41, p. 751, footnote no. 86; see also PINEAU and PRATTE, *supra*, note 4, pp. 166-67, para. 13; TÉTRAULT, *supra*, note 41, vol. 1, p. 667.

52. John E.C. BRIERLEY and Roderick A. MACDONALD, eds., *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, pp. 144-47, paras. 117, 118. For discussion of “le règne de l’analogie” as “le règne même de l’équité,” see Gérard CORNU, *L’art du droit en quête de sagesse*, Paris, Presses Universitaires de France, 1998, p. 339.

more or less equally in financial terms to the couple's common life.⁵³ Accordingly, she was entitled to one-half of the proceeds of the house sold by her former *de facto* spouse, the principal form of wealth enduring from their relationship. That judgment will prove helpful to claimants whose evidentiary records leave something to be desired. But it is not an example along the lines of the Supreme Court's resolution of the Vanasse-Seguin appeal, in which a cohabitant's contributions in one sphere are leveraged into the creation of wealth in another, independently of any economically measurable value directly transferred and received.⁵⁴

4. QUEBEC JUDGES' OPENNESS TO *PETER*

Why expect *Kerr* to have any influence? Some judges have referred to its common-law provenance as grounds for keeping it at bay.⁵⁵ It is germane, however, that Quebec judges have integrated into the civil law *Peter*, the Supreme Court of Canada's prior case addressing unjust enrichment amongst cohabitants under the common law. Such demonstrated openness militates against dismissing the more recent judgment as irrelevant. Specifically, Quebec courts have cited *Peter* in nearly 150 judgments, receiving it into Quebec law in two ways. The first is that, in order to facilitate a former *de facto* spouse's claim in unjust enrichment, the Court of Appeal has adopted presumptions from the judgment concerning the correlation between the defendant's enrichment and the plaintiff's impoverishment and respecting the absence of justification for the enrichment.⁵⁶

The second reception of *Peter* concerns the calculation of the creditor's indemnity. It will be recalled that in *Peter*, the Supreme Court distinguished two measures for unjust enrichment, the value

53. *C.L. c. J.Le.*, *supra*, note 49, paras. 22, 23.

54. In this respect, see Gonthier J.'s discussion, in the context of *de jure* spouses' compensatory allowance, of "contribution to the marriage," including his alertness to the possibility that "even normal contributions to the expenses of the marriage certainly may enrich the other spouse's patrimony." *M. (M.E.) v. L. (P.)*, *supra*, note 48, p. 198.

55. *Thibault c. Benoît*, 2011 QCCQ 13824, para. 13; *Brousseau c. Cloutier*, 2011 QCCQ 8647, paras. 19, 20.

56. *B. (M.) c. L. (L.)*, *supra*, note 5; *C.L. c. J.Le.*, *supra*, note 49. See JOBIN and VÉZINA, *supra*, note 41, pp. 575-76, para. 585; LLUELLES and MOORE, *supra*, note 41, p. 749, footnote no. 72; Brigitte LEFEBVRE, "Union de fait", dans Pierre-Claude LAFOND, ed., *JurisClasseur Québec: Personnes et famille*, LexisNexis Canada, 2012, Fascicule 28, pp. 27-28, para. 41.

received and the value surviving. It spoke favourably about the value surviving in the context of a remedial constructive trust. Although the civil law has no constructive trust, Quebec courts of first instance have cited *Peter* and used the measure of value surviving when remedying unjust enrichment after a *de facto* union.⁵⁷ The typical case is where the claimant worked directly on property owned by the defendant, such as his or her house. Despite the doctrinal insistence that the indemnity cannot exceed the lesser of the debtor's enrichment or the creditor's impoverishment, the indemnity in such cases is based on the increase in the immovable's value, and not what the creditor would have earned if selling the same construction labour in the market.⁵⁸ In a case concerning work performed on an immovable in which the plaintiff pleaded the value surviving conferred to and received by the defendant, the judge cited *Peter* and suggested that the measure of the value surviving would have been appropriate.⁵⁹ As some Quebec judges realize, the measure of value functions similarly in certain respects to the common law's proprietary remedy of the constructive trust. It does so by capturing the increase in an asset's value in the way of an ownership stake. Even calculated by the value surviving, however, an indemnificatory order under the civil law produces only a personal right; unlike the constructive trust, it will offer no protection from the defendant's creditors in the event of insolvency or bankruptcy.⁶⁰

Construction or improvement of an immovable is not, however, the sole case in which Quebec courts have cited *Peter* and ordered indemnification on the basis of the value surviving. Indemnification calculated by that metric has been ordered for a *de facto* spouse's contribution, as an unpaid clerical assistant, to the other spouse's business.⁶¹ It has also been ordered where a spouse had put her earnings towards the family's consumption while her partner sunk his into capital goods, which survived the union.⁶² Judges citing

57. PINEAU and PRATTE, *supra*, note 4, p. 577, para. 383; TÉTRAULT, *supra*, note 41, vol. 1, p. 969.

58. *Doyon c. Bessette*, 2011 QCCS 6857; *Turgeon c. Lachapelle*, 2011 QCCS 2656; *Cloutier c. Gaudet*, 2008 QCCQ 9150, leave to appeal refused, 2008 QCCA 2192; *Gagnon c. Desgranges*, 2007 QCCQ 6077.

59. *Dompierre c. Laniel*, 2011 QCCQ 7715, leave to appeal refused (*sub nom. Laniel c. Dompierre*), 2011 QCCA 2089.

60. For a reminder that even robust rules for equal sharing of family property applicable to married spouses may, depending on the province, offer limited protection in the event of bankruptcy, see *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605.

61. *Wilkie c. Lapensée*, [2005] R.D.F. 469 (Sup. Ct.).

62. *Droit de la famille – 2648*, [1997] R.D.F. 246 (Sup. Ct.).

Peter have taken the difficulties of calculating the value of services rendered by a spouse as making preferable the value surviving.⁶³ In a case where domestic work had no direct connection to a particular property, a judge blended the two approaches set out in *Peter*.⁶⁴ Strikingly, the judge in that case held that doing otherwise would devalue women's contribution and contribute to the feminization of poverty as discussed by the Supreme Court in *Moge v. Moge*,⁶⁵ a spousal-support decision under the *Divorce Act*.⁶⁶

Unsurprisingly, not all judges agree that the measure of value surviving approved by the Supreme Court in *Peter* is relevant to Quebec civil law. Indeed, the Court of Appeal has rejected it as related to the common law's constructive trust, borrowed inappropriately where articles 1493 to 1496 of the Civil Code provided all the guidance necessary for calculating an indemnity for unjust enrichment.⁶⁷ The lower-court judgments which take up the value surviving thus do not embody the best understanding of the state of the law. They do, however, exemplify Quebec judges' openness to lessons from the Supreme Court's resolution of a private-law appeal from a sister province.

This incorporation of *Peter* shows that Quebec judges, as they elaborate the living civil law, are able to adapt insights from a Supreme Court judgment on unjust enrichment, rendered in that tribunal's capacity as a court of equity. The hypothesis cannot be tested here, but it might be conjectured that the family context favours such circulation of ideas. One might enlist the federal enactment on divorce in support of that hypothesis. Another factor might be the sense on some judges' part that this area of the law must deliver substantive fairness in a response to human needs, and not merely the predictability that facilitates planning by repeat players.

63. *Laniel c. Neveu*, 2007 QCCQ 11922, para. 19; *Lacombe c. Deshaies*, EYB 2005-98956, 2005 CanLII 46452, para. 30 (C.Q.).

64. *Barrette c. Imbeault*, [2000] R.D.F. 813, para. 85 (C.Q.) ("Dans le cas présent, la Cour fait usage des deux méthodes en conciliant les indications obtenues par chacune des méthodes, et en s'inspirant du principe que la réparation doit être souple de façon à l'adapter au contexte donné."). Combining two conceptually distinct approaches is not, of course, the same thing as averaging valuations made by different experts using the same measure.

65. [1992] 3 S.C.R. 813; see *Barrette c. Imbeault*, *ibid.*, para. 86.

66. R.S.C. 1985, c. 3 (2d Supp.).

67. *Barrette c. Falardeau*, 2010 QCCA 989, [2010] R.D.F. 243, para. 43. See also S.C. c. S.R., 2007 QCCS 5660, [2008] R.D.F. 166, paras. 43-45; LLUELLES and MOORE, *supra*, note 41, p. 757, footnote no. 117.

In addition, it is worth recollecting that the *Civil Code of Québec* incorporated jurisprudential developments into the codified *jus commune*, notably unjust enrichment.⁶⁸ There is no reason, then, to restrict the judges' role to a mechanical application of the legislated rules; theirs also includes "une bonne dose de créativité."⁶⁹ Speaking directly to the question of unjust enrichment in the cohabitation context, Professors Lluelles and Moore have written that the pragmatism of the courts "doit pouvoir rétablir l'équité. Les formidables capacités d'adaptation et d'évolution du droit civil sauront les assister dans la conciliation de l'équité et du droit."⁷⁰

Doctrine and jurisprudence nevertheless reveal a firm perception of limits on the possible borrowing. If lessons from *Peter* may lubricate the operation of the elements of unjust enrichment, and perhaps affect the calibration of the indemnity, transplanting the constructive trust from the common law into the Civil Code's book on obligations appears to most observers to be out of the question.⁷¹ In short, there is a basis for expecting that Quebec judges, who continue to confront many claims arising from *de facto* unions, will draw at least some inspiration from *Kerr*, in one way or another.⁷²

68. JOBIN and VÉZINA, *supra*, note 41, pp. 563-65, paras. 569-76.

69. Pierre J. DALPHOND, "Le style civiliste et le juge: Le juge québécois ne serait-il pas le prototype du juge civiliste de l'avenir?", in Nicholas KASIRER, ed., *Le droit civil, avant tout un style?*, Montreal, Thémis, 2003, p. 81, p. 98.

70. LLUELLES and MOORE, *supra*, note 41, p. 759, para. 1420.

71. Michel TÉTRAULT, "De choses et d'autres en droit de la famille la jurisprudence marquante de 2011-2012", in Service de la formation continue du Barreau du Québec, ed., *Développements récents en droit familial*, Cowansville, Yvon Blais, 2012, p. 145, p. 323, suggests that hints of the constructive trust, which generates a proprietary right, are discernible in the civil law only in relation to the compensatory allowance and the family patrimony (respectively arts. 429, 420 C.C.Q.). But for a remarkable application of "la doctrine de 'la fiducie par interprétation,'" citing *Peter*, *supra*, note 16, *Pettkus v. Becker*, [1980] 2 S.C.R. 834 [Pettkus], and *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, see *Guertin c. Blanchette*, 2008 QCCS 5183, [2008] R.D.F. 775 (the quoted words are from para. 26 [emphasis in original]). In that case, the judge declared a woman to be sole owner of two residences formerly held in co-ownership, with the aim of reversing the unjust enrichment that would otherwise arise on the part of her former *de facto* spouse, the properties having been bought from her parents at a price—as a result of their donative intent to her—just over one-half the market value.

72. LEFEBVRE, *supra*, note 56, p. 29, para. 43, characterizes the judgment as "susceptible" of influencing Quebec courts on account of its bearing on calculation of the indemnity without involving the constructive trust. Lest any civilian jurist should fret that the permeability of Quebec civil law lead to a circulation of ideas in one direction only, it bears mention that scholars of the common law read the
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5. KERR IN QUEBEC?

Conflicting views as to the appropriate impact of *Kerr* in Quebec are already in contention. On the assessment of one *Kerr* enthusiast, common-law solutions involving a constructive trust remain inapplicable, but the principles for monetary remedies set out by *Kerr* appear “parfaitement conciliables” with the Civil Code’s text and spirit.⁷³ This paper’s second part, above, sketched a basis for thinking that such an assessment might underestimate *Kerr*’s originality, even in the common law. Although it is difficult to pinpoint the effect on the outcome, judges have referred to *Kerr* on the appropriateness of unjust enrichment’s recognizing the accumulation of wealth by joint effort.⁷⁴ They have also referred to its factors for identifying a joint family venture, although, again, that concept’s role under the civil law is murky.⁷⁵ More generally, judges more inclined to recognize unjust enrichment arising from a *de facto* union are those who are likelier to praise the framework in *Kerr* as respectful of social evolution and of the specificity of unmarried cohabitation.⁷⁶ How might one spell out a more systematic approach?

A cautious reading would take *Kerr* as calling for heightened sensitivity, on the part of Quebec judges, to the specificity of *de facto* unions. The Supreme Court’s attention in *Kerr* to tacit signs of commitment in the unfolding of family life would counsel against taking *de facto* union as implying any affirmative intention not to share

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Supreme Court in *Kerr* as pinning its colours to the civil law’s formulation of unjust enrichment as concerns a juristic reason for the enrichment, as set out in *Garland v. Consumers’ Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. McINNES, *supra*, note 37, pp. 278-82. For the influence of unjust enrichment under the civil law of Quebec, as articulated by Beetz J., on Dickson J.’s decision in *Pettikus*, *ibid.*, see Robert J. SHARPE and Kent ROACH, *Brian Dickson: A Judge’s Journey*, Toronto, Osgoode Society for Canadian Legal History/University of Toronto Press, 2003, pp. 189-90. Daniel Jutras directed me to this source.

73. Violaine BELZILE, “Enrichissement injustifié et action *de in rem verso* entre conjoints de fait – Comme si l’amour allait durer toujours”, in Service de la formation continue du Barreau du Québec, ed., *Développements récents en droit familial*, Cowansville, Yvon Blais, 2011, p. 21, p. 46. See also *ibid.*, p. 78.
74. *Bouillon c. Chapman*, 2011 QCCS 5771, para. 116, quoting *Kerr*, *supra*, note 1, para. 85; *Clément c. Leduc*, 2011 QCCS 4240, para. 130.
75. *Grégoire c. St-Arnaud*, 2012 QCCS 173, paras. 94-98, aff’d (*sub nom. St-Arnaud c. Grégoire*), 2012 QCCA 1852 (a cross-appeal was allowed on a matter irrelevant to the present discussion); *Belley c. Lidy*, 2012 QCCS 2671, para. 121 (following reliance on the joint family venture in *Grégoire c. St-Arnaud*). Voir Christine MORIN, « L’enrichissement injustifié entre conjoints de fait : vers une meilleure prise en compte des situations vécues », *Repères*, janvier 2013.
76. *Montreuil c. Jasmin (Succession de)*, 2011 QCCS 1032, para. 84.

property. In fairness, that reading might add little to the presumptions adopted from *Peter* and the liberalism arising from the analogical invocation of the compensatory allowance, although it might consolidate these developments by the Court of Appeal. Such a reading of *Kerr* might, however, establish that the focus on partners' intentions on entry into their relationship, taken as crucial by the majority in *Walsh* for the purposes of that appeal's *Charter* analysis, does not apply to ex post claims made under the general private law.⁷⁷ Rather, as observed by Dickson J. in *Rathwell v. Rathwell*,⁷⁸ and reproduced by Abella J. in her discrimination analysis for the majority in *Quebec v. A*, seeking comment intent is "to misapprehend the way most couples approach their relationship."⁷⁹ Recognizing that *de facto* spouses cannot plausibly be regarded as legal strangers is consistent with the legislature's assimilation of *de facto* spouses to married spouses for the purposes of social laws. It is also coherent with the Civil Code's acknowledgement, albeit sparse, that they have some family tie, if not a bond of alliance.⁸⁰

A bolder proposal would take up a commentator's call to view *Kerr* as a "source d'inspiration" for quantifying indemnities under articles 1493 to 1496 of the Civil Code.⁸¹ It would build on that author's hope that greater predictability might be achieved by combining the Supreme Court's judgment with the Court of Appeal's invitation to use the principles established for the compensatory allowance.⁸² The proposal would use Cromwell J.'s test for recognizing a joint family venture as the threshold for accessing a more robust incarnation of the elements laid out for the compensatory allowance. As in *Kerr*, the demonstration of unjust enrichment dur-

77. *Walsh*, *supra*, note 23, para. 35. Despite Cromwell J.'s insistence on the doctrinal consistency of *Kerr* with *Walsh*, many readers will detect a substantially altered posture towards unmarried cohabitation on the Court's part from that *Charter* judgment to its most recent elaboration of unjust enrichment. On the recent overruling of equity analysis in *Walsh*, see *supra*, note 27.

78. [1978] 2 S.C.R. 436.

79. *Supra*, note 2, para. 311.

80. See e.g. arts. 15, 1938, 1974.1 C.C.Q. Moreover, for the purposes of one partner's adopting the other's child by special consent, three years of cohabitation in a *de facto* union operates equivalently to the bond of alliance arising from marriage or civil union: art. 555 C.C.Q. For discussion of the judicial deployment, in the context of former *de facto* spouses, of the discretion conferred by art. 587.2 C.C.Q. so as to increase one parent's alimentary obligation to his child with a view to palliating "undue hardship" on the part of the other, see Jocelyne JARRY, *Les conjoints de fait au Québec : vers un encadrement légal*, Cowansville, Yvon Blais, 2008, pp. 141-43.

81. BELZILE, *supra*, note 73, p. 78.

82. *Ibid.*, p. 60.

ing a joint family venture would trigger an allocation of value beyond that authorized by classical understandings of unjust enrichment.

On the present proposal, the claimant would still need to demonstrate the elements of the claim. As accepted by the Supreme Court, the elements of a claim for a compensatory allowance consist of (1) a spouse's contribution; (2) the enrichment of the other spouse's patrimony; (3) the causal link between the two; (4) the proportion in which the contribution made possible the enrichment; (5) the concomitant impoverishment of the claimant spouse; and (6) the absence of justification for the enrichment.⁸³ For a spouse by marriage or by civil union, who frames her claim squarely under article 427, that fourth element, the proportion in which the contribution made possible the enrichment, does little work. It simply draws together the three preceding elements.⁸⁴ Under the proposal for *de facto* spouses, the enrichment of the debtor's patrimony and the concomitant impoverishment of the creditor spouse would no longer limit the possible award. Instead, the fourth element would serve as the entry point into Quebec law of Cromwell J.'s concern about the fruits of a joint family venture. In its augmented role, the fourth element would anchor the concern that, where spouses have accumulated wealth by joint efforts—whatever their division of labour and irrespective of whether they bore on a given asset—it might be unfair for one spouse to retain a disproportionate proportion of that wealth. If this approach were adopted, judges might often find that a homemaker spouse had contributed in a one-half proportion to the breadwinner's generation of wealth.

The proposal has at least four strengths. First, it would acknowledge that sharing the wealth accumulated as a result of joint efforts without reference to the claimant's impoverishment falls outside the classical notion of unjust enrichment. Once claims in unjust enrichment arising from *de facto* union are distinguished from ordinary commercial matters, the Supreme Court of Canada's notion of the joint family venture would help to justify a thicker obligation by flagging the connection with family law. Building on the

83. *M. (M.E.) v. L. (P.)*, *supra*, note 48; *Lacroix*, *supra*, note 48. See PINEAU and PRATTE, *supra*, note 4, pp. 166-77, para. 135.

84. PINEAU and PRATTE, *ibid.*, p. 174, para. 135 ("Dérivant de l'exigence de causalité, cet élément, qui rassemble en quelque sorte les trois précédents, permet la détermination du montant de la prestation puisque l'appauvri ne pourra être compensé que dans la mesure où son apport a contribué à l'enrichissement").

Court of Appeal's analogical invocation of the compensatory allowance would recognize that the recourse does not fit entirely within the book on obligations. It hovers instead midway between that book and the book on the family.⁸⁵

Specifically, the threshold of the joint family venture provides a justification for the application, by analogy, of a device limited by the legislative drafters to spouses by marriage or by civil union. It does so because Cromwell J.'s inquiry identifies partners who already carried out, more or less, some of the duties assigned by the Civil Code to married and civil-union spouses. True, the indicia in *Kerr* reveal nothing as to whether *de facto* spouses in a joint family venture executed reciprocal obligations of respect or of fidelity,⁸⁶ "l'essence du mariage,"⁸⁷ nor whether they loved one another.⁸⁸ They do, however, gesture towards partners who together took in hand the moral and material direction of the family and contributed towards the expenses of the marriage in proportion to their respective means.⁸⁹ In fact, by foregrounding its kinship with family law, the approach proposed for Quebec would be more forthright than that in common-law jurisdictions. In *Kerr*, in the same breath that it expanded unjust enrichment in response to cohabitants' joint family ventures, the Supreme Court of Canada insisted, challengingly, that "there is and should be no separate line of authority for 'family' cases developed within the law of unjust enrichment."⁹⁰

Second, this proposal claims consistency with civilian method. It is inspired by the Supreme Court of Canada's judgment in *Kerr*.

85. LLUELLES and MOORE, *supra*, note 41, p. 758, footnote no. 117, write that, in reality, the jurisprudence on unjust enrichment in respect of *de facto* spouses hesitates "entre l'application des règles du droit commun de l'enrichissement injustifié et l'élaboration d'une théorie partiellement distincte, fondée sur la volonté de corriger les injustices causées par l'inexistence actuelle d'une obligation alimentaire civile entre conjoints de fait."

86. Art. 392, para. 2 C.C.Q.

87. PINEAU and PRATTE, *supra*, note 4, p. 130, para. 106.

88. For the doctrinal clarification—were any necessary—that the matrimonial duty of fidelity is not a duty to love the other spouse, see Philippe MALAURIE and Hugues FULCHIRON, *La famille*, 4th ed., Paris, Defrénois, 2011, p. 586, para. 1473. For philosophical problems with promises to love, see Elizabeth BRAKE, *Minimizing Marriage: Marriage, Morality, and the Law*, New York, Oxford University Press, 2012, pp. 32-35.

89. Arts. 394, 396 C.C.Q.

90. *Kerr*, *supra*, note 1, para. 33. For a study of the process of "familialisation" that has taken place within the general law of property in England and Wales, see Andrew HAYWARD, "'Family Property' and the Process of 'Familialisation' of Property Law", (2012) 24 *Child & Family Law Quarterly* 284.

But the suggestion that the principles from that judgment should enter Quebec law via the Court of Appeal's analogy between unjust enrichment and the compensatory allowance is more consistent with the civil-law tradition than would be a more direct importation or *ad hoc* borrowing. Enlarging the work done by the fourth element for a claim to a compensatory allowance is to operate within an existing concept of Quebec civil law. The proposal would lead to an example of the Civil Code's allowing the law, "par la porosité de ses règles, de respirer et de se vivifier au contact du quotidien."⁹¹ Without any identified hook in the civil law, the sharing of accumulated wealth authorized by *Kerr* would otherwise be more strongly—and, for some, disagreeably—redolent of the common law's constructive trust. Moreover, the present proposal would offer a framework more predictable and consistent with the character of civilian rules and civilian judging than the wide discretion that Quebec judges are, in practice, exercising now.⁹²

Third, the proposal includes a limit on its scope of application that is respectful of the separation of powers. Recall the repeated civilian concern that judges would exceed their role were they to create a comprehensive regime applicable to the class of *de facto* spouses. Reliance on the fact-specific test as to whether a joint family venture had arisen would confine the operation of the proposal's sharing of jointly amassed wealth.⁹³

Fourth, and relatedly, the threshold requirement of the existence of a joint family venture may be understood as respecting the freedom of choice of those who ordered their affairs in a way that resists that characterization.⁹⁴ For spouses whose shared life did

91. Marie José LONGTIN, "Le style civiliste et la loi", in KASIRER, *supra*, note 69, p. 185, p. 198.

92. On the "uncivilian" character of rules which authorize action to be taken "selon les circonstances," see Adrian POPOVICI, "Le droit civil, avant tout un style..." in KASIRER, *ibid.*, p. 207, p. 222.

93. This feature of the proposal underscores the felicity of Dalphond J.C.A.'s analogy: even for married or civil-union spouses, the right to a compensatory allowance flows from a judgment, *ex post*; by contrast, marriage or civil union entails the establishment of a family patrimony.

94. Naturally, there are varying assessments of the relevance of conjugal partners' intention or freedom of choice, particularly given the legislature's apparent determination—manifested by the public—order character of the family patrimony—that protection trumps choice in the case of *de jure* spouses. Benoît MOORE, "Variations chromatiques : l'union de fait entre noir et blanc", in Génomira Bras MIRANDA and Benoît MOORE, eds., *Mélanges Adrian Popovici* : (continued...)

not include, amongst the other factors, mutual effort or a placement of priority on the family, claims in unjust enrichment would remain possible. Such claims would, however, proceed under the more classical approach to unjust enrichment, largely unaffected by *Kerr* and modified solely by the presumptions from *Peter*, which the Court of Appeal had adopted in 2003 for all *de facto* unions. The fact that evidence would lead to viewing some, but not all, *de facto* spouses as having engaged in a joint family venture is consistent with the heterogeneity of the class of unmarried couples. The ostensibly “significant heterogeneity” within the class of unmarried couples had been an important factor in the majority’s rejection of the discrimination claim in *Walsh*,⁹⁵ although a majority of the Court in *Quebec v. A* rejected that consideration as inappropriate to the equality analysis.⁹⁶ It remains a sticking point for those opposed to judicial or legislative application of matrimonial-property rules to *de facto* spouses.⁹⁷

To be sure, the proposal is not without objections. Readers with a narrower understanding of the judges’ role in the civil law, or of its legitimate sources, might prefer to ignore *Kerr* entirely. Does the call for proportionate sharing of the results of jointly amassed wealth exceed unjust enrichment’s limits, it might be wondered, evoking instead the profit sharing familiar from co-ownership or the disgorgement of profits associated with mandate or administration of the property of another? Other readers, discouraged by the caution or reticence of the judges in this area, may doubt that this proposal will be taken up. Certainly, there may be an irony in holding up the compensatory allowance as a promising path, given the prevailing reading of recent history by which the judges’ restrictive approach to

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Les couleurs du droit, Montreal, Thémis, 2010, 97. See also Anne-France GOLDWATER, “Unjustified Enrichment between *De facto* Spouses: A Renewal of the Law, or History being Re-written?”, online, <<http://www.goldwaterdube.com/files/publications/article07finalversion.pdf>>, p. 2-3 (date accessed: 19 November 2012).

95. *Supra*, note 23, para. 39.

96. *Supra*, note 2, paras. 344-46, Abella J.

97. The “diverses composantes” of civil society may be a key reason why the legislature persists in withholding “la consécration législative générale” from *de facto* spouses in *Quebec*: Didier LLUELLES and Benoît MOORE, *Droit des obligations*, 1st ed., Montreal, Thémis, 2006, p. 721, para. 1420 (this statement was not retained in the 2d ed., *supra*, note 41). On some views, the heterogeneity of the class of *de jure* spouses undermines the wisdom, as legislative policy, of the rigid regimes currently applicable to them: Alain ROY, “L’encadrement législatif des rapports pécuniaires entre époux: un grand ménage s’impose pour les nouveaux ménages”, (2000) 41 *C. de D.* 657, 668.

that equitable device in the 1980s precipitated the enactment of the family patrimony.⁹⁸ Conversely, those who believe unhesitatingly that courts should palliate legislative inertia—to use a neutral term—might wonder why *Kerr*'s concept of the joint family venture should limit the benefits of a further-expanded approach to unjust enrichment. After all, it was with an eye on *de facto* spouses as a class that the Court of Appeal loosened the criteria for unjust enrichment.

Another approach entirely would stop pressing at the limits of unjust enrichment for the benefit of former *de facto* spouses and breathe more life into the undeclared partnership.⁹⁹ The concept of the joint family venture from *Kerr* has parallels with that contract and the undeclared partnership might provide a richer and more flexible avenue. If the logic of commercial settings were not taken as decisive, might not the notion of partnership be closer to the reality of *de facto* spouses than is the idea of unjust enrichment? Channelling the inspiration of *Kerr*—which includes attention to the spouses' intentions, express and implied—into the undeclared partnership might require departing from Lamer J.'s insistence that cohabitation must not make proof of a partnership contract easier, on the basis that *de facto* spouses were subject only to the general private law.¹⁰⁰ The obstacle graver than that dictum nearly thirty years old is the general restrictiveness of the approach taken by Quebec courts to the undeclared partnership.¹⁰¹ In particular, the

98. ROY, *ibid.*, pp. 663-64.

99. Arts. 2250 *et seq.* C.C.Q.

100. *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, p. 17.

101. D.-CASTELLI and GOUBAU, *supra*, note 48, p. 531; PINEAU and PRATTE, *supra*, note 4, pp. 561-66, para. 382; LEFEBVRE, *supra*, note 56, pp. 25-27, paras. 36-38; Christine MORIN, « La société tacite : quand les affaires se conjuguent avec l'amour », (2008) 110 *R. du N.* 825. Three conditions must be established in order to demonstrate the formation of a contract of partnership: the contribution of each partner; the sharing of gains and losses; and the presence of *affectio societatis*. See art. 2186 C.C.Q.; LEFEBVRE, *ibid.*, p. 25, para. 37. PINEAU and PRATTE, *ibid.*, pp. 562-564, para. 382, summarize the current law by stating that the third condition rarely obtains: "Le comportement des conjoints de fait doit aussi démontrer qu'ils étaient tous les deux animés de l'*affectio societatis*, c'est-à-dire l'intention de former ce contrat de société. Or, pour que l'on puisse parvenir à une telle conclusion, les faits doivent révéler, entre les associés, une collaboration, active, consciencieuse et intéressée, sur un pied d'égalité. ... Recherchant l'existence de l'*affectio societatis*, le tribunal accordera une importance particulière aux apports respectifs de chacune des parties. Ils n'ont pas à être égaux, mais le fait que l'apport de l'un soit hors de proportion avec celui de l'autre pèse grandement à l'encontre de l'existence (continued...)"

Court of Appeal has indicated a preference for unjust enrichment—an “other,” non-contractual source of obligation—over that contract as the site for jurisprudential elaboration.

* * *

Whatever path is chosen—the analogy of the compensatory allowance, the undeclared partnership, or another—Quebec judges will feel pressure to do something with *Kerr*. Indeed, some already do. To be sure, the process of systematically assimilating that judgment’s relevant lessons may be slow. After all, ten years elapsed before the Court of Appeal took up the pair of presumptions from *Peter*. But some circulation of ideas is probable, and likely to prove fruitful. Scholarly reflection and debate may help to ensure that the approach eventually adopted is a principled one, sensitive to the living tradition of Quebec civil law.

(...continued)

de l'affection societatis'. On peut en effet douter qu'il existe alors entre les concubins une collaboration consciente, d'égal à égal, justifiant un partage égal de l'actif, des bénéfices et des pertes.”