THE PRESUMPTION OF RESULTING TRUST: *NISHI V. RASCAL TRUCKING LTD.*

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The resulting trust can be traced back 500 years to the resulting use, and yet it continues to attract considerable judicial and academic attention.[1] In *Pecore v. Pecore*[2] and *Madsen Estate v. Saylor*,[3] the Supreme Court of Canada amended the presumption of advancement (to include mothers and exclude adult children), and in *Kerr v. Baranow*,[4] it declared that there is no such thing as a "common intention resulting trust." In *Nishi v. Rascal Trucking Ltd.*,[5] the Court had an opportunity to consider the presumption of resulting trust and the evidence which rebuts it. It also rejected an argument that "the purchase money resulting trust … should be abandoned in favour of the doctrine of unjust enrichment."[6]

In *Pecore*, *Saylor*, and *Kerr*, the Supreme Court was able to clarify and develop the law of resulting trusts. Unfortunately, little progress was made in *Nishi*. The unusual facts may have been to blame, or perhaps it was the unusual treatment of those facts. In any event, judges, lawyers, and students hoping to find a better understanding of the resulting trust may be disappointed by this latest case.

I. THE FACTS

This long running legal saga began with a nuisance. In 1996, Rascal Trucking Ltd. (Rascal) leased land from Kismet Enterprises Inc. (Kismet). The lease contained a covenant in which Rascal agreed "to hold harmless Kismet from any and all liabilities resulting from Rascal's operations on the property."[7] The land was zoned for "topsoil processing" and Rascal obtained a permit to deposit 15,000 cubic yards of topsoil on the land. After neighbours complained about the dust, the City of Nanaimo resolved that the soil was a nuisance and ordered its removal. Rascal's petition to quash the resolution was denied at first instance, granted by the British Columbia Court of Appeal,[8] and finally denied again by the

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1 P Birks, "Restitution and Resulting Trusts" in S Goldstein, ed, *Equity and Contemporary Legal Developments* (Jerusalem: Humaccabi Press, 1992) 335; W Swadling, "A New Role for Resulting Trusts?" (1996) 16 LS 110; R Chambers, *Resulting Trusts* (New York: Oxford University Press, 1997); P Birks & F Rose, eds, *Restitution and Equity: Resulting Trusts and Equitable Compensation*, vol 1 (London: Mansfield Press, 2000); R Chambers, "Resulting Trusts in Canada" (2000) 38:2 Alta L Rev 378; R Chambers, "Resulting Trusts" in A Burrows & A Rodger, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 247; E O'Dell, "The Resulting Trust" in C Rickett & R Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford: Hart, 2008) 379; W Swadling, "Explaining Resulting Trusts" (2008) 124:1 Law Q Rev 72; R Chambers, "Is There a Presumption of Resulting Trust?" in C Mitchell, ed, *Constructive and Resulting Trusts* (Oxford: Hart, 2010) 267; J Glister, "The Presumption of Advancement" in C Mitchell, ed, *Constructive and Resulting Trusts* (Oxford: Hart, 2010) 289; J Mee, "'Automatic' Resulting Trusts: Retention, Restitution, or Reposing Trust?" in Charles Mitchell, ed, *Constructive and Resulting Trusts* (Oxford: Hart, 2010) 207; J Penner, "Resulting Trusts and Unjust Enrichment: Three Controversies" in C Mitchell, ed, *Constructive and Resulting Trusts* (Oxford: Hart, 2010) 237; Jamie Glister, "Is There a Presumption of Advancement?" (2011) 33:1 Sydney L Rev 39.

2 2007 SCC 17, [2007] 1 SCR 795 [*Pecore*].

3 2007 SCC 18, [2007] 1 SCR 838 [*Saylor*].

4 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*].

5 2013 SCC 33, 359 DLR (4th) 575 [*Nishi*].

6 *Ibid* at para 22.

7 *Rascal Trucking Ltd v Nishi*, 2010 BCSC 649, [2010] BCJ no 840 (QL) at para 4 [*Rascal Trucking*].

8 *Nanaimo v Rascal Trucking Ltd* (1998), 161 DLR (4th) 177, 109 BCAC 12 (CA).

Supreme Court of Canada.[9] After Rascal and Kismet refused to obey the order, the City removed the soil and added the cost of $110,679.74 to Kismet's tax bill.

That is only the backstory, but it is essential for understanding the chain of events that led Rascal to the Supreme Court of Canada for a second time. It is also helpful to know that the principal of Rascal, Mr. Heringa, "had more than just a business relationship for a period of time" with the principal of Kismet, Ms. Plavetic, and that "Mr. Nishi and Ms. Plavetic have resided on the … property in a common-law relationship since 1997."[10]

After the battle with Nanaimo was lost, Kismet decided that its equity of redemption was worthless and stopped making its mortgage payments. The mortgagee, CIBC, then paid the tax arrears and added this to the mortgage debt. In 2001, CIBC sold the land to Mr. Nishi for $237,500, which left Kismet still owing $60,000 to CIBC. To help Nishi buy the land, Rascal paid $85,000 up front and agreed to be responsible for $25,679.74 of his mortgage. In other words, Rascal contributed $110,679.74 towards the purchase, which was equal to the debt it owed to Kismet.

In 2008, Rascal sued Nishi claiming that he held the land on resulting trust for himself and Rascal as tenants in common in proportion to their contributions to the purchase price. Again, Rascal lost at trial, won in the Court of Appeal, and lost in the Supreme Court of Canada.

II. THE PRESUMPTION OF RESULTING TRUST

The legal effect of a transaction usually depends on the intention with which it was done. For example, if I deliver my book to you, whether this transfers ownership or creates a bailment will depend on whether I intend to make a gift or a loan. The act of delivery is the same in either case. The presumption of resulting trust arises in cases involving apparent gifts, or as William Swadling prefers, "ambiguous transfers,"[11] when evidence of intention is missing. These occur when one person transfers an asset to another or pays all or part of the purchase price for an asset sold to another. The recipient bears the onus of proving that a gift was intended or that the transaction was made for some other reason, such as a loan or in discharge of a debt. If no explanation is forthcoming, the recipient will hold the apparent gift on resulting trust for the apparent donor. Where the apparent gift consists of part payment of the purchase price, the purchased asset will be held on resulting trust for the contributors in proportion to their contributions.

The presumption of resulting trust does not apply to apparent gifts from parents to their minor children.[12] The presumption of advancement applies instead, so that the parents bear the onus of proving that a gift was not intended. Traditionally, the presumption of advancement also applied to apparent gifts from husbands to their wives, but this has been altered partly by statute.[13]

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9 *Nanaimo v Rascal Trucking Ltd*, 2000 SCC 13, [2000] 1 SCR 342.
10 *Rascal Trucking*, *supra* note 7 at paras 3, 20.
11 Swadling, "Explaining Resulting Trusts," *supra* note 1 at 86.
12 *Pecore*, *supra* note 2.
13 See A Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed (Toronto: Carswell, 2009) at 681-90.

At each level, the Court held that Rascal's contribution towards the purchase price gave rise to a presumption of resulting trust in its favour. At trial, Justice Dley held that no gift had been intended, but the presumption was rebutted because Rascal had made the contribution in satisfaction of its debt to Kismet. The Court of Appeal held that the presumption was not rebutted because no gift was intended and no debt was owed by Rascal to Nishi. The Supreme Court restored the trial judgment on the basis that Rascal had intended to make a gift to Nishi.

III. WHAT DID RASCAL INTEND?

The conclusion that Rascal intended to make a substantial gift to Nishi is surprising. There is no doubt that business corporations have the power to make gifts and often do, but the real question is whether Herringa had the authority as Rascal's agent to make such a gift on its behalf? When business corporations make political donations, sponsor charitable or sporting events, or offer prizes to potential customers, those gifts further the best interests of the corporation. When an agent uses corporate assets to buy land for the current common law partner of his ex-partner, that is a very different sort of transaction. It is hard to imagine that Herringa had such authority, and as a donee, Nishi could not claim reliance on his apparent authority. One might expect that this could give rise to claims by Rascal both against Herringa for breach of fiduciary duty and against Nishi to recover the land as the traceable proceeds of misappropriated corporate assets. In *El Ajou v. Dollar Land Holdings plc*, where an agent had misused his principal's money to buy land for a third party, Justice Millett (as he then was) said that this gave rise to "an old-fashioned institutional resulting trust."[14]

Justice Rothstein characterized the contribution to the purchase price as a gift in fulfilment of Rascal's "moral obligation"[15] to Kismet:

> Rascal acknowledged its responsibility for a debt to Kismet related to the tax arrears arising from Rascal's topsoil operation. However, it made no sense for Rascal to make that payment directly to Kismet since Kismet was subject to other liabilities and was essentially defunct. If Rascal had made the payment to Kismet, it would not have assisted Mr. Heringa's friends to obtain title to the property. Making the contribution to the purchase price, therefore, enabled Rascal to live up to its moral commitment in a way that practically benefited Mr. Heringa's friends.[16]

This is no less troubling. Rascal's debt to Kismet was a significant corporate asset held by Kismet which should have been used to pay its creditors. Either Rascal still owed that debt to Kismet, in which case the basis for its contribution to the purchase price failed, or this was a fraudulent attempt to hide Kismet's assets from its creditors. If the latter, then evidence of this illegal purpose should not have been admitted to rebut the presumption of resulting

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14 [1993] 3 All ER 717 at 734; reversed [1994] 2 All ER 685 [*El Ajou*].
15 *Nishi*, *supra* note 5 at para 40.
16 *Ibid* at para 39.

trust.[17] The effect of illegality on the presumptions of resulting trust and advancement has been criticized,[18] and modified in Australia,[19] but it was not even mentioned in *Nishi*.

The approach taken by the trial judge is much easier to understand. Rascal's assets were not misappropriated when it paid $110,679.74 for Nishi's benefit in satisfaction of its $110,679.74 debt to Kismet. The apparent gift to Nishi was not from Rascal, but from Kismet. Justice Dley recognized this when he said, "[i]f any trust was created, it was between Mr. Nishi and Ms. Plavetic."[20] More accurately, it would be a resulting trust for Kismet, which would at least address the problem of the apparent diversion of its assets to the detriment of its creditors.

The Court of Appeal rejected this analysis because Rascal's debt was owed to Kismet and "Kismet had not assigned or transferred Kismet's rights against Rascal to Mr. Nishi."[21] With respect, it did not matter whether the debt had been assigned to Nishi since he was not seeking to enforce it. The important question was whether Rascal's contribution to the purchase for Nishi was accepted by Kismet as satisfaction of Rascal's debt and it appears from the trial judgment that it was. This provides an explanation for the transaction which should rebut the presumption of resulting trust in favour of Rascal and raise one in favour of Kismet.

IV. WHAT IS BEING PRESUMED?

The presumption of resulting trust or advancement applies when a transaction has the outward appearance of a gift but it is not clear what the apparent donor intended. If the presumption of advancement applies, it is assumed that a gift was intended. In other words, the presumption of advancement is "the presumption of a gift."[22] It is often said that the presumption of resulting trust is a presumption that a trust was intended. As Justice Rothstein said in *Nishi*: "In the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price."[23] There are three main difficulties with this approach. First, as Swadling said, "an unexpressed intention to create a trust when proved by evidence does not generate a trust."[24] That intention will not be effective unless it is manifest in the appropriate way. Intention is an important fact, but it cannot have any greater legal effect when presumed than it would have if proven. This is why Swadling regards the presumption of resulting trust as a presumption that the apparent donor made a declaration of trust.

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17 *Gorog v Kiss* (1977), 78 DLR (3d) 690 (Ont CA); *Tinsley v Milligan*, [1993] UKHL 3, [1994] 1 AC 340.

18 See P Birks, "Recovering Value Transferred Under an Illegal Contract" (2000) 1 Theor Inq L 155; The Law Commission, *The Illegality Defence: A Consultative Report* (Law Com No 320 London: 2010).

19 *Nelson v Nelson* [1995] HCA 25, 184 CLR 538. See M McInnes, "Advancement, Illegality and Restitution" (1997) 5:1 Austl Prop LJ 1.

20 *Rascal Trucking*, *supra* note 7 at para 55.

21 *Rascal Trucking Ltd v Nishi*, 2011 BCCA 348, 340 DLR (4th) 284 at para 47.

22 *Pecore*, *supra* note 2 at para 27. Also see para 81. For a contrary view, see Swadling, "Explaining Resulting Trusts," *supra* note 1 at 73.

23 *Nishi*, *supra* note 5 at para 29.

24 Swadling, "Explaining Resulting Trusts," *supra* note 1 at 80. Also see *Byrnes v Kendle*, [2011] HCA 26, 243 CLR 253.

Secondly, even if an intention to create a trust of an interest in land had been manifested, it would not be effective to create a trust unless it was evidenced in writing as required by the *Statute of Frauds 1677*[25] and its descendants. In contrast, the resulting trust is exempt from that requirement because it arises by operation of law in response to the unexplained transaction and not as a presumed declaration of trust.[26]

The operation of the resulting trust was explained in *Hodgson v. Marks*,[27] where an elderly widow transferred her house to her lodger with the intention to create a trust for herself. The lodger then sold the house to an honest buyer who argued that the intended trust was unenforceable against him because it had not been evidenced in writing as required in England by section 53(1) of the *Law of Property Act 1925*.[28] Lord Justice Russell said:

> It was argued that a resulting trust is based upon implied intention, and that where there is an express trust for the transferor intended and declared — albeit ineffectively — there is no room for such an implication. I do not accept that. If an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust, whether the failure be due to uncertainty, or perpetuity, or lack of form. It would be a strange outcome if the plaintiff were to lose her beneficial interest because her evidence had not been confined to negativing a gift but had additionally moved into a field forbidden by section 53(1) for lack of writing.[29]

The resulting trust is not created by the intention to create a trust, but arises in response to the absence of intention to give. This is also how Lord Millett explained it in *Air Jamaica Ltd. v. Charlton*:

> Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest — he almost always does not — since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient.[30]

Thirdly, if the presumption of resulting trust really was a presumed intention to create a trust, then it should be rebutted by evidence that no trust was intended. However, a resulting trust can arise even though the purchase price was contributed by someone who clearly did not intend to create a trust, but also did not intend to benefit the recipient. This can occur when the contributor's money was misappropriated,[31] the contributor lacked mental capacity to declare a trust,[32] or the contributor simply never turned her or his mind to the issue.[33]

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25 29 Cha 11, c 3.
26 Chambers, "Is There a Presumption of Resulting Trust?," *supra* note 1 at 276-80.
27 [1971] EWCA Civ 8, [1971] Ch 892.
28 15 Geo V, c 20.
29 *Ibid* at 933.
30 [1999] UKPC 20, [1999] 1 WLR 1399 at 1412.
31 *Ryall v Ryall* (1739), 26 ER 39; *Merchants Express Co v Morton* (1868), 15 Gr 274; *Re Kolari* (1981), 36 OR (2d) 473 (Dist Ct); *El Ajou*, *supra* note 14; *Evans v European Bank Ltd*, [2004] NSWCA 82, 61 NSWLR 75.
32 *Goodfellow v Robertson* (1871), 18 Gr 572.
33 *Lattimer v Lattimer* (1978), 82 DLR (3d) 587 (Ont H Ct J); *Brown v Brown* (1993), 31 NSWLR 582 (CA).

In *Nishi*, Justice Rothstein presented the presumptions of advancement and resulting trust as opposing and exhaustive categories: when confronted with an unexplained contribution to the purchase price, the court must decide whether the contributor intended to make a gift or create a trust. These may well be the most likely possibilities, but there are at least three others. First, the payment could have been made in satisfaction of a debt or some other legal obligation. As discussed above, this was the finding of the trial judge and provided the best explanation of the unusual facts. Secondly, the payment could have been advanced as a loan. Indeed, if it was also established that the recipient had deposited the title deeds (or duplicate certificate of title) with the contributor, this would give rise to an inference that the recipient intended to mortgage the land to the contributor and would produce an equitable mortgage.[34] Thirdly, due to ignorance, incapacity, or inadvertence, the contributor may have had no relevant intention whatsoever, as discussed above.

If an apparent gift turns out to be a loan or in satisfaction of a debt, this evidence would rebut either presumption. There would be no gift and no trust, but a different transaction with different legal consequences. Justice Rothstein said that the "trial judge erred in distinguishing between a gift and intention to create a beneficial interest for the transferee but that error was inconsequential."[35] However, this distinction is important. It does matter whether the contributor is a creditor, and if so, whether he or she has a security interest in the property. Whether the recipient gave value or is merely a donee can also be important for a variety of issues such as taxation, fraudulent preferences, and defences available to bona fide purchasers.

If it turns out that the contributor had no relevant intention, this would rebut the presumption of advancement. It would also displace the presumption of resulting trust (since there is no room for a presumption once the relevant facts are known),[36] but it would still produce a resulting trust. While the transaction is no longer unexplained, the explanation does not establish any valid basis for the operation of a presumption.

The resulting trust responds to an absence of basis in much the same way as the resulting use arose in response to an absence of consideration. As Peter Birks said, "[a] 'consideration' was once no more than a 'matter considered', and the consideration for doing something was the matter considered in forming the decision to do it."[37] This was how consideration was understood in the days of the resulting use. When land was transferred, a consideration was needed to pass the use to the recipient. It could be valuable consideration, such as a bargain and sale, but could also be kinship or love and affection. In the absence of consideration, the land would be held on a resulting use for the transferor.

When the resulting trust began to take shape, it operated in a similar fashion. As Lord Nottingham said in *Grey v. Grey*, "[g]enerally and *prima facie*, as they say, a purchase in the name of a stranger is a trust, for want of consideration, but a purchase in the name of a son

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34 See *North West Trust Co v West* (1989), 101 AR 257 (CA).

35 *Nishi*, *supra* note 5 at para 35.

36 *Mackowik v Kansas City*, 94 SW 256 at 262 (1906), per Lamm J: "Presumptions …may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

37 P Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 223 [Birks, *Law of Restitution*].

is no trust, for the consideration is apparent."[38] And as Lord Eyre famously said in *Dyer v. Dyer*:

> [T]he trust of a legal estate … results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor.[39]

Since "consideration" has now acquired a special meaning within the law of contracts, that term is best avoided in this context. However, the principle underlying the resulting trust remains the same: if there is no basis for an apparent gift at the plaintiff's expense, a resulting trust will cause it to be transferred to the plaintiff.

V. RESULTING TRUSTS AND UNJUST ENRICHMENT

Mr. Nishi's appeal to the Supreme Court of Canada succeeded because the presumption of resulting trust was rebutted by evidence of Rascal's intention to make a gift to him. He had also argued that "the purchase money resulting trust … should be abandoned in favour of the doctrine of unjust enrichment" because of "overlap with the doctrine of unjust enrichment in terms of purpose … and overall lack of flexibility in terms of what can be considered relative to unjust enrichment."[40] This argument was flatly rejected. Justice Rothstein said that "in the absence of harm, confusion or other disadvantage, I am not satisfied that conceptual overlap is a sufficient reason to abandon the purchase money resulting trust".[41] He went on to say:

> While flexibility is no doubt desirable in certain areas of the law, the purchase money resulting trust provides certainty and predictability because it relies on a clear rule for determining who holds the beneficial interest in a property. Absent strong dissenting opinions in this Court, contrary decisions in provincial appellate courts or significant negative academic commentary that would justify disturbing such a settled area of the law, there is no reason to abandon the purchase money resulting trust.[42]

This is reminiscent of *Soulos v. Korkontzilas*, where the Supreme Court of Canada rejected an argument that the traditional categories of constructive trust should be abandoned in favour of a "constructive trust based exclusively on unjust enrichment."[43] Chief Justice McLachlin said that "the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence."[44] Justices Sopinka and Iacobucci dissented for two main reasons: "First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate

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38 (1677), 36 ER 742 at 743.
39 (1788), 30 ER 42 at 43.
40 *Nishi*, *supra* note 5 at paras 22, 25.
41 *Ibid* at para 26.
42 *Ibid* at para 28.
43 [1997] 2 SCR 217 at para 16 [*Soulos*].
44 *Ibid* at para 25.

deference.… Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment."[45]

In both *Soulos* and *Nishi*, it was made clear that the modern law of unjust enrichment does not displace the traditional categories of trusts. *Soulos* confirmed that constructive trusts based on unjust enrichment formed a newer general category of constructive trusts alongside the traditional categories.[46] In *Nishi*, the relationship between resulting trusts and unjust enrichment was not explored. Justice Rothstein said: "Mr. Nishi's first argument is that since the purchase money resulting trust essentially responds to unjust enrichment, it is unnecessary to retain it as a separate doctrine. Even if the purchase money resulting trust is considered to be an inherently restitutionary concept, I would still not give effect to this argument."[47]

Do resulting trusts respond to unjust enrichment? In *Garland v. Consumers' Gas Co.*, Justice Iacobucci said: "As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment."[48]

The first two elements are always satisfied whenever a resulting trust arises. The defendant has received an asset that was provided wholly or partly at the plaintiff's expense. The resulting trust compels the defendant to give up that asset or the proportionate share that was provided by the plaintiff. The contentious issue is whether there is an absence of juristic reason for that enrichment.

If, as Justice Rothstein suggested, the resulting trust gives effect to the plaintiff's intention to create a trust, then it is really no different from an express trust. It does not respond to unjust enrichment but more properly belongs with other transactions that give effect to the manifest intentions of the parties, such as express trusts, wills, gifts, and contracts. The main difficulties with this approach are discussed above. Even when the plaintiff's intention to create a trust is proven, the resulting trust does not give direct effect to that intention, but responds to the absence of intention to give. If that intention is effective to create a trust (for example, because writing is not required to create an *inter vivos* trust of personal property), that trust is express. If it is not effective, then there is no valid basis for the recipient's enrichment and a resulting trust arises.

Perhaps the presumed intention to create a trust is being used as an artificial device to achieve restitution of unjust enrichment. When the presumption of resulting trust applies, the onus shifts to the defendant to prove that the transaction was a gift or that there was some other basis for it. Of course, proof of an intention to give also proves that there was no intention to create a trust. However, the task of the defendant is not merely to prove that the plaintiff never declared a trust. All the cases would have been argued and decided differently

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45 *Ibid* at para 53.
46 *Ibid* at para 36.
47 *Nishi*, *supra* note 5 at para 26.
48 *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629 at para 30 [*Garland*].

if that was the real issue. The defendant must establish a basis for keeping the enrichment for her or his own benefit.

If the presumed intention to create a trust operated in this way, it would be the equitable equivalent to the common law's implied promise to pay which was used to effect restitution of unjust enrichment back when that was regarded as a form of quasi-contract.[49] Just as the common law has outgrown the implied promise, so should equity move past the presumed intention to identify the real reason for imposing a resulting trust. It is, in Canadian terms, the absence of juristic reason for the enrichment. Every resulting trust can satisfy all three elements of the Canadian test for unjust enrichment.

Recognizing that resulting trusts respond to unjust enrichment would not alter the traditional categories in any way. It would simply provide a coherent explanation and defensible justification for their continued existence in modern society. Nor would it encroach on the territory now occupied by the cause of action for restitution of unjust enrichment established in 1980 in *Pettkus v. Becker*[50] and applied in countless cases since then, including *Garland*. Resulting trusts would occupy an additional category of responses to unjust enrichment, working along side the modern cause of action.

The broad category of unjust enrichment now includes several different causes of action in Canada. In this sense, it is like the category of civil wrongs (which includes various torts, breach of contract, and breach of trust) or the category of manifestations of consent (including contracts, gifts, and wills, as discussed above). According to *Kingstreet Investment Ltd. v. New Brunswick (Department of Finance)*,[51] restitution of *ultra vires* taxes operates separately from the cause of action for unjust enrichment in Canada even though the payment of an *ultra vires* tax satisfies the three-part test set out in *Garland* as an enrichment of the government at the taxpayer's expense without juristic reason. The cause of action in *Kingstreet* now sits alongside the cause of action in *Garland* within the broader category of claims based on unjust enrichment.[52] This is different from Australia and England, where the recovery of *ultra vires* taxes is regarded as restitution of unjust enrichment.[53] Similarly, "the mistaken payment of a non-existent debt" is generally regarded as the "core case" of unjust enrichment,[54] and yet in Canada, the recovery of money paid by mistake operates outside the cause of action for unjust enrichment,[55] but within the same category.

The need for multiple subcategories within the broader category of unjust enrichment was explained in *Kingstreet*. The new cause of action was established in *Pettkus* to provide for the distribution of family assets at the end of a marriage or similar relationship. This involves

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49 *Sinclair v Brougham*, [1914] AC 398 at 415 (HL (Eng)); Birks, *Law of Restitution*, *supra* note 37 at 29-39.

50 [1980] 2 SCR 834 at 847-48 [*Pettkus*].

51 2007 SCC 1, [2007] 1 SCR 3 [*Kingstreet*].

52 R Chambers, "Restitution of Overpaid Tax in Canada" in S Elliott, B Häcker & C Mitchell, eds, *Restitution of Overpaid Tax* (Oxford: Hart, 2013) 303.

53 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*, [1994] HCA 61, 182 CLR 51; *Deutsche Morgan Grenfell Group plc v Inland Revenue*, [2006] UKHL 49, [2007] 1 AC 558; *Sempra Metals Ltd v Inland Revenue Commissioners*, [2007] UKHL 34, [2008] 1 AC 561; *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners*, [2012] UKSC 19, [2012] 2 AC 337; R Williams, *Unjust Enrichment and Public Law* (Oxford: Hart, 2010) at 32-35.

54 P Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at 3.

55 *BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 SCR 504.

the exercise of discretion to produce a fair distribution with due regard for the reasonable expectations of the parties. These factors are not relevant to the citizen's right to recover *ultra vires* taxes, nor should they affect the right to recover a mistaken payment. As *Nishi* confirms, this is also true of the traditional categories of resulting trusts.