

COMMON LAW SPOUSES & PROPERTY CLAIMS

Peter v. Beblow 15 years Later

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Introduction:

Common Law relationships are on the rise. They come in all shapes and sizes; some are long, some are short, some are a relationship of dependancy, others are not. Some couples have common assets and expenses, others keep a strict accounting and divide all expenses exactly in half. Sometimes there are children involved.

No longer is the common law relationship exclusive to younger persons. Older persons with assets are entering the fray. When the relationship ends there is often a disgruntled party who thinks they were taken advantage of. The claim of unjust enrichment is made.

As a result, perhaps, of an increasing number of cases in this area with widely differing facts patterns, the courts have been inconsistent in their application of the law. However, in the last decade there seems to be a rising body of law seeking to develop a framework for analysis. The principles stem from the Supreme Court of Canada's decision in *Peter vs. Beblow*, (1993 SCC) and those cases that *Peter v. Beblow* relied on such as *Petkus v. Becker* (1980 SCC), however, the principles are evolving. Winds of change blowing in favor of the Defendant can be detected from decisions arising in 1997 and later.

Analysis of the Claim as Expressed in Recent Cases:

1. Can an claim in unjust enrichment be made out?
 - a. Need an enrichment.
 - i. efforts of the Plaintiff made towards the purchase, maintenance or preservation of the property;
 - ii. can be contribution of labor, money, collateral, guarantees, ideas;
 - iii. can be direct or indirect (i.e. contributions to things other than the property thereby freeing up income or time of the Defendant to contribute to the property);
 - iv. can be the receipt of domestic duties such as housekeeping and childcare; and,
 - v. must be unjust.
 - b. Need corresponding deprivation.
 - i. contributions for a fairly brief period of time may not be enough;
 - ii. while deprivation can sometimes be assumed by the enrichment, increasingly it is neutralized by the ever expanding category of juristic reason; and,
 - iii. an enrichment does not necessarily assume a deprivation (*Massincaud*).
 - c. Need lack of juristic reason for the enrichment. This is the category in which the court considers whether the enrichment and corresponding deprivation is "unjust".
 - i. originally this was an established category of defenses that if in existence denied recovery (*Peter v. Beblow*) :

- (1) contractual obligation;
 - (2) a disposition of law (such as a statute); or a
 - (3) donative intent.
 - ii. The following considerations arise which allow the Defendant to rebut the finding of “no juristic reason” which is prima facie made out if criteria 1 to 3 in the preceding paragraph are found lacking:
 - (1) the fundamental concern is the legitimate expectation of the Plaintiff to share in the property of the Defendant, that is; was there a reasonable expectation that the Plaintiff’s contributions would be rewarded with a share of the wealth? (*Pickelein*)
 - (2) consider the benefits conferred on the Plaintiff, were they trivial, substantial or were they outweighed by the benefits received by the Defendant? (*Massincaud*)
 - (3) was it a traditional relationship where one party sacrificed their goals to advance the relationship and became economically dependant?
 - (4) was there a sharing of finances, joint accounts, debts, property, bank accounts?
 - (5) did the Plaintiff confer the benefit she/he gave as a valid gift or as an obligation owed? or as a trade for free rent, use of the property, potential gain on income for a business etc.?
 - (6) does public policy support the enrichment?
 - (7) this list of factors is evolving and further cases will add additional refinements and developments (*Garland v. Consumers Gas Co.*) .
2. If after consideration of all of the above, unjust enrichment is found, then what is the appropriate remedy? The choice between the remedy is discretionary and should be exercised flexibly (*Pickelein*) (*Peter*).
- a. Monetary award: (by far the most common remedy)
 - i. this can be like a claim in quantum meruit;
 - ii. can the contributions be measured in the form of money?
 - iii. this can be a value received approach, but;
 - iv. a monetary award can be assessed on a value survived approach and is not restricted to a quantum meruit claim (*Kauwell*),
 - v. this remedy must be adequate for instance where:
 - (1) the Plaintiff’s entitlement is small compared to the value of the property;
 - (2) the Defendant is able to satisfy the claim without sale of the property; or
 - (3) hardship might be caused to the Defendant if the Plaintiff received rights in the property. (*Peter*)
 - b. Constructive trust - This remedy leads to an interest in the property. It is proprietary in nature (*Peter*), therefore;
 - i. there must be a direct link to the property;
 - ii. extent of the constructive trust must reflect the amount of the Plaintiff’s contributions;
 - iii. a minor or unsubstantial contribution is insufficient; and
 - iv. this is the value survived approach; and
 - v. a monetary award must be inadequate (*Pickelein*) such as when:
 - (1) it will not be paid; or

(2) there is a special contribution to the property (*Peter*).

3. What is the valuation date?
 - a. Date to assess the value of the contributions and the value of the property is the date of the cessation of cohabitation or the date the person removed himself/herself from marriage like relationship - not the trial date in most cases. (*JAB v. HWC*) (*Pickelein*).
 - b. Only where the true constructive trust remedy is ordered will there be value at the date of trial used as then there is a proprietary right in the property. This remedy seems to be the exception and will likely only be granted in the strongest of cases.
4. If a constructive trust or a monetary award based on value survived approach is the appropriate remedy then what equity should be considered for division?
 - a. Most money contributions will notionally get subtracted from the equity and get credited to the paying party;
 - b. Including starting equity;
 - c. Gifts and loans put into the property; and
 - d. In some cases mortgage payments, taxes paid, and other.
5. What else can be subtracted from the equity? Sometimes:
 - a. Value of the benefits to claimant such as a notional rent;
 - b. Notional contribution to existing debts; and
 - c. Interest on the capital cost (*Harrison*) .
6. What can be added?
 - a. Court order interest from date of separation (*Pickelein*).
7. What part or percentage of the equity is fair?
 - a. "A percentage of the net appreciation is one way of doing it. To the extent the contributions are proven, they should be considered as should the parties contributions made before and after the relationship." (*Pickelein*)
 - b. The court can provide the claimant with a percentage of the increase in the value of the property by assessing a figure which the court feels is reflective of the relative contributions of the parties. (*Kauwell*)
 - c. Monetary and non monetary contributions can be added and taken as a percentage of the total contributions and a percentage therefore of the asset. (*Reavie*)

Review of the Case Authorities

1. Peter v. Beblow 1993 SCC - following the 1980 SCC decision in *Pettkus v. Becker*. An unpaid homemaker Plaintiff in a 12 year relationship was found to have contributed to the estate of her partner. The court wrote that the woman was under no obligation to perform domestic services without reasonable expectation of compensation. The broad interpretation of this case is that a common law relationship automatically leads to an enrichment and a deprivation. The court talked about respective contributions to the family assets. The wife got the house, he got the houseboat and van.
2. Harrison v. Kalinocha 1994 BCCA - The Plaintiff woman lived on property for five years purchased by the Defendant. Plaintiff's teenage children lived there too. The property increased in value exceeding the Defendant's contributions. Court found she had urged him to buy the property and it had increased in value at least in part due to the effort she had put into renovations and maintenance. *Peter v. Below* applied "whatever its implication". He gets his money out **plus interest** on that money for 5 years and property taxes paid and they share equally the "net appreciation". She gets \$35,000.00.
3. Ford v. Werden - 1997 BCCA - 4 year relationship but cohabited only one year. They had one child. Both parties worked. She gave up no job opportunities. Her assets and income grew over the relationship. Trial judge gave her an award of \$40,000.00 for little more than the fact of a common law relationship. Court of Appeal set it aside as they found that there was no unjust enrichment or deprivation. She provided spousal services but so did he. These were two independent persons. Taken to a logical conclusion both were enriched and deprived and each could sue. The fact that spousal services are now regarded as valuable and compensable does not remove the requirement to determine in each case whether or not there is a lack of juristic reason for the enrichment. In non traditional relationships each confers benefits on the other without expecting to be paid except perhaps in kind with reciprocal gifts. Public policy does not favour some type of restitution in this case.
4. Pickelein v. Gillmore 1997 BCCA - 13 year relationship. Multiple properties owned by both parties. Trial judge had awarded each party a half interest in the other party's property. Talks about juristic reason and the importance of the legitimate expectations; that is, did the Plaintiff expect to share in the wealth they created during the relationship. Long term marriage like relationships are more likely to result in a value survived approach to accord with the reasonable expectation. In this case there was an legitimate expectation that each would share in the assets of the other. Talks about valuation. What portion of the value of the property is attributable to the claimant's services? Starting point is net appreciation of value during the relationship which is attributable to the contributions of the Plaintiff. Contributions (including loans and gifts) and starting capital need to be taken account of in valuation of the respective contributions. A percentage of the net appreciation is one way of doing it. Trial judge erred in giving of constructive trust remedy. A monetary award is the fair remedy. Appeal Court gives her half of hers less half of his less contributions including gifts given by his parents. Result was Plaintiff woman gets \$56,000.00 **plus interest** under the Court Order Interest Act from date of separation. This case is cited with approval by most of the cases that follow including the most recent BCCA .
5. Roering v. Nicholson: 1997 BCSC - 10 year common law relationship. Woman Plaintiff. Mere fact of living together does not give one a right to property. No reasonable expectation in this case. They kept track of expenses. She paid rent. No dependancy created. The

Defendant (lawyer) did not lead the Plaintiff to expect a share. No exploitation. Plaintiff ended up in better financial situation and with a better job. In analyzing an unjust enrichment case one must remember it is fact driven and a close analysis of the reasonable expectations must be undertaken. "to place the facts (of this case) within the principles of *Peter v. Beblow* is to advance the law from valuing spousal services when given to the detriment of the giver to simply creating property interests based on the establishment of a common law relationship." Woman's perception was different than reality, although sincere. Comment that *Peter and Beblow* and some of the cases following it were cases in which there was considerable imbalance between the parties, the husband a greater financial earner and the wife giving up career opportunities to provide spousal services. Case dismissed. Start of the movement away from strict application of *Peter v. Beblow*.

6. Hubar v. Jobling 2000 BCCA - 7 year common law relationship. Woman Plaintiff. Trial Judge dismisses the case finding the Plaintiff was better off after the relationship than before. *Roering* is distinguished. No marriage plans, no co-mingling of accounts. She had a motor vehicle accident and put \$5000.00 from the settlement into a new well. Woman had limited means so therefore the judge gave this contribution great significance. Gardening and household activities found by chambers judge to be insubstantial. The Defendant contributed more financially to the relationship but the Plaintiff put \$15,000.00 of her settlement into the Defendant's account for household expenses. On the basis of *Harrison* type analysis, Plaintiff is awarded 20,000.00 of the \$94,000.00 rise in value or somewhat more than 20%. Law of unjust enrichment manipulated to create a quasi type matrimonial property regime
7. Walsh v. Bona 2002 SCC - This was not a case on unjust enrichment but involved a question to determine whether it was discrimination to exclude a common law spouse from the matrimonial property rights under the *Matrimonial Property Act* (Nova Scotia). Held - common law spouses are not to be treated the same as married couples. Individuals retain the freedom to choose not to marry and choose not to have the legal consequences that flow from marriage. For those that do not marry the principles of unjust enrichment can rectify injustices, if any. Treating all common-law relationships like legal marriages in terms of support obligations and property division ignores the very different circumstances under which people may enter a common-law union. If they choose to marry, they make a positive choice to live under one type of regime. If they have chosen not to marry, it is not the state's task to impose a marriage-like regime on them retroactively. To ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state. An important turning point. Many cases that follow cite this case.
8. Kennedy and Drake 2004 BCSC - 10 year com law relationship with one child. She paid mortgage payments but he put more money into their expenses than she. House was paid for by her inheritance. About \$780,000.00 in equity. Increase in the equity of about \$80,000.00 in second house. First house increased in value about \$25,000.00. He did a lot of manual labour in the renovation in both houses. Much evidence about work put into the properties. Sole reason she could purchase was her inheritance. No contribution direct or indirect connected to acquisition (although he did guarantee mortgage). He gets \$25,000.00 based on value of the work he put in. Monetary award is found adequate.
9. Garland v. Consumer Gas Co. 2004 SCC - Class action on behalf of 500,000.00 customers of a gas company about late payment penalties. Unjust enrichment argued. The proper approach to the juristic reason analysis has two parts. The Plaintiff must show that there is no juristic

reason from an established category, such as a contract or disposition of law to deny recovery. If there is no juristic reason then prima facie the Plaintiff has made out a case. Then the burden shifts to the Defendant to rebut the case by demonstrating there is another reason to deny the claim. As part of the Defendant's attempt to rebut, Courts should have regard to the reasonable expectations of the parties and public policy considerations. This is an area that is evolving and further cases will add additional refinements and developments. This is in equitable remedy that will necessarily involve discretion and a question of fairness.

10. Bartkowski v. Lecy 2004 BCSC, - 9 year relationship with child.. Woman purchased property during later stage of relationship. Plaintiff man performed some work on the property. Constructive trust exists independent of a spousal relationship. Court accepts that the SCC has settled the test of Juristic Reason in *Garland v. Consumers' Gas Co.* (2004 SCC). This is a 2 part analysis - is there lack of juristic reason from the established categories? If not, then are there other reasons to deny recovery such as reasonable expectations of the parties and public policy? In this case either the alleged contributions had nothing to do with the property or there was juristic reason for the contributions such as he got paid for the work or received value for his rent. Case dismissed.
11. Massincaud v. Logie 2005 BCSC - nine year relationship. Claim on an employment pension. Both worked but he made more money than her. She contributed to joint expenses. She did majority of domestic duties. He got an enrichment but this does not automatically lead to a conclusion of detriment to the Plaintiff. She lost no career or job prospects. She had a better standard of living during relationship than before. What she received was in excess of what she gave. Benefits conferred on Plaintiff should be considered under lack of juristic reason. She gained more from relationship than she can fairly be said to have contributed. Whether or not they intended to marry is of little assistance in assessing juristic reason. In any event the Plaintiff must show a connection between the contributions and the acquisition, accumulation, and preservation of the assets. She can not. Case dismissed.
12. Thomas and Fenton 2006 BCCA - 30 year relationship. Plaintiff man. Last 7 years the parties lived separately in same house. Trial judge had given him 25% of the house. She bought property for \$44,000.00 with \$12,000.00 down. In 1980's and 1990's he did renovations but she paid for the materials. Sold in 2004. \$150,000.00 of equity. No children. He worked part-time only. Modest contribution to the housekeeping and gardening. Clear that she purchased the house for herself. She paid the mortgage and other expenses. He earned little money and paid no rent. His renovations were long used up. He received free room and board. She bought him a van. Appeal allowed and claim dismissed. Trial judge erred in that he did not give adequate consideration to the benefits conferred on the Plaintiff by the Defendant.
13. Hughes v. Miller - 2007 BCCA most recent BCCA - 12 year relationship. Plaintiff woman and intention to marry. He inherited a property which rose in value of about \$300,000.00 to ***date of separation*** which the court takes as the date to use for valuation. She supported the Defendant for much of the relationship as he was underemployed and then ill for a time. The property was worth \$1,750,000.00. The spouse like care and assistance and some financial assistance over the years entitled her to an unjust enrichment award.. They give her a 1/3 interest in the rise in value of the property and the value of the logging equipment bought with some of the logging revenues. Because this was inherited property the court comments that it does not feel that 50% would be justified. It was a relatively long relationship and the proportional approach reflects the temporal duration of the relationship. This is more appropriate than estimating each parties contribution. *Pickelein* followed. This award was explained as a monetary award, not a constructive trust award, which was found sufficient due

to the relatively sparse direct contributions to the property. (Collateral fact: he was intentionally underemployed to cheat his children out of child support).

14. Kauwell v. Melnyk 2007 BCSC - 5.5 year common law. A deprivation is not presumed from an enrichment. Do the benefits equal or exceed the contributions? Even if enrich and deprivation, is it unjust? Provision of spousal services in non-traditional relationship does not presume compensation. The court must look at the direct and indirect contributions and the effect that those contributions had on her career, training, opportunity to earn income, and whether she has forgone remuneration for the services provided. A monetary award can be assessed on a value survived approach and is not restricted to a quantum meruit claim. The court can provide the claimant with a percentage of the increase in the value of the property by assessing an figure which the court feels is reflective of the relative contributions of the parties. She never lost out on anything. She has slightly more assets than going in. He paid for her vacations. She lived more comfortably. Case dismissed.
15. Eisener v. Baker 2007 BCSC - 3 year common law relationship. House put in joint names as she inserted herself on the interim agreement. A finding that the Defendant did not intend a gift and the beneficial ownership was his. The extent of the interest *must be proportionate to the contribution of the claimant*. The Defendant was not enriched. Domestic duties were shared. He paid almost all the expenses. She had modest income of \$4,000.00 to \$7,000.00 per year so realistically, how could she have contributed to the property? All she could do was cover her basic expenses. She did not forego any career opportunities. The property is awarded solely back to the Defendant.
16. J.A. B. v H.W.C. 2008 BCSC - 14 year marriage like relationship. Lived together a further 3 years after. Both parties in their 70's at trial. She had little income and he had a larger income especially before his retirement. Joint accounts, merged financial affairs and reciprocal wills. She did all of the household work and growing and preserving food and other gardening and looked after the finances for the household.. Traditional type roles. She and he renovated the house. The court found there had been an enrichment and a deprivation as she was deprived of the economic value of her labour and the freedom to pursue other opportunities. There was a legitimate expectation that the wealth accumulated would be shared, at least until the relation deteriorated. A constructive trust should be imposed only where a monetary award is inadequate. A value survived approach can be taken anyway. The Plaintiff is awarded 40% of the increase in equity to date of separation. Rent for last 3 years of cohabitation subtracted. Entitlement is \$35,000.00. She also gets \$10,000.00 for unjust enrichment related to his pension. *Walsh v. Bona* discussed and distinguished. "What *Walsh v. Bona* makes clear is that there is not to be a presumed 50% division of shared assets in cases where parties choose not to marry".
17. Reavie v. Heaps - 2008 BCSC - 4 year relationship. Engaged but never married. Accepts *Garland* as definitive on juristic reason. She made a significant contribution to a property purchased by sale of his and her properties. He was general contractor of the home and she spent time too. She put in \$15,000.00 and he \$338,000.00. Title was joint. Her labour was quantified at \$20,000.00 and added to the \$15,000.00 to give her a percentage of the total equity - 10% (arithmetic is not quite right) . His labor was not counted because he gets property and appreciation since 2006 (separation) which is when she took herself off title because she was worried about the associated debt. She is awarded \$50,500.00 because value of the property in 2006 was \$505,000.00. She also gets compensation for ½ the mortgage penalty of \$5000.00 she paid when she sold her home. This case represents a unique way of quantifying the claim.