I. Introduction

The purpose of this paper is to provide suggestions to counsel representing defendants in unjust enrichment claims.

II. Terminology

In this paper, “plaintiff” refers to the party seeking to prove an unjust enrichment and “defendant” refers to the person allegedly unjustly enriched.

III. Understanding the difference between Unjust Enrichment and Constructive Trust

If a plaintiff can show an unjust enrichment, then he / she is entitled to a monetary award, or a constructive trust.

It should always be kept in mind that unjust enrichment is the cause of action and that a constructive trust is a possible remedy once the cause of action is proven.

It is easy to fall into the error of thinking that the constructive trust is a cause of action in and of itself. It is not. This error was recognized by Justice McLachlan in Peter v. Beblow when she stated: “occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.”

IV. Three requirements of an Unjust Enrichment

Many cases set out the three elements of an unjust enrichment:
• enrichment
• deprivation
• no juristic reason.  

An unjust enrichment claim fails if the plaintiff fails to establish that these three elements exist.

The task of the defendant’s lawyer is to persuade the court that one or more of these elements does not exist. Therefore an examination of each of the three elements is necessary.

V.  **Burden of proof**

As with most claims, the burden of proof is on the plaintiff. The plaintiff must prove the three elements.  

However, there is a complication with respect to burden of proof for the last element: juristic reason. The Supreme Court of Canada has held that the plaintiff has the initial burden of showing that none of the recognized categories of juristic reason exists, and if successful, the claim is *prima facie* made out. The defendant then has an opportunity to show a reason why the benefit should be retained. See the detailed discussion of this issue in section VII c below.

VI.  **Enrichment / Deprivation**

   a.  **General definition**

The first two elements of unjust enrichment are two sides of the same coin. The question is: did the plaintiff provide to the defendant something of value (such as money, labour, domestic services) which led to the enrichment of the defendant?

The focus is economic. The question, when considering these two elements, is whether something of *economic value* was provided by the plaintiff to the defendant.
In *Peter v. Beblow*, Justice Mclachlan commented that “This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment.”

In his minority decision in *Peter v. Beblow*, Justice Cory stated: “Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. There is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.”

b. **Example from caselaw where enrichment / deprivation proven**

A classic case where the plaintiff did meet the enrichment / deprivation requirements was *Sorochan v. Sorochan*. The following led the Supreme Court of Canada to find in the plaintiff’s favour:

- The parties had a 42 year common law relationship
- They had six children
- The defendant already owned real property at the commencement of the relationship
- The plaintiff wife did virtually all the childcare
- She also did a lot of farm work. The defendant husband worked for part of the year as a travelling salesman and during those times the wife was responsible for the six children and the farm
- The plaintiff was not paid for any of this
- The defendant received a benefit: all the unpaid work and maintenance of the real property and the childcare
- The plaintiff suffered a deprivation: her full time devotion of labour without pay

Clearly, the plaintiff had an overwhelming case. Fortunately for defendants’ counsel, most plaintiffs will not have as strong a case as Mrs. Sorochan.
c. Examples from caselaw where enrichment / deprivation not proven

A good case for defendants on the enrichment / deprivation issue is *Buist v. Greaves.* The facts of this case were:

- The parties were in a same sex relationship from 1988 to 1995
- The defendant had a child and both parties acted as parents
- At the end of the relationship, the plaintiff brought an action for unjust enrichment, and sought an award equal to one-half the defendant’s property.
- The action was based on household payments and domestic services
- The plaintiff argued that the defendant could not have kept the home but for the plaintiff’s contributions.

Justice Benotto dismissed the claim. She found that there was no enrichment because:

- The defendant could have maintained her home even without the plaintiff’s contributions. The plaintiff’s contributions were not vital to the maintenance of the asset
- The defendant’s income was not increased as a result of the relationship
- Although the plaintiff did a lot of domestic services, the defendant did a roughly equal amount: “the work (the plaintiff) did around the house and the country property are the sorts of things that people share in when they are living together. Both women benefitted from the other’s contribution.” (paragraph 41)
- The parties contributed in roughly equal amounts to the household costs
- Justice Benotto also found that the plaintiff had not suffered a deprivation
  - “there is no evidence that (the plaintiff) is worse off than had she not lived with (the defendant)” paragraph 44
  - “there is no evidence that the career of (the plaintiff) was hampered by the relationship.” (paragraph 45)

*Parnell v. Viger* is another case useful to defendant’s counsel. The facts were:
• There was a 13 year common law relationship
• There were two children
• The defendant operated a security company
• The plaintiff was a paid employee of the security company and had other employment
• The plaintiff did most of the domestic work and child rearing.
• Many family expenses were paid from a joint account to which the plaintiff contributed 39% and the defendant contributed 61%
• At the end of the relationship the plaintiff claimed an interest in the defendant’s home, his yacht, an investment property and the security business

She was successful against the home and yacht but not the investment property or the security business. The trial judge found that there was no “causal connection” between the plaintiff and those properties.

The Court of Appeal dismissed the defendant’s appeal. For our purposes, the reasoning of the Court of Appeal about the security business is important: “The trial judge concluded that the (“plaintiff’s) contribution to the business, as both a full and part time employee over many years, was essentially that of an employee for which she received appropriate financial compensation. We see no basis for interfering with this conclusion.”

It seems clear from Parnell that payment of an appropriate salary will lead to the dismissal of an unjust enrichment claim.

Wylie v. Leclair is yet another helpful case to defendants. The trial judge awarded the plaintiff $150,000 on the basis of the domestic services rendered during the fifteen year common law relationship. The Court of Appeal reduced the award to $70,000. The main reason for the reduction was that the trial judge failed to account for the benefits received by the plaintiff:

“the value of the benefits that (the plaintiff) and (the defendant) received from each other were not assessed or set off. A set off analysis would have been particularly relevant in light of findings of the trial judge that (the plaintiff) lived rent-free for the duration of her 15-year
relationship with (the defendant) and made no contribution during the first three years of their relationship.” 11

d. Conclusion re enrichment / deprivation analysis

What can defendants’ counsel draw from Sorochan, Buist, Parnell and Wylie? With respect to enrichment / deprivation, counsel must carefully analyze the economic benefits going back and forth between the parties.

Defendants’ counsel should shine a spotlight on any benefits flowing from the defendant to the plaintiff during the relationship. Plaintiffs will see only what they put in to the relationship, and demand restitution for same. Plaintiffs will often overlook the benefits they received from the relationship.

A common type of unjust enrichment case involves a plaintiff who has lived for an extended period in a home belonging to the defendant, and has paid some of the carrying costs. The plaintiff will argue that since he/she paid costs of the residence, the defendant has been unjustly enriched. In many of these cases, however, the plaintiff will have lived rent free in the defendant’s residence. This is an economic benefit to the plaintiff which defendant’s counsel should highlight.

VII. Definitions of “juristic reason”

a. General definitions of “juristic reason”

If the plaintiff proves enrichment / deprivation, then the analysis moves to the question: is there any juristic reason for the defendant to retain the benefit without compensating the plaintiff?

What is a “juristic reason?”
In his excellent paper “The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust” Professor M. Litman provides the following definition:

“In formulating juristic justification, the primary focus of the courts should be the narrow question of fairness as between the parties. Courts should consider whether, having regard to the particular circumstances giving rise to an enrichment and to subsequent events, it is fair for the defendant to retain the benefit.” 12

The Court of Appeal approved of this definition in *Campbell v. Campbell*. 13

Is it fair for the defendant to retain the benefit provided by the plaintiff? That is the ultimate question.

However, arguments based on fairness alone will not be sufficient. Principles have been developed for determining what is fair. While the underlying concept is fairness, the concept of fairness is structured by caselaw.

In *Peter v. Beblow*, Justice Mclachlan was clear that unjust enrichment was not a free for all for a judge to do whatever he / she feels is fair:

“There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. ….

…As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that *assumpsit, quantum meruit* and other terms associated with quasi-contract have never quite succeeded in duplicating" (George E. Palmer, The Law of Restitution, vol. 1, at p. 16).” 14

In *Pettkus v. Becker*, Justice Dickson equated juristic reason with reasonable expectations:

“as for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in
circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.” 15

b. More detailed definitions of juristic reason

Judges and academic commentators have tried to create catalogues of circumstances that constitute juristic reason.

The following catalogue was accepted by the Supreme Court of Canada in Peter v. Beblow:

“In every case, the fundamental concern is the legitimate expectation of the parties: Pettkus v. Becker, supra. In family cases, this concern may raise the following subsidiary questions:

(ii) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?
(iii) Did the plaintiff submit to, or compromise, the defendant’s honest claim?
(iv) Does public policy support the enrichment?” 16

The Supreme Court of Canada set out a slightly different catalogue in the non-family case of Garland v. Consumers’ Gas Co.: “The established categories that can constitute juristic reasons include a contract (Pettkus, supra), a disposition of law (Pettkus, supra), a donative intent (Peter, supra), and other valid common law, equitable or statutory obligations (Peter, supra).” 17

c. Juristic reason: questions of burden of proof

In Garland, Justice Iacobucci dealt with the question of burdens of proof on the issue of juristic reason. He found that once the plaintiff had shown that none of the established categories of juristic reason existed, then the case is proven, subject to the defendant having an opportunity to show that some other reason exists to allow the defendant to retain the benefit.

Justice Iacobucci’s formulation (at paragraphs 44 to 46) is worth repeating in full:
“...If there is no juristic reason from an established category, then the plaintiff has made out a 
*prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another 
reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant 
to show the reason why the enrichment should be retained. This stage of the analysis thus 
provides for a category of residual defence in which courts can look to all of the circumstances 
of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the 
reasonable expectations of the parties, and public policy considerations. It may be that when 
these factors are considered, the court will find that a new category of juristic reason is 
established. In other cases, a consideration of these factors will suggest that there was a juristic 
reason in the particular circumstances of a case which does not give rise to a new category of 
juristic reason that should be applied in other factual circumstances. In a third group of cases, a 
consideration of these factors will yield a determination that there was no juristic reason for the 
enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an 
evolving one and that further cases will add additional refinements and developments.”

d. **Examples of successful defences on the basis of juristic reason**

Although the concept of juristic reason is open to expansion, there are battle tested arguments of 
which defendants’ counsel should be aware. In most cases, defendant’s counsel will be able to 
rely on an established argument.

In this section of the paper, I will set out the most common arguments that defendants have used 
to defeat claims for unjust enrichment.

**Contract**

There is no doubt that a contract is a juristic reason. For example, in *Rathwell*, Justice Dickson 
stated that for an unjust enrichment to succeed, “the facts must display an enrichment, a
corresponding deprivation, and the absence of any juristic reason – such as a contract or disposition of law – for the enrichment.” (page 455).

In Garland, Justice Iacobucci stated that contract was one of the established categories of juristic reason. (paragraph 44). This principle was applied in a family law context by the Nova Scotia Court of Appeal in Goddard v. Hambleton. 18

**Obligation**

The essence of this argument is: the plaintiff had an obligation to contribute, and therefore it cannot be said that the defendant (the recipient of the contribution) was unjustly enriched.

*Bell v. Bailey* is a good case for defendants. 19

The facts were:

- There was an 8 year common law relationship.
- The plaintiff’s income ranged from $12,532 to $28,676.
- The defendant’s income ranged from $30,000 to $45,000.
- During the first half of the relationship the plaintiff paid most of the household costs so that that the defendant could focus on paying off a mortgage taken out to pay a lump sum spousal support payment to his former wife.
- The defendant paid off the mortgage about half way through the relationship and then the parties started sharing the household expenses.
- The defendant’s home and RRSP increased in value during the relationship.
- The plaintiff’s assets also increased during the relationship.

The Court of Appeal reduced the trial judge’s award of monetary damages from $46,300 to $15,000.

For defendants’ counsel the important part of the decision is the concept of “proportionality” used in the decision. The Court said that in the first half of the relationship, the plaintiff was required to do “more than her share” (paragraph 26) and that she had made “disproportionate
contributions.” (paragraph 43). In the second half of the relationship, the plaintiff’s contributions were “proportional” (paragraph 28).

As a result of this finding, her unjust enrichment claim was accepted only for the first half of the relationship. Thus the reduction in the trial judge’s award.

The Court of Appeal’s decision assumes that in a common law relationship, each party is obligated to make a “proportionate” contribution to living costs. Unfortunately, Justice Osborne did not elaborate on the concept. For example, does proportionate mean equal? Or is it like a section 7 expense – proportionate to income? Does it depend on who owns the home where the parties live? That is open to argument.

Based on *Bell v. Bailey*, it will be open to defendants’ counsel to argue that the plaintiff’s contribution was merely proportionate, and therefore the unjust enrichment claim fails.

In *Buist v. Greaves*, Justice Benotto employed similar reasoning to Justice Osborne’s. The facts of that case are set out above. It will be recalled that the plaintiff’s claim was denied. One reason for the denial was that the plaintiff had an obligation to pay the household costs which she relied on. “She had an obligation to support herself. She also had an obligation to contribute to the (child’s) support”. See paragraph 48.

Defendants’ counsel should be aware of the limits of the obligation argument. In particular, the fact that a person is a spouse does not mean that he / she has an obligation to provide domestic services.

In *Peter v. Beblow*, the defendant argued as follows:

- it is true that the defendant was enriched and that the plaintiff was deprived as a result of the plaintiff wife's domestic services
- but the plaintiff had an obligation, as a spouse, to provide those services
- there is a juristic reason for allowing the husband to retain all the benefit: the services were provided pursuant to an obligation
Justice McLachlan dismissed this argument at paragraph 12: “This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner”

**Set Off**

This argument is different than the obligation argument.

The obligation argument is that the plaintiff should not be rewarded for providing monies / services which he /she was obligated to provide.

The set off argument is that the plaintiff got as much as he / she put in to the relationship, and therefore is not entitled to any reward.

The set off analysis usually occurs in considering the first two elements of unjust enrichment: deprivation and enrichment. However, some cases use the set off analysis in the juristic reason portion of the analysis.

An example of this argument is *Thomas v. Fenton*. 21 The British Columbia Court of Appeal overturned the decision of the trial judge in favour of the plaintiff, on this basis:

“In my opinion, the trial judge erred in failing to give adequate consideration to the benefits conferred on (the plaintiff) by (the defendant). It is manifestly clear that (the defendant) bestowed far more on (the plaintiff) than he bestowed on her. Had the trial judge undertaken the requisite global analysis of the circumstances of these parties, I think he would have concluded that there was a juristic reason for (the defendant’s) enrichment and that the claim for unjust enrichment could not succeed.”

Another example is the April 2007 decision of the British Columbia Supreme Court, *Otcenasek v. Otcenasek*. 22 In this case, the plaintiff sued the parents of her husband on the basis of work and monies provided to them. Justice Melnick denied the claim against the parents on this basis:
“However, in this case, there was a strong prima facie juristic reason for the enrichment of (the parents). (The plaintiff), together with (her child), lived on the Lapp Road property together with their children for six years virtually rent free.” (paragraph 23).

**Gift**

If the plaintiff intended to give the money / services to the defendant, then the plaintiff has no claim for unjust enrichment.

The leading case is *Berdette v. Berdette.* The facts of this well known case were:

- The plaintiff wife provided all funds to purchase cottage and home, but title was in joint names
- After separation, the plaintiff wife sought a declaration that the defendant husband held his legal interest in the cottage and home in trust for her
- The plaintiff failed, on the basis that the wife had intended to give the one-half interests in the two properties to the husband.

Justice Galligan made these comments at page 522: “Therefore, it is now clear that a gift defeats a claim based on either a resulting trust or a constructive trust.”

Certainly *Berdette* is useful for defendants. However, it is submitted that in most unjust enrichment cases, it will be quite hard to convince trial judges that the plaintiff intended a gift.

Remember that *Berdette* involved a wealthy wife and a husband of modest means. The wife paid for two pieces of real estate and then put them in joint names. The court found that on those two occasions, the wife intended to make a gift to the husband.

The facts of most unjust enrichment cases are different than those in *Berdette*:

- Most unjust enrichment cases involve a plaintiff who is poorer than the defendant.
- The plaintiff’s contributions are usually in small amounts (i.e. carrying costs of a home or domestic services) and spread over a long period of time, whereas in *Berdette*, there were just two transactions in issue.
• Most unjust enrichment cases involve the provision of domestic services.

It will be hard to convince a trial judge that a plaintiff, who provided small contributions over an extended period of time, and also provided domestic services, intended throughout the time period in question to gift these things to the defendant.

In other words, where the facts in any way resemble the classic cases of *Pettkus v. Becker*, *Murdoch v. Murdoch*, there is virtually no chance that a trial judge will find an intent to give. 24

A review of caselaw confirms the high standard applied to defendants who argue “gift.”

For example, *Hough v. Champagne*25 The facts were:

- There was a brief common law relationship
- the plaintiff paid for the home but put title in joint names
- After separation, the plaintiff tried to recover the defendant’s legal interest through trust arguments
- The defendant attempted to defeat the trust arguments by relying on *Berdette* – arguing that the plaintiff intended to give her the one-half interest
- The trial judge made these comments about gift: “in order to establish that there was a ‘gift’, the onus rests with the defendant to show very clearly on the evidence that that was the plaintiff’s intention at the time he made the conveyance to the defendant.”
- the trial judge ended up concluding that the transaction was a conditional gift – the gift was conditional on the parties’ marriage; as the marriage never took place, the gift was not perfected

A similar case to *Hough* is *Gaunt v. Woudenberg.* 26

The facts were similar to those in *Hough*. The defendant argued “gift.” At paragraph 13, Justice Minden quoted *The Law of Trust In Canada*, to the effect that the gift must be proven “very clearly.”
Justice Minden referred to *Berdette*, but said that it was distinguishable because the evidence in *Berdette* had been so strong, leading to an “inescapable” inference of a gift. (paragraph 94).

**Unrequested benefits**

If a plaintiff provides a benefit to the defendant without any request or even acquiescence, there is no unjust enrichment.

The leading case in this regard is *Campbell v. Campbell*\(^2\). The facts were:

- The defendant mother owned a dairy farm
- The plaintiffs (her two sons) operated the farm from 1977 to 1991
- During that period, the plaintiffs provided only modest benefits to mother
- In 1988, the sons built a barn on the property and bought machinery to be used on the dairy farm

The key finding of fact in that the case was that the defendant mother was mentally incompetent at the time of the building of the barn and had not consented.

The trial judge allowed the plaintiffs’ claim but the Court of Appeal overturned this decision: “the absence of (the defendant mother’s) consent to the construction of the barn and the making of the other improvements to the farm -- indeed, the absence of any evidence that she expressly requested her sons to undertake this work -- is the essential reason why the respondents' claim based on unjust enrichment should fail.” (page 790)

**The unjust enrichment no longer exists**

The unjust enrichment must exist at the time of the application; otherwise there is no claim.

In *Roseneck v. Gowling*, the trial judge felt that the equalization calculation was unfair to the wife. She found that the wife had an unjust enrichment claim as of the date of marriage. This claim had value on the date of marriage, and was a marriage date deduction. This marriage date
deduction, the trial judge felt, led to a fairer equalization calculation. This finding was despite the fact that the unjust enrichment had already been rectified by the time of the trial. The purpose of the trial judge’s finding was to create a different result of the equalization calculation.

The decision was overturned by the Court of Appeal. Justice Weiler stated at paragraph 29 – “it is not until the end of the relationship or an application is made to the court for relief that the court ascertains whether justice does not permit the benefit to be retained.” 28

**A court order supports the enrichment / deprivation**

A court order is a juristic reason.

A good example is the 1999 decision of the British Columbia Court of Appeal, *S.L. v. P.E.* 29

The facts were similar to the *Lastman* case:

- A married man (the defendant) had a child with “another” woman (the plaintiff).
- The defendant’s wife and first family did not know about the child
- The child was a secret for several years
- In 1984, the plaintiff obtained declaration that the defendant was the father and requiring him to pay $1 per month in support
- in 1995, the plaintiff sued for retroactive support, and unjust enrichment – similar claims made in the *Lastman* case. The argument was that he enriched himself by paying no support
- the claims were denied.

The Court said this about the unjust enrichment claim:

“Under the 1984 order, the respondent's liability to pay child maintenance was fixed at $1.00 per month, and that continued until 1995, when the interim order of $3,000.00 per month was made. For the period in issue, the court order made under the Child Paternity and Support Act, which must be assumed to be valid until set aside or varied, functioned as a juristic reason for the enrichment.” (paragraph 25)
A valid statute supports the enrichment

A statute constitutes a juristic reason.

The leading case is *Mack v. Canada (Attorney General)*. The facts were:

- A group of Chinese Canadians who had been harmed by the federal government's head tax on Chinese immigrants, and descendants, sued the federal government on the basis of unjust enrichment, asking that the government disgorge the monies it had collected
- The claim was dismissed on a Rule 21 motion and an appeal from that decision was dismissed
- With respect to the unjust enrichment claim, the Court of Appeal agreed that there had been an enrichment (of the government of Canada) and a deprivation (of the Chinese immigrants)
- but there was a juristic reason: the head tax was pursuant to valid statutes of Canada
- this argument does not apply if the law is unconstitutional
- at the time the head tax law was in effect, the law was constitutional.

Could this argument ever have relevance in family law? One can envision a disgruntled former spouse claiming that the other spouse was unjustly enriched by an “excessive” award of support, or a very favourable property award. The *Mack* case would defeat the claim, although there are probably a lot of other reasons to dismiss such a claim.

**VIII. Other equitable defences**

Unjust enrichment is an equitable claim. It is subject to equitable defences, including delay and clean hands.
Delay

The well known *Louie v. Lastman* case is an example of delay defeating an unjust enrichment claim. The facts were:

- The defendant had an extra marital affair with the plaintiff
- They had two sons (born in 1958 and 1962) although the sons did not discover the identity of their father until much later
- The plaintiff did not seek periodic child support at any time while the sons were dependents.
- In 1974, the plaintiff signed a full and final release of all claims against the defendant, and received $27,500
- About 30 years later, the plaintiff sued the defendant. One of her claims was unjust enrichment: the defendant had been unjustly enriched by not paying child support.

Justice Benotto held that the 30 year delay barred the claim:

> “Equitable claims must be advanced promptly after the facts upon which relief is based are discovered. This concept is embodied in the oft-cited maxim that "equity assists the diligent, and not the tardy". [See Note 16 at end of document] An equitable claim cannot succeed where the plaintiff has knowingly delayed in prosecuting her case, or the delay results in prejudice to the defendant.” (paragraph 22).

The Court of Appeal dismissed an appeal from Justice Benotto’s decision. The plaintiff’s claims depended on the 1974 release being set aside. The 30 year delay was a bar to a claim for rescission of the release.

Clean hands

The facts of *Buist v. Greaves* are set out above. The plaintiff’s claim was dismissed. One reason was her lack of clean hands.
The following factors led the court to conclude that she did not have clean hands:

- In support of her claim, the plaintiff argued that she had contributed funds to the household costs. However, she had claimed many of these expenses as business expenses of her law practice and deducted them from her income. Justice Benotto stated: “having filed fraudulent records, she cannot rely on them to support an equitable claim.” (paragraph 55)

- She had committed ethical breaches in her role as a lawyer.

Although useful to defendants’ counsel, the “clean hands” finding in *Buist* should be read in light of the entire case. Justice Benotto made a whole series of negative findings about the plaintiff. There were several reasons for the denial of the claim. It may be that the “clean hands” finding alone would not have defeated the plaintiff’s claim.

The “clean hands” issue was dealt with differently in *Parnell v. Viger*. In that case, the defendant argued that the unjust enrichment claim should be denied because the plaintiff had filed false tax returns with the CRA. The defendant argued “unclean hands,” relying on *Buist*.

Justice Matheson rejected this argument because the filing of the income tax returns was unrelated to the unjust enrichment claim: “I find that the non-reporting of certain income from Avon, Regal and the cake enterprises, does not bar Lynn from making a claim in equity for the constructive trust. It is not related to the claim; and in fact may have been of assistance to Richard.” (paragraph 23)

At paragraph 22, he quoted Snell's Equity, Thirtieth Edition as follows:

"The maxim (He who comes into equity must come with clean hands) must not be taken too widely; `Equity does not demand that its suitors shall have led blameless lives.’ What bars the claim is not a general depravity but one which has `an immediate and necessary relation to the equity sued for,’ and is not balanced by any mitigating factors."
IX. Arguments that will not work

Defendants’ counsel should be aware of arguments that have been tried and failed.

Lack of formal marriage

One such argument is: the plaintiff could not have had a reasonable expectation of benefit, because the parties were not married.

This argument was tried and rejected in *Hubar v. Jobling*. The facts were:

- The parties lived in a common law relationship from 1988 to 1995
- They lived in the defendant’s cabin, which was worth $56,000 in 1988
- The plaintiff contributed some capital and paid some expenses but her contribution was less than the defendant’s
- As of 1995, the cabin was worth $150,000
- The plaintiff argued that the defendant would be unjustly enriched if allowed to keep the entire cottage

The trial judge found that since the parties were not married, the plaintiff could not have had a reasonable expectation that she would benefit from her contributions. This was a juristic reason. The claim was dismissed

This was overturned on appeal by Justice Prowse, who stated at paragraph 25: “In my view, the fact that Ms. Hubar and Mr. Jobling were not married, and arguably did not intend to marry, is of little assistance in determining whether there is a juristic reason justifying Mr. Jobling retaining the benefit of Ms. Hubar’s contributions.”

Justice Prowse awarded the plaintiff 20% of increment in value of cottage home during the relationships
Citations

4. Peter v. Beblow, supra, paragraph 8
5. Peter v. Beblow, supra, paragraph 72
9. Parnell v. Viger, supra, at paragraph 8
10. Wylie v. Leclaire 64 O.R. (3d) 782
11. Wylie v. Leclaire, supra, at paragraph 19
14. Peter v. Beblow, supra, paragraph 4
16. Peter v. Beblow, supra, paragraph 10
27. Campbell v. Campbell, supra
30. Mack v. Canada (Attorney General) 60 O.R. (3d) 737
31. Louie v. Lastman (No. 2) 54 O.R. (3d) 301
32. Louie v. Lastman (No. 2) 61 O.R. (3d) 459
34. Parnell v. Viger, supra.