

Take Five

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Summer is here!
In theory, at least...

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Larry Kahn, QC and Marvin Lithwick, Kahn Zack Ehrlich Lithwick

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Ken Kramer, KMK Law Corp

Zeitler v. Zeitler (Estate), 2010 BCCA 216

Areas of Law: Estates; Contract Interpretation Under Appeal: Justice Arnold-Bailey

The appellant transferred two rental properties to her husband in the 1980's. His death in 2007 gave rise to potential assessments for capital gains tax due to the deemed disposition rules in the Income Tax Act. The appellant sought to make the respondent estate liable for capital gains tax on the properties as an implied term of the contract of sale because otherwise she could be liable for the tax while the estate retained the capital gain for distribution. The chambers judge concluded that such a term could not be implied and that the appellant would be liable for capital gains tax on the properties if Canada Revenue Agency made an assessment.

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Held: Appeal allowed

The Court reviewed the law with respect to implying contractual terms, and found that the attribution rules in the taxing statute could not be determinative of whether or not to imply a term in a contract. The Court evaluated the intentions of the parties to the contract and concluded that, at the time the contract was concluded, the parties must have intended for the husband to assume full liability for future capital gains. The appellant divested herself of both legal and beneficial interest in the properties, and any future gains on the property were exclusively her husband's, so it would not make sense for her to retain a contingent tax liability with no corresponding benefit. As such, implying a term in the contract of sale to release the appellant from future tax liabilities is reflective of the intentions of the parties and ensures the purpose of the contract is fulfilled. The Court noted that implying such a term will not occur in every transfer of real property between spouses, and will depend on the facts of each case.

The parties were in a motor vehicle accident and liability was attributed wholly to the appellant plaintiff at trial. The accident occurred at a “T” intersection. The road on which the appellant was driving required her to make a turn at the intersection after stopping in accordance with the stop sign. The respondent was travelling on the road perpendicular to the road on which the appellant was driving. The appellant did not stop at the intersection as required and travelled into the intersection where she was struck by the respondent’s car. The respondent saw the appellant’s car at the intersection as he approached and he noticed that the appellant’s car was not stopping. Rather than apply his brakes when he noticed the appellant’s car was entering his lane of travel, the respondent changed lanes without reducing his speed. The trial judge concluded that the respondent was not liable because once he determined that the appellant’s vehicle was an “immediate hazard”, it was too late to apply the brakes and a collision was inevitable.

Salaam v. Abramovic, 2010 BCCA 212

Area of Law: Motor Vehicles; Duties of Motorist
Under Appeal: Justice Gropper



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Held: Appeal allowed.

The Court concluded that the respondent was 25% liable for the accident because he ought to have applied his brakes earlier, when he noticed that the appellant was not following the rules of the road. The Court concluded that the trial judge erred by not applying the correct legal test to ascertain the liability of the respondent. The correct test was whether the respondent exercised reasonable care once he was alerted to the fact that the appellant was not obeying the rules of the road, rather than determining that he was not required to take action until the appellant’s vehicle posed an immediate hazard.

Ted Leroy Trucking Ltd. v. Century Services Inc., 2010 BCCA 223

Areas of Law: Bankruptcy; Priority of Claims
Under Appeal: Justice Brenner

The appellant was the highest ranking secured creditor of the respondent bankrupt company. The respondent union represented the interests of the company's employees and brought a motion in the bankruptcy proceedings to secure payments by the company to third parties on behalf of employees. The union argued successfully that payments to third parties for the benefit of the employees, such as union dues or payments to a health trust, attract the protections afforded by both the Wage Earner Protection Program

Act ("WEPPA") and the Bankruptcy and Insolvency Act ("BIA"). The WEPPA permits employees to recover some wages owed to them by a bankrupt employer, and the BIA gives limited priority to employees to collect compensation for services rendered in the six months preceding bankruptcy. The chambers judge agreed

with the union that these statutory protections extended to all monetary obligations of the employer in respect of the employees, not just wages owed directly to the employees.



Held: Appeal dismissed.

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The Court considered the legislative intent giving rise to the statutory protections at issue and found that the goal was to strike a balance between the interests of secured creditors and employees. This balance was struck by limiting the dollar value of the payments to employees and by limiting the amount that attracts top priority among secured creditors. The Court concluded that the term "wages" was defined broadly in the WEPPA and prior jurisprudence also gave the term a broad definition in the same context. Finally, the Court was careful to note that benefits provided through a collective agreement as well as those provided in individual employment contracts to non-unionized employees attract the statutory protections.

Wilson v. Fotch, 2010 BCCA 226

Areas of Law: Family; Constructive Trusts
Under Appeal: Justice Boyd

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ENTIRE JUDGMENT](#)

The parties began a common law relationship in 1995 and separated 7½ years later. At trial, the respondent successfully argued that the appellant was unjustly enriched by his work and was awarded a monetary remedy. Prior to meeting one another, the appellant started a janitorial business and purchased a half interest in the mobile home owned by her mother. During their marriage-like relationship, the respondent worked for the appellant's janitorial company at what the trial judge found to be a reduced wage. The trial judge also agreed with the respondent that he had contributed to the value of the appellant's mobile home property and another property she purchased during their relationship which, along with his reduced wages, made out the unjust enrichment claim.

Held: The appeal was allowed by all three judges, to differing degrees. The majority allowed the appeal in part, by significantly reducing the award to the respondent. The dissenting judge found no unjust enrichment and would have allowed the appeal in its entirety.

The majority reasons gave a thorough background on the law of unjust enrichment, noting that doctrinal consistency and clarity in the family and commercial law contexts was an overriding concern. The reasons outlined the doctrinal approach to addressing claims of unjust enrichment. The first step is a purely economic assessment of whether a benefit has been visited on one party. Once a benefit is found, the second stage of the analysis is to show a deprivation on the part of the claimant without engaging in an analysis of the net gains or costs to the claimant, but with respect to the specific benefit, the provision of which deprived the claimant in some way. The third stage of the analysis is to determine that the benefit and corresponding deprivation lacked a juristic reason. The two-step categorical approach espoused by the Supreme Court in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 requires the claimant to show that no juristic reason from an established category exists to deny recovery and if successful with this, a prima facie case of unjust enrichment is established. The second step of the *Garland* approach permits the defendant to rebut the prima facie case by asserting a juristic reason for the benefit and deprivation in a category of residual defence, having regard to two factors: the reasonable or legitimate expectations of the parties, and public policy considerations which mitigate in favor of the enrichment being retained. The majority judgment cautioned against reliance on its own prior jurisprudence where parties had successfully relied on reciprocal contributions within the relationship as a juristic reason to justify the retention of a benefit by the defendant. Such an approach cannot easily fit within the *Garland* framework. If a juristic reason can be found for the benefit, there is no unjust enrichment. Otherwise, the analysis moves to the defences available to the defendant, including estoppel, change of position, and equitable considerations. If no defence is established, the analysis moves to determining and quantifying the appropriate remedy. The last stage of the analysis is to apply principles of set-off which may reduce the value of the remedy. The majority concluded that the trial judge erred in both quantifying the remedy and in properly applying the principles of set-off.



Roach v. Dutra, 2010 BCCA 264

Areas of Law: Family; Property; Civil Procedure Under Appeal: Mr. Justice Pearlman

The parties were in litigation to resolve issues of spousal support and a claim for unjust enrichment following the termination of their common law relationship. Four days prior to trial, the plaintiff offered to settle the action for \$70,000. The defendant rejected the offer. The plaintiff was ultimately awarded just over that amount at the

conclusion of the trial as a lump sum spousal support payment (\$30,000) and compensation for unjust enrichment (\$40,000). Pursuant to Rule 37B(1)(c), the plaintiff applied for double costs from the time of her offer to the conclusion of the action. The trial judge awarded double costs to the plaintiff beginning seven days after the offer was presented to the defendant, to account for a reasonable period

of time for the defendant to consider the offer. Although the plaintiff was unsuccessful with her claim for unjust enrichment, the trial judge found that she had enjoyed substantial success in the litigation and awarded her costs. Her claim for special costs on the ground that the defendant failed to provide timely financial disclosure was rejected.

Held: Appeal and cross-appeal dismissed.

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The Court applied a highly deferential standard of review to the trial judge's conclusion that the plaintiff was substantially successful in the litigation and upheld his finding on that ground of appeal. The Court also rejected the defendant's argument that the offer to settle ought not to have been considered because it did not fully comply with Rule 37B(1)(c) by not specifically naming the plaintiff in the action, but referring to "our client". The Court agreed with the trial judge's conclusion that the offer was substantially compliant, especially because the Rule had been introduced only eight days prior to the offer. After a thorough review of the history of Rule 37B and its predecessor Rules, the Court concluded that an overly rigid application of the definition of an offer to settle would undermine the flexibility and judicial discretion intended by the introduction of the new Rule. The Court did emphasize that, in order to be considered an offer within the meaning of the Rule, the offer must be in writing, the wording must indicate clearly who is making the offer and to whom and must include wording to indicate that the party making the offer reserves the right to bring the offer to the attention of the court during submissions as to costs.