

**Law 680**

**Unjust Enrichment**

**McInnes**

## Part I – Introduction

### A. The Nature of the Subject

#### UNJUST ENRICHMENT IN A NUTSHELL THREE SEMINAL CASES

##### *Moses v Macferlan*

A third party named Jacob issued promissory notes to the plaintiff. The plaintiff in turn endorsed the notes to the defendant, but only on the latter's undertaking to not seek recovery on the notes from the former on the basis of his endorsements. Contrary to the promise, the defendant successfully brought an action against the plaintiff for the amounts represented by the notes. The plaintiff then brought an action seeking recovery of the payments. The defendant resisted, arguing, *inter alia*, that liability can lie only if an express or implied promise to do so can be established. Lord Mansfield recognized that in the circumstances of the case, such a promise was implausible; a recipient of money obtained by way of adverse suit does not promise repayment. Nevertheless, he allowed recovery on the basis of a promise implied (or imposed) law:

“If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (*'quasi ex contractu'* as the Roman law expresses it). ... This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex a quo et bono*, the defendant ought to refund. ...In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”

Analysis: transfer from Moses enriched Macferlan. Money was transferred b/c of pressure of the law. Macferlan had sued for this money and obtained judgment.

- 1) Law implies a promise to pay but we know it's not true, b/c court imposes promise to pay
- 2) *Quasi ex contractu* – as if upon is a contract got bastardized into “quasi-contract”. It a wrong view that it's a type of contract.
- 3) Equitable action – “discretionary” - this is a mistake. **It is not an equitable action.**

Ratio: Mansfield analysis doesn't work because **there was a juristic reason** from the first judgment (court judgment) for the enrichment and unjust enrichment requires no juristic reason for the enrichment.

- 1) Moses v. Mcferlan could be wrongly decided
- 2) It might be other type of unjust enrichment (disgorgement for a wrong (breach of contract)). Breach of contract usually leads compensation, but since 2001 or will also lead to disgorgement.
- 3) We have no idea what type of unjust enrichment and restitution means.

- In what sense is *assumpsit* premised upon a “promise to pay”?
- When will such “promises” be recognized?
- On what basis will such “promises” arise?
- What is the meaning “*quasi ex contractu*” - *Quasi ex contracto* – as if upon is a contract got bastardized into “quasi-contract”. It a wrong view that it's a type of contract.
- Subsequent complications: 1) unjust enrichment and “equity”, and 2) the ratio of *Moses v. Macferlan*: restitution or disgorgement?

##### *Kelly v Solari*

Facts: Mr. Solari died. He had insured his life. His widow, as his executrix, claimed under the policy and was paid. The insurers later discovered they had not been liable to pay. The policy had lapsed before Mr. Solari's death. He had omitted to pay a premium. The policy had indeed been marked “lapsed”, but when the claim was made the office never checked and paid out.

Issue: Can widow recover under the policy was mistakenly paid out?

Decision: No, unless at retrial, the jury was to find the insurers had not been mistaken, or even if they had been mistaken, the widow was bound to repay.

Ratio: **Where money is paid to another under the influence of a mistake, that is, on the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.**

- When there is an unjust enrichment, the reason why restitution is obligatory is never a contract and never a wrong. Strict liability
- Fault has nothing to do with unjust enrichment, it's strict liability
- Why do you get the transfer reversed? 1) Until 2004, we thought company could recover is b/c of a mistake, defect in mental process 2) 2004 – the only reason is b/c of absence of juristic reason of why D should be enriched by P
- Liability in private law generally is premised upon fault or breach. Why is restitutionary liability strict?
- Why was liability imposed: a) b/c the claimant's intention in conferring a benefit upon D was impaired (before 2004) or b) b/c there was no legal basis for D's enrichment (in 2004)

*Degelman v. Guaranty Trust Co.*

Facts: Aunt promised nephew a piece of land for doing odd jobs and driving her when he lived with her, but there was no agreement in writing.

Issue: Can nephew get the land for the acts he did?

Decision: Nephew gets \$3000 for services rendered, despite the fact that Statute of Frauds rendered the contract unenforceable.

Ratio: **The deceased having received the benefits of the full performance of the contract by the respondent, there is an obligation to pay the fair value of the services rendered to her.**

This case was a clear recognition of unjust enrichment in Canada.

- Aunt was enriched, nephew suffered deprivation by driving her around and there is no juristic reason that nephew works for free.
- Cannot enforce the contract, restitution never looks forward (cf: contract looks at expectation damages). Restitution reverses transfer.
- Why did P fail in contract but succeed in unjust enrichment? P failed in contract b/c *Statute of Frauds* says contracts regarding land have to be in writing and in this case it was not.
- Explain the significance of "reasonable expectations" under each head of liability. In what sense was the successful claim "quasi-contractual"?
- What measure of relief did P seek contractually? He wanted expectation damages.
- What measure of relief did he receive for unjust enrichment?
  - Restitution in *quantum meruit*
- Explain the difference b/w in principle and in practice.
  - In principle, restitution never looks forward, it only seeks to reverse the transfer and expectation damages from contract is about looking forward. In practice, he got the *quantum meruit* of services, but if he had been successful in expectation damages, would have gotten the land.

Unjust Enrichment: A Summary

- *Tertium quid*
  - A third head of liability
    - Independent of contract and tort
- Truly strict liability
  - Liability triggered by unwarranted transfer of wealth
    - Fault and wrongdoing irrelevant
- Restitutionary response
  - Reverse transfer of wealth

- No consequential relief

## B. The Structure of the Subject

### Birkisian Taxonomy

- Private law dichotomized into causative events and responses
- Causative event = factual occurrence outside of court
- Four species of causative event
  - Consent
    - Provision of gift
    - Possession of ownerless property
    - Bilateral creation of contract
    - Unilateral creation of express trust
  - Wrongs
    - Torts
    - Breach of contract
    - Equitable wrongs (breach of fiduciary duty)
  - Unjust enrichment
    - Autonomous action in unjust enrichment
  - Miscellaneous other
    - Maritime salvage
    - Emergency intervention
    - Generation of taxable income
- Response = legal reaction to causative event
  - Innumerable species of legal response
    - Non-monetary responses
      - Specific performance
      - Injunction
      - Declaration
    - Monetary responses
      - Non-consequential
        - Punitive damages (punishment and deterrence)
        - Nominal damages (symbolic vindication of a right)
      - Consequential
        - Compensation (reparation of P's loss)
        - Disgorgement (divestment of D's gain)
        - Restitution (reversal of transfer of wealth)

### Dangerous Ambiguities

#### Unjust Enrichment by Subtraction

- Rationale: reverse unjustified transfer of wealth
- Cause of action = unjust enrichment
  - Enrichment to D
  - Deprivation to P
  - Reason to reverse transfer
- Invariable response = restitution
  - D must "give back" benefit subtracted from P
    - Reverse transfer of wealth b/w the parties
      - No more than D gained from P (no punishment)
      - No more than P lost to D (no windfall)

#### "Unjust Enrichment" by Wrongdoing + "Restitution"

- Rationale: nullify wrongful gains
- Cause of action = some species of civil wrong (not unjust enrichment)

- Tort
- Breach of contract (AG v. Blake)
- Equitable breach (breach of fiduciary duty)
- Usual response = compensation
  - D must monetarily repair P's loss
- Exceptional response = "restitution"
  - D must "give up" benefit acquired by wrong against P
    - Divest entire wrongful gain
      - D must give regardless of material source of benefit
        - If you write a book that defames money, money came from customers that bought the book, not from the actual writing of the book
      - The above example is disgorgement (give up) rather than restitution (give back)

"Unjust Enrichment" + "Restitution": Alternative Analyses

- Alternative analyses: different actions or remedies drawn from same facts
  - P prima facie entitle to prove any action or remedy
  - P RQ to elect amongst available actions and remedies

Example

Dave tricked Pam out of \$5000. As a result of the same set of events, Dave directly received an additional sum of \$1000 from a third party and Pam directly incurred an additional loss of \$2000.

Pam is entitled to plead in the alternative and to establish every action and every remedy that are supported by the facts.

Identify the causes of action that are available to Pam.

- Unjust enrichment: D was enriched, P was deprived and no juristic reason
- Tort of deceit

Identify the remedies that are available to Pam in connection with each cause of action.

- Unjust enrichment is reversal of wealth which \$5000
- Disgorgement is \$6000 (give up all your gain)
- Compensation is \$7000 (for all of loss)

What cause of action and what remedy will Pam ultimately elect?

- Tort of deceit b/c get the biggest payout

### **Dangerous Ambiguities: Explanations and Conclusions**

"Unjust Enrichment" and "Restitution": Consistently Misleading Ambiguities

- Different rationale: reverse unjustified transfer v. nullify wrongful gain
- Different cause of action: unjust enrichment v. wrongdoing
- Different measure of relief: restitution v. disgorgement

Textbook Inertia and Force of Habit

Historical Explanations

- Common basis in ancient writs of quasi-contract
  - *Indebitatus assumpsit* "being indebted, he promised to pay" – this writ did 3 things. This writ covered too much.
  - True promises
    - Debt arising from voluntary undertaking (contract)
  - "Implied promises" (i.e. imposed obligations: *Moses v. Macferlan*)
    - Debt arising from unjustified transfer (unjust enrichment)
    - Debt arising from wrongful gain (tort, contract, equity)

Virtual Monopoly of Compensatory Concerns

- Traditional focus on reparation of loss
  - Insufficient resources to address less pressing concerns
- Anomaly of gain oriented relief
  - Restitution for unjust enrichment
    - Shared focus of D's gain and P's loss
  - Disgorgement for civil wrongs
    - Exclusive focus on D's gain
- Incomplete dichotomization of private law concepts
  - Loss based (orthodox) v. non-loss-based (unorthodox)
- Recurring need for *tertium quid*
  - Three bases of liability
    - Tort + contract + unjust enrichment
  - Three measures of consequential relief
    - Compensation + disgorgement + restitution

### DANGEROUS AMBIGUITIES THREE TYPES OF ERROR

#### Error #1: Misunderstanding

##### *Moses v Macferlan* (1760 KB)

Moses held three promissory notes drafted by Jacobs. Moses agreed to endorse those notes to Macferlan only after Macferlan promised that he would seek payment from Jacobs and *not* on the basis of Moses' endorsement. In breach of that promise, Macferlan successfully sued on the endorsement and thereby received payment from. Moses.

Moses then commenced separate proceedings (not an appeal) for the purpose of recovering the money paid. The defendant resisted, arguing, *inter alia*, that liability can lie only if an express or implied promise to do so can be established. Lord Mansfield recognized that in the circumstances of the case, such a promise was implausible; a recipient of money obtained by way of adverse suit does not promise repayment. Nevertheless, he allowed recovery on the basis of unjust enrichment.

- Do the facts support a claim for true restitution of unjust enrichment? Can the plaintiff establish an *unjust factor*? Can the plaintiff establish the *absence of juristic reason*?
  - No b/c there was a juristic reason b/c court ordered payment
- Do the facts disclose any other cause of action? If so, what measure(s) of relief are available?

#### Error #2: Oversight

##### *Rosenfeldt v Olsen* (1986 BC CA)

Clifford Olsen was imprisoned for the murder of eleven children. Because many of the bodies remained missing, and because the grieving families sought a sense of closure, Olsen persuaded the RCMP to enter into a contract. In exchange for the whereabouts of the murdered children, the RCMP agreed to pay \$100 000 on trust for the benefit of Olsen's wife and child. (In fact, much of that money was used to discharge Olsen's personal debts.) The families of the murdered children sought "restitution" of Olsen's alleged "unjust enrichment."

- How did the lawyers for the victims' families frame the claim? What was their cause of action? What measure of relief did they seek?
  - Said it was unjust enrichment: D was enriched, P was deprived and no juristic reason for D to keep money – sought restitution
- Did the court come to the correct conclusion?
  - Yes, because the money came from RCMP, not P. Therefore, P was not deprived
- What error did the plaintiffs' lawyers commit?
  - Didn't plead unjust enrichment requiring a wrongdoing
- How should the case have been decided?
  - Should have awarded disgorgement if P pleaded unjust enrichment requiring wrongdoing.
  - McInnes: By pleading true unjust enrichment, the lawyers forgot the other type of unjust enrichment

RQ wrongdoing.

Error #3 – Incoherence

*Lac Minerals v Corona* (1989 SCC)

The plaintiff company possessed information regarding potentially enormous gold deposits in northern Ontario, but it lacked the financial wherewithal to exploit that information. It therefore approached the defendant, a large mining company, with a view to creating a joint venture. Instead, the defendant used the plaintiff's information in order to purchase the properties on its own behalf. The defendant thereby put itself into a position to earn huge profits.

The plaintiff sued on the bases of breach of confidence and breach of fiduciary duty. The majority of the Supreme Court of Canada upheld the former claim but rejected the latter. A differently constituted majority held that the appropriate remedy was an imposition of a constructive trust (rather than monetary damages).

LaForest J., held (in dissent) that there had been a breach of a fiduciary obligation and favored (as part of the majority) proprietary relief. However, he also (wrongly) stated that the success of the claim was premised upon proof by the plaintiff that it had suffered a "corresponding deprivation." He did so on the basis of a line of cases, beginning with *Pettkus v Becker*, which appeared to hold that all constructive trusts are premised upon "unjust enrichment."

- Did D receive an "unjust enrichment" from P? If so, in what sense? D received "unjust enrichment" of information
- Did P suffer a "corresponding deprivation" wrt D's enrichment? In what sense must a deprivation correspond w/ an enrichment for restitutionary purposes?
  - No corresponding deprivation, b/c the land came from a third party – not from P.
- How could LaForest J. satisfy the element of "corresponding deprivation" on the facts?
- How should the case have been decided?

Restitution for Unjust Enrichment Explanations

**Question: Why does unjust enrichment always result in restitution?**

Explanation #1: Formal Alignment

- Relationship b/w causative event and legal response
- Causative event = unjust enrichment
  - Gist of claim: unjustified transfer b/w parties
    - Enrichment to D
    - Corresponding deprivation to P
    - Reason to reverse transfer of wealth
- Legal response = restitution
  - Gist of response: reversal of transfer of wealth
    - Only response that reflects all three elements of the claim
- Incoherent alternatives:
  - Compensation for loss
    - Disregards proof of D's gain
  - Disgorgement of gain
    - Disregards proof of P's deprivation
  - Fulfillment of expectation
    - Disregards inherently backward looking claim

Explanation #2A: True Strict Liability

- Strict liability: an ambiguity
  - Strict liability in wrongdoing
    - Civil wrong = breach of duty
    - Strict liability = breach w/o intention or carelessness
      - Breach of contract, *Rylands v. Fletcher*, dangerous animals
    - Strict liability in unjust enrichment

- Strict liability = no breach of duty
      - Kelly v. Solari (fault irrelevant)
  - Private law presumption against liability
    - Parties assumed to be self reliant and non-accountable
    - Judicial intervention must be specifically justified
  - Threshold to judicial intervention determined by effect of liability
    - Compensation (purely loss based response)
      - Restore P's status quo ante + adversely affect D
    - Disgorgement (purely gain-based response)
      - Restore D's status quo ante + windfall to P
    - Restitution (transfer based response)
      - Restore status quo ante of P and D
  - Compensation and disgorgement – high threshold to liability
    - Liability invariably premised upon breach of duty
  - Restitution – low threshold to liability
    - Liability never premised upon breach of duty
      - Restoration of status quo ante always justified
      - Disruption of status quo ante never justified

#### Explanation #2B: Primary and Secondary Obligations

- Liability for civil wrongdoing: a three stage process
  - Imposition of primary duty (do not be negligent)
  - Breach of primary duty (negligent accident)
  - Creation of secondary duty (repair loss)
- Liability for unjust enrichment: a two stage process
  - Unjust enrichment creates primary duty of restitution
  - Direct enforcement of primary duty (to give back)
    - Non-sensical to analyze response as secondary duty (cf Weinrib)
      - Unjust enrichment creates primary duty of restitution
      - Breach of duty to provide restitution
      - Secondary obligation to provide restitution

#### Explanation #3: Restitution in a “Basket of Remedies”

- Growing trend toward broad remedial discretion
  - Cadbury Schweppes v. FBI Foods
- Dangers of remedial discretion
  - Subjectivity and individualized “justice”
  - Disrespect for legal system
  - Uncertainty in litigation
  - Incoherence and misalignment

#### Perfect Quadrature Thesis

##### Remedial Purposes and Effects

- Remedy given for one purpose may have several effects
  - Paradigm example = restitution
    - Purpose: reverse transfer of wealth
    - Effect 1: restitution of benefit from D to P
    - Effect 2: compensation of deprivation suffered by P
    - Effect 3: disgorgement of gain acquired by D
- Dangers of classification by effect
  - Misunderstanding and uncertainty
    - “Disgorgement” for “unjust enrichment”
      - Purely gain-based relief for wrongdoing?
      - Reversal of unjustified transfer of wealth?

- Misalignment of causative events and legal responses
  - Subtractive unjust enrichment generating “compensation”
    - Possibility of purely loss-based relief for unjust enrichment
    - Possibility of fault RQ in unjust enrichment
- Remedies must be classified by *purpose not effect*. Every remedy has many effects.

#### Birks’ Recantation: Multi-Causative

- Restitution responsive to *every* species of causative event
- Restitution and unjust enrichment
  - An uncontroversial proposition
- Restitution and consent
  - Restitution of benefit may occur consensually
  - Matter of interpretation
    - Repayment of a loan
      - Effect is restitution but purpose is contractual performance
        - What if repay w/ inaccurate interest (mostly restitution)?
        - What if repay at discount (imperfectly restitution)?
      - Reciprocation of a gift
        - Effect is restitution but purpose is gratuity
        - “Restitution” fundamentally misconstrues purpose
          - Purpose is to give “altruistic” not give back (obligatory)
- Restitution and wrongs
  - Wrongdoing may trigger “restitution”
  - A matter of definition and semantics
    - “Unjust enrichment” defined narrowly
      - Autonomous action in unjust enrichment
      - Not unjust enrichment by wrongdoing
    - “Restitution” defined broadly
      - Any remedy of least partially responsive to gain
        - Reversal of transferred benefit (restitution)
        - Divestment of wrong gain (disgorgement)
  - Restitution and other
    - Vindication of asset to P w/ subsisting (equitable) title
    - A matter of substantive classification
      - Recovery in specie of misappropriated trust property
        - Recovery = restitutionary response (purposely give back)
        - Event – unjust enrichment (misc. other)
          - Perhaps not enrichment if title does not pass
            - But enrichment incontrovertible if asset in possession
          - Right of vindication not vulnerable to change of position
            - But defence is not necessary to unjust enrichment

## Part II – Enrichment

### Enrichment

#### Logical Necessity of Enrichment

#### Role of Enrichment

- Establish first element of cause of action
- Partially quantify restitutionary relief (see also deprivation)
- Restitution imposes liability that would hurt D
- Real role of enrichment is that it takes care of the argument “freedom of choice”

#### Tests of Enrichment

- Enrichment if D chose to accept risk of financial responsibility
- Enrichment if in the circumstances there was no choice to exercise

### Enrichment: Three-Stage Test

- Objective enrichment
- Subjective devaluation
- Overcoming freedom of choice

### Objective Enrichment

- Need to have market value
- Straightforward economic approach to first two elements
  - Restitution prima facie personal, rather than proprietary
    - D must give back value received from P
    - Monetary restoration presumes quantifiable valuation
  - Strict liability restitution must never hurt D
    - Restitution must not diminish D's overall patrimony
    - Restitution presumes receipt of money or money's worth

### Example #1

Dave had assets worth \$5000 and debts worth \$2000. By error, Pam discharged Dave's debt. She now seeks restitution for her services. Dave insists that he has a good defence insofar as his assets would decrease from \$5000 to \$3000, despite the absence of any wrongdoing, if he was required to satisfy judgment.

### Should Dave's argue defeat Pam's claim in unjust enrichment?

- No, D had net value of \$3000 before, even if he satisfies judgment he still has \$3000
- We can reallocate wealth, not diminish his wealth

### Example #2

Dave was an aged widower. Although he had assets worth \$5000, and no debts, he was terribly lonely. He begged his niece, Pam, to visit with him on a daily basis. He promised that if she did so, she would "find her reward" after he was gone. Pam dutifully visited with Dave every day for the better part of a year. She did not provide any services aside from companionship. At the time of his death, Dave was, by his own admission, happier than he had been in years. Pam now points at the \$5000 that Dave left behind and sues his estate for the value of her services. Should Pam's claim succeed?

- No, "love and affection" is not consideration. No dollar value can be placed on it.
- "Love and affection" cannot be an enrichment because it is not an objective enrichment (no market value)

*Peel v Canada*  
(1993 SCC)

The *Juvenile Delinquents Act* allowed judges to select from amongst a variety of orders when dealing with juvenile delinquents. Some of those options involved expense to the federal government. Judges instead imposed orders that involved expense for the municipality. Those orders were later declared invalid. The municipality sued the federal government for unjust enrichment.

- Was there an objective benefit? No, an "incontrovertible benefit" is found in the gain of a "demonstrable financial benefit" or saving of an "inevitable expense" and P did not prove that
- What if the defendant conceded that it had received a moral or political benefit insofar as its goals were fulfilled? No, only an economic benefit can be an objective benefit.

### Objective Benefit – Services – Pure Services

- Enrichment undeniably possible for some services
  - Marketable residuum = exchange value left in D's hands
    - Services involved in building of a boat
    - Services involved in repairing an existing boat
      - Restitution possible from sale proceeds of new or improved boat

- Discharge necessary expense = elimination inevitable cost to D
  - Services involved in removing snow from sidewalk
    - Restitution possible from money otherwise spent on services
- Enrichment controversial for pure services
  - Pure service = no marketable residuum or saved expense
    - Services consisting of classic concert (cf Beatson)
    - Services consisting of university lecture (cf. Grantham & Rickett)

#### Example #1

Pam is a world famous pianist. As a result of a clerical error, she believed that she had a contract to perform a private concert at a party that Dave was hosting. After Pam had performed, however, the parties realized that they never actually had an enforceable agreement. Pam therefore wants to sue for unjust enrichment. Dave resists liability by arguing that, while he certainly enjoyed the concert, he was not left with anything from which he could provide restitution.

- Leaving other elements of the claim, did Dave receive an objective benefit from Pam? Should an order for restitution be possible?
  - D did receive an objective benefit because there was a request. Anytime you request something, it is implied that you will show financial responsibility. He had autonomy.

#### Example #2

Pam is a world famous legal scholar. Dave expects to become a lawyer and to specialize in commercial litigation. As a result of a clerical error, Pam believed that she had a contract to deliver a lecture to Dave. After Pam performed her services, however, the parties realized that they never actually had an enforceable agreement. Pam therefore wants to sue for unjust enrichment. Dave resists liability by arguing that, while he certainly found the lecture to be useful, he was not left with anything from which he could provide restitution.

Leaving other elements of the claim, did Dave receive an objective benefit from Pam? Should an order for restitution be possible?

- Yes, there is market residuum of human capital

#### Pure Services in Canadian Law

- *Degelman v. Guaranty Trust + Pettkus v. Becker*
- Focus on receipt of market value
  - Provision of ephemeral objective benefit sufficient
    - E.g. concert
  - Retention of marketable residuum or human capital unnecessary
    - Enhanced boat or useful lecture

#### Objective Benefit – Interrupted Services – Time of Receipt

- Is D enriched if P does not fully perform?

#### *Planché v Colburn*

(1831 CP)

The defendant asked the plaintiff to undertake research and prepare a manuscript on ancient armor. After the plaintiff had completed a great deal of work, but before he had delivered a single page, the defendant terminated the relationship.

- Assuming that contractual relief was not available, did the plaintiff enjoy a claim in unjust enrichment?
  - Yes, there was request and D exercised a choice to use P's effort and time
- More specifically, had the defendant received an objective benefit despite the fact that he had not received anything “tangible” from the plaintiff?
  - Had the objective benefit of his time and effort for research
- Focus on receipt of value
  - Services may possess MV apart from anticipated end product
    - Colburn had use of Planche's time and effort
- Enrichment ultimately confined to relevant services

- Distinguish b/w performance and preparation
  - Restitution for research *but not* for travel to the library
- Perhaps distinguish pure service from end product
  - Restitution for services if D requested product *and* services
  - No restitution for services if D requested product *only*

### Subjective Devaluation

- Test of objective benefit too broad
  - Liability potentially contrary to D's freedom of choice
- Protection for D's freedom of choice

### Nature of Subjective Devaluation

- Relevant that D did not choose risk of financial responsibility
  - Even if one did provide an objective benefit, can force benefits behind people's backs. Just b/c it has a market value, doesn't mean one has to pay for it if they didn't ask for it.
  - It's not whether the person felt enriched or not, it's about if they made the choice.

#### *Estok v Heguy* (1963 BC SC)

The defendant owned land that he used as pasture. He entered into an apparent sale contract with the plaintiff. Because he intended to use the land for crops, the plaintiff spread a great deal of manure. The parties then realized that the contract was invalid. The plaintiff sued the defendant for the value of the manure. The defendant resisted the claim on the basis that the fertilizer did not help his pasture business.

- Was D objectively enriched? Yes, b/c people would pay for fertilizer
- Was D entitled to subjectively devalue? Yes b/c D didn't choose to have manure on his land and doesn't help w/ pasture business.
- Was the recognition of an enrichment consistent w/ D's freedom of choice?

### Subjective Devaluation – Absence of Choice – Partial Devaluation

#### *Ashman v Ministry of Defence* (1993 CA)

The defendant was married to a man who, because he was in the military, was entitled to housing at a substantially reduced rate (£95 per month). After her husband moved out on his own, the defendant was legally obliged to vacate the premises. She nevertheless remained in possession because she could not afford alternative accommodation on the open market (£472 per month) and because the local government had not yet provided her with subsidized council housing (£145 per month). The Ministry of Defence brought an action for trespass to land and sought "mesne profits" (*i.e.* disgorgement of the defendant's ill-gotten gain).

- Was the defendant enriched? If so, what was the *value* of that enrichment? Does your answer depend upon whether the question is asked *objectively* or *subjectively*?
  - Yes – the value of the enrichment is what the rent would have been on the open market
- Should the defendant, as a tortfeasor, have been allowed to subjectively devalue her objective benefit?
- Should the court have accepted the defendant's argument that she "had no choice" but to trespass? Is it meaningful to speak of "freedom of choice" in such circumstances?
- This is focusing on her freedom of choice: did she have any other choice but to stay and if so, at what value. Court: can't subjectively devalue the benefit entirely (can't say it isn't worth anything) or devalue it down to 95, but can partially subjectively devalue. We will accept that you only would have exercised your freedom of choice to a certain extent. Ct. accepted that the woman would have accepted rent capped at the council amount of 145.
- Subjective devaluation isn't all or nothing – can be a partial basis, where she would have exercised her choice. Ask: At what point would she have accepted the risk of being financially responsible.
- Prof: thinks this was decidedly based on sympathetic facts – should have made her liable to value of 472, b/c we don't know if she would have gotten approved for the amount of 145.

### The Need for Tests of Enrichment

- Test of subjective devaluation too restricted

- Bare denial of choice not always credible
- Liability potentially denied despite sufficient regard to choice

#### The Role of Tests of Enrichment

- Aim to overcome subjective devaluation
  - P proves liability is consistent w/ D's freedom of choice

#### Tests of Enrichment

- Tests based on D's exercise of choice
  - Request
  - Free acceptance
- Tests based on absence of need for choice
  - Incontrovertible benefit
    - Money
    - Realizable financial gain
    - Discharge of a necessary expense
    - Specific restitution

#### Request

##### Request as a Test of Enrichment

- Subjective devaluation overcome by active choice
  - Request prima facie denotes desire for benefit and willingness to pay
- Contract
  - Request may trigger true contract
    - Unjust enrichment only if contract somehow evaded (Kuny v. Wigle)
- Acceptance of financial responsibility
  - Request may reveal price or import market value
  - Request relevant to extent that recipient exercised free choice

#### Example #1

Dave asked Pam, a landscaper, to provide certain services. After performing the services for four hours, Pam demanded payment.

- Is Dave liable to Pam? If so, on what basis and in what amount?
  - Yes, D is liable to P b/c of request. Liable for *quantum meruit*.
- What if Dave mistakenly believed that Pam was offering her services free of charge in the hope of building up goodwill in the area?
- What if Dave mistakenly believed that Pam offered to perform for \$100, even though Pam actually intended to charge \$100 per hour?
  - Value of benefit has to be tied in exactly with the nature of the request. Dave requested entire job for \$100 – not \$100/hr. Liable for the nature of request for the \$100.
- Part performance
  - Request *may be* relevant if services partially performed
    - Prima facie enrichment to extent of performance
    - Presumption rebuttable by circumstance

#### *Sumpter v Hedges*

(1898 CA)

The defendant asked the plaintiff to build two houses and a stable for, 565. The plaintiff performed work worth, 333, but was unable to complete the job and therefore abandoned the work site and the materials that he had obtained for the project. The defendant refused to pay for the plaintiff's services, but he did use the abandoned materials and completed the job himself.

- Was the defendant enriched? If so, to what extent?
  - He requested, which overcomes "freedom of choice" argument.
  - What is his enrichment if he paid a 3<sup>rd</sup> party 300 to finish the job?

- His willingness to pay 565. His enrichment was 265 if he paid a 3<sup>rd</sup> party 300 to finish. He exercised his freedom of choice of 565.
  - **P assumes risk of 565 and he receives anything less than that, then it is not enrichment.**
  - Court's conclusion – liable materials that were used to finish up structure. P had choice to use the materials or not, and in choosing to use them he had to pay for them.
  - No liability for labour b/c P didn't request for partial performance.
  - Prof thinks liable for only 565. D requested for and exercised a choice to pay 565 minus what he had to expend.
- Illegitimate demand
    - Emphatic request negating implicit promise to pay
      - “Reprehensible seeking out test” (Burrows)
        - If you reprehensibly sought out, you still have to pay for what you would have paid at market value. Ex - A fleeing bank robber seeks out doctor to fix leg while putting a gun to doctor's head. Bank robber has no intent of paying, but would still be liable for the amount.
  - Subjective overvaluation
    - Request importing promise to pay in excess (in absence) of market
      - What happens if the request actually decreases objective market value?
        - Ex - painting a house purple decreases value of house. Although the paint decreases objective value of the house, it doesn't matter. Look at the value of the service. If the request for the service is a dis-benefit – still have to pay.

*Brisebois v Modern Music*  
(1993 Ont Gen Div)

Early in their marriage, the plaintiff and his wife did not have enough money to buy a house. An arrangement was created whereby the defendant company (Modern Music), which was owned by the plaintiff's father-in-law (Emile Gauvreau), purchased a house for \$72 000 and took care of the taxes, insurance and mortgage payments. The plaintiff and his wife were allowed to live there in exchange for their promise to pay \$300 per month and to be responsible for maintenance and repairs.

The plaintiff eventually established a successful business of his own. Over the course of many years, he used a substantial amount of income to extensively expand and renovate the house. The marriage deteriorated and the plaintiff left at his wife's request. The house was sold for \$500,000, with net proceeds of \$188 642. The plaintiff sued in unjust enrichment with respect to the improvements that he had made. He sought restitution in the form of a constructive trust for a half interest in the property.

- Was the plaintiff entitled to relief? If so, in what measure and form?
  - Yes, for renovations.
  - Father in law knew son in law was doing in work and son in law had a reasonable expectation of living in the house or to be paid for the renovations
  - Prof thinks ct. went too far. House has already been sold, no reason to give proprietary judgment. Only had obligation to give personal judgment. (Father owes debt to son in law personal debt)

Free Acceptance

- Basis of operation
  - Request = active exercise of choice
  - Free acceptance = passive exercise of choice

Free Acceptance and Passive Choice

- Can (and should) mere passivity support liability?
  - Has D exercised any choice at all
  - Can liability be justified in the absence of choice?
  - Problem w/ free acceptance in Canada is that it covers too many situations. Free acceptance applies where you ought to have known (constructive notice) that payment was expected. If

you ought to have known, it doesn't sound like you exercised a choice.

#### Example #1

Dave brings his car into Pam's auto body shop to have the antennae replaced at a cost of \$100. As a result of her own clerical error, Pam believes that Dave wants his car repainted. She sends a message to Dave indicating that she expects to be paid \$2000 for her services. Dave unreasonably - though honestly - disregards that message. After the work is done, Pam demands payment.

- Has Dave been enriched? Should Dave be held liable?
  - Dave would be liable if you accept "free acceptance" on constructive notice

#### Incontrovertible Benefit

- Money
- Money's worth
  - Realizable financial gain
  - Discharge of a necessary expense
- Property returnable *in specie*

#### Incontrovertible Benefit – Money

- Peculiar character of money
  - Invariably valuable regardless of who holds it
  - Invariably valuable to same extent
  - Fungible therefore invariably effectively restorable in specie

#### Incontrovertible Benefit – Services

- Peculiar character of services
  - Services are valued by some but not others
  - Recipient may or may not subscribe to MV
  - Services can never be restored in specie
- Incontrovertibly beneficial services
  - Reduced scope for "unquestionable benefit"
  - Incontrovertible benefit if D placed *as if* money received

#### Incontrovertible Benefit – Financial Gain Already Realized

- P renders services from which D *has* realized financial gain
  - *As if* D received money from P
- *Prima facie* enrichment to the extent of the gain
  - Ex – car mistakenly repaired, then you sell the car, realized financial gains. The extra money that you made is directly from the service

#### *Olchoway v MacKay* (1996 Sask QB)

In the mistaken belief that he had purchased a farm property, the plaintiff cleared the land of rocks and planted a canola crop at a cost of \$3000. The defendant, who knew that the plaintiff was laboring under an error, stood silently by. After the work was completed, the defendant purchased the land from the owner. The defendant subsequently harvested the crop for a profit of \$4000.

- Did the defendant receive an incontrovertible benefit?
  - Yes, there was an enrichment - it's a realized financial gain.
    - Prof said the court got it wrong by looking for a pre-existing relationship. They said there cannot be an injustice unless they have a bilateral relationship.
- Should the court have imposed liability? If so, for what amount?
  - Yes, realized financial gain
- What if, forewarned of the plaintiff's claim, the defendant deliberately sold the crop at a reduced price of \$2000? *Quantum meruit*???

#### **Incontrovertible Benefit – Financial Gain *Not Yet* Realized**

### Example

Dave owns a car. As a result of an error, Pam provided services to the vehicle. While those services were not necessary, they have increased the market value of the vehicle from \$20 000 to \$30 000. Dave hasn't sold the car.

- Has Dave been enriched?
  - Yes, Dave has been enriched by from the increase in value on his car.
- What if Dave has \$10 000 in his bank account? Is it sufficient for Pam to show that while restitution would result in a re-allocation of Dave's assets, it would not diminish the totality of his wealth?
- What if Dave has no other assets with which to satisfy judgment? Is it sufficient for Pam to say that Dave could sell the car for \$30 000, pay \$10 000 to her, and use the remaining \$20 000 to buy a replacement vehicle?
  - No, because you shouldn't have to sacrifice any chattel b/c it's against freedom of choice
- Under what circumstances (if any) should the analysis be affected by Dave's argument that his car is somehow unique or irreplaceable?

### Formulating the Test

- Prospect of financial gain
  - Mere possibility?
  - Bare probability?
  - Strong likelihood?
  - Certainty?
    - We don't know the answer b/c there is no consistent answer from the courts.
    - Asset in question has a lien – when and if you sell the asset, then you have to turn over the realized profit
- Nature of property
  - Should some assets be immune to incontrovertible benefits?
  - Should some assets be immune from risk of practically forced sale?
- Lien pending realization
  - Enrichment if and to extent gain eventually realized
    - D relieved of need to liquidate asset
    - P defeated by obstinacy and depreciation

### *Gidney v Shank*

(1995 Man QB) (Overruled on other grounds)

A thief stole the defendant's dilapidated canoe and sold it to the unsuspecting plaintiff for \$100. The plaintiff spent \$800 in materials and many hours on repairs. The value of the canoe increased to \$1900. The police seized the canoe and returned it to the defendant. The plaintiff claimed restitution for the repairs. At the time of trial, the defendant still had possession of the canoe.

- Was the defendant enriched?
  - Yes, there was incontrovertible benefit because there was a realizable financial gain by selling the canoe
    - When you pay off judgment – can use money to buy another dilapidated canoe. It doesn't restrict freedom of choice because you end up with status quo.
      - CA – said there was no special relationship until D requests services
      - What test of enrichment did the judge use? Use incontrovertible benefit when there is an absence of choice
      - Did the court reach an appropriate result on the facts? MBCA did not.

### Incontrovertible Benefit – Discharge of Necessary Expense

- Enrichment may be positive or negative
  - Receipt of \$100 = release of \$100 debt
    - Judgment satisfied by restoration of \$100
    - Judgment satisfied by redirection of \$100 intended for debt
  - Enrichment if expense necessary
    - The easy case: legal necessity
      - Generally no latitude as to cost or timing of discharge

*Carleton v Ottawa*  
(1964 SCC)

Norah Baker was an indigent person in need of social assistance. Although the statutory obligation to provide care fell on the City of Ottawa, a clerical error caused the County of Carleton to provide housing and other necessities of life to Baker. The county was entitled to restitution. In light of the legislative scheme, the City had no choice but to care for Baker. It consequently could not complain that a duty to reimburse the County would inappropriately violate its freedom of choice.

- The difficult case: factual necessity
  - Generally some latitude as to cost and timing of discharge
  - Identification of “necessity” □ requires policy decision
    - Sufficient inevitability in “necessities of life”
      - Clothing, food and shelter
    - Uncertain standard for other practical “necessities”
      - No test has been devised

*Craven-Ellis v Cannons*  
(1936 CA)

The plaintiff was purportedly hired by the defendant company to act as a manager. After the services had been fully performed, the parties discovered that their apparent contract was void because the people with whom the plaintiff had supposedly reached the agreement were not, at the relevant time, qualified to act as directors. The plaintiff therefore claimed restitution for unjust enrichment.

- Was the defendant enriched? If so, on what basis?
  - D was enriched on P’s services
- Had the defendant freely accepted the plaintiff’s services?
  - Previously, thought this case was free acceptance. Why can’t we use free acceptance/request? The explanation is that P that signed didn’t have capacity and therefore didn’t have capacity to free accept or request. Didn’t have capacity for contract, so there is no capacity in unjust enrichment.
- Had the plaintiff provided an incontrovertible benefit?
  - Yes, b/c it was a service
  - It is an incontrovertible benefit and company needed a manager factually. We accept factual necessity.

Enrichment to *true extent* of necessary expense

- Discount if D denied benefit of credit over time
  - Mistaken discharge of L/T interest free loan
- Discount if D uniquely positioned to discharge below face value
  - Discharge of debt for which D held partial right of set off (when there is a discount)
  - Don’t look at full face value of debt, look at NPV

*Chernichan v Chernichan Estate*  
(2002 Alta QB)

The deceased died insolvent: his assets were worth \$34,000 whereas accumulated debt was \$102,600. His will named his wife as his personal representative and directed her to dispose of his estate after paying his “just debts, funeral and testamentary expenses, and income taxes.” At the time of death, however, the parties were separated and involved in matrimonial property proceedings. The funeral therefore was arranged and purchased by the Applicant, who was the deceased’s brother. The Applicant subsequently brought a claim in unjust enrichment and claimed restitution of his expenses.

The court held that restitution might be available from any person charged with a *higher obligation* to bury the dead. In that respect, it recognized a hierarchy of obligations: estate—spouse—child—municipality. In any event, however, relief is confined to “reasonable expenses,” as determined by the deceased’s culture, religion and station in life, and the financial status of the estate. (There is a minimum necessary as a matter of dignity even if the deceased was insolvent.) Moreover, relief will be denied if the intervener acted with a gratuitous intention.

- 1) Necessary expense – there was a legal necessity to pay for funeral

2) Need to get right amount – everyone is entitled to baseline expense. Beyond “reasonable costs” – need to look at station in life, culture for the reasonable costs. (Fact specific situation)

## Enrichment and Passage of Title

### Passing of Title

#### *R v Milne*

(1991 Alta CA)

Property passes if, and only if, the transferor gives the very object he believes and intends to the very person he believes and intends. That is so whether or not his willingness and decision to do so stem from fraud, forgetfulness, or spontaneous mistake, so long as the chattel and the recipients are the ones he intends. But if he mixes up the recipients, or mixes up the property, and gets the wrong chattel or wrong recipient, no property passes. That is so whatever caused his mistake, be it fraud or mishap.

- Title transfers when the right thing is given to the right transferee (even if fraud occurs)

### If Title Does Not Pass

- *Vindicatio*
  - No persisting title left to vindicate
- Wrongs
  - Remote recipient not liable for wrongdoing if title passed on transfer

#### *Lipkin Gorman v Karpnale*

(1991 HL)

Cass was a partner with the plaintiff law firm. In breach of obligation, he withdrew money from the firm’s account. Because he had signing authority on that account, he was able to acquire good title. Cass then used the money to gamble at the Playboy Club. When the firm discovered the misappropriation, it successfully sued the club for restitution. Lord Goff confirmed that an action in conversion was impossible because Cass was able to pass title to the club.

- Why did the club not have a defence of a bona fide purchase?
  - It’s a gambling club – you can’t enforce a gambling debt. A court will never enforce a gambling debt. You can’t be a bona fide purchaser for a gambling debt.
- Unjust enrichment
  - D enriched by receipt of title and purchasing power

#### *Re Ames*

(1946 Ch)

Ames gave, 10 000 to his son as a wedding gift. Title was transferred on the wedding day. The marriage was annulled eighteen years later as a result of the son’s inability to consummate the relationship. Ames was entitled to recover the surviving portion of the gift by way of a resulting trust that constituted restitution for unjust enrichment. Although the recipient continued to hold legal title, a beneficial (equitable title) arose in favour of the donor.

### If Title Does Not Pass

- *Vindicatio* – available in equity
- Birks – no title means there is no enrichment
- McInnes disagrees b/c still get the use of the thing

#### *MacMillan v Bishopsgate Investment Trust*

(1996 CA)

Certain shares were held in trust for the plaintiff. In breach of trust, those shares were used as security for loans. As a result of that loan arrangement, the defendant acquired legal title, though not equitable title, to the shares. The plaintiff attempted to have the shares returned to it by way of a *vindicatio* - it simply pointed to the shares as persisting equitable owner and said, “Those shares are mine. Give them back.” While sound in theory, the claim failed in practice because the defendant had acquired legal title as a *bona fide* purchaser of the shares.

- Why was the relevant event *not* unjust enrichment?

- Is it correct to say that D was not enriched? What if the property were not shares, but rather a vehicle?

#### Wrongs

- D potentially liable for wrongful interference w/ property
  - Wrongdoing presupposes that P retained property interest
    - Wrongdoing – incompatible w/ enrichment
  - Title passed by compulsory purchase upon payment of claim

#### Unjust Enrichment

- Enrichment: factual, legal or electable
  - Grantham & Rickett: no enrichment if title persists (wrongs)
  - Birks: enrichment *if P chooses* to relinquish title (restitution)

#### *Moffatt v Kazana*

(1967 QB)

The plaintiff had 2000 in 1 notes. Rather than deposit the money into a bank account, he put them into a biscuit tin and hid the tin in his chimney. When he subsequently sold his house, he forgot about the tin. The defendant, who had purchased the house, discovered the tin while working on the chimney. The court held that the money was not included in the house sale and that the plaintiff continued to be owner. The court also held that, aside from any wrongdoing, the plaintiff was entitled to restitution of the value of the notes. Of course, once he exercised that choice, title to the money passed to the defendant.

- Title to house passed, but title to cookie tin did not. E.g. I give you my coat w/ watch in pocket, you don't get the watch.
- Birks: Can sue in either conversion if you want to keep your title or you can give up title and get restitution
- Grantham and Rickett: Impossible to get restitution, can only get it for wrongdoing

#### Change of Position

##### Freedom of Choice – Front and Back: Enrichment and Change of Position

##### Freedom of choice and enrichment

- No enrichment unless subjective devaluation overcome
  - D chose to accept responsibility (request + free acceptance)
  - No choice to be made (incontrovertible benefit)
- Freedom of choice and change of position
  - Liability defeated to extent of exceptional expenditure in good faith reliance

##### Example

Pam mistakenly paid \$10 000 to Dave. Dave spent \$6000 on a trip to Tahiti and \$4000 on rent. After Pam discovered the mistake and demanded restitution, Dave argued change of position. He insisted that in the absence of wrongdoing, he should not be adversely affected by the need to satisfy judgment

- How is the defense of change position related to test of enrichment and the concept of freedom of choice?
- Will the defense apply w/ respect to trip to Tahiti? What if Dave had been planning the vacation all along and only fortuitously used the money received from Pam rather than from pre-existing resources?
  - Not liable for trip to Tahiti. He exercised autonomy on the honest belief that money was windfall. If he had taken the trip otherwise, he would be liable.
- Will the defense apply w/ respect to rent?
  - No, b/c he has to spend money on rent. That expense would have been incurred w/ or w/o the windfall.

#### Review Exercise

##### *Upton-on-Severn RDC v Powell*

(1942 CA)

A fire broke out in Powell's barn. He telephoned to the police inspector at the Upton police office, told him that there was a fire and asked for the fire brigade to be sent. The Upton brigade was informed, immediately went to the fire,

and worked for several hours putting it out. In fact, although Powell's farm is in the Upton police district, it is not in the Upton fire district - it is in the Pershore fire district. Powell is entitled to have the services of the Pershore fire brigade for free, but not those of the Upton fire brigade. Finally, the Upton fire brigade is entitled to go to a fire outside its area and, and if it does so, it is entitled to make a contract for the repayment of its expenses.

- Assuming that no contract was ever created, does a claim of unjust enrichment arise on the facts?
- More specifically, did the Upton's fire brigade's services confer an enrichment upon Powell or anyone else.

#### Enrichment

- Objective enrichment which prevented the barn from burning down
- Subjective devaluation: cannot find enrichment b/c apparent vitiation of intent. D could argue he requested services' thinking it was free and it was a reasonable assumption. It didn't import a willingness to pay.
- However, there was an incontrovertible benefit of financial gain realizable. We have a realizable financial gain b/c fire brigade saved someone from losing value.
- It was a factually necessary expense b/c we look at D at the time of the fire. Only Upton was there to respond, and it was a factually necessary expense.
- As b/w the two fire departments: There was an incontrovertible benefit b/c Pershore had legal obligation to intervene and would incur expenses if they put the fire. They are liable once they were notified of the fire. Before they were notified, Pershore would not be liable b/c they didn't know there was fire.

#### Corresponding Deprivation Does Two Things

- 1) Provides standing to sue
- 2) Quantification of remedy

Restitution is the highest amount common to gain and loss

#### Implications of Deprivation and Expense

##### Standing to Sue

- P must be material source of D's enrichment
  - Enrichment and "injustice" insufficient to trigger liability

##### *Payer v Peerless Plating Rack Co* (1994 Ont Gen Div)

Payer and Milanese owned a company. The company had purchased a life insurance policy on Payer's life. The company was the beneficiary of that policy. Due to personal differences, Payer sold his interest in the company to Milanese. The termination contract gave Payer the option of either: (i) taking over the policy and naming a new beneficiary, or (ii) allowing the policy to lapse. He chose the latter. By error, however, the company continued to pay the policy's premiums. The company consequently received \$100 000 upon Payer's death. Payer's widow sued the company for unjust enrichment.

- Was the company enriched? Yes.
- Was the company enriched at Payer's expense?
  - No corresponding deprivation, there was no nexus b/w them. Have to show a material loss, and the gain came from your pocket.
- Was the company's enrichment "unjust" (unjustifiable)? Yes.
- The company was enriched, but it was enriched at it's own expense, and not the widow's. She paid nothing, and she had no connection to the money, so no corresponding deprivation.
- Are you entitled to purchase a life insurance policy on my life? No, insurance law – insurable interest.

##### Quantification – Surplus Value of Services

- Benefit of services may exceed cost of services

##### Example #1

Dave owns a car. As a result of an error, Pam paid a third party \$1000 to make certain repairs to that vehicle. Dave subsequently sold the vehicle. As a result of the improvements, he received \$15 000 rather than \$12 000.

- Identify and quantify Dave's gain and Pam's loss.

- Dave gained \$3000
- Pam's loss \$1000
- Would liability for \$3000 be truly "restitutionary"?
  - No, b/c we only look what is lesser b/w \$3000 and \$1000 and reverse that amount
- Is there any justification for stripping Dave's benefit?
- Is there any justification for awarding Pam more than she lost?
- Does redistributing a windfall justify the societal expense of litigation?

#### Quantification – Passing On

- P may shift ultimate financial cost to a third party

#### Example #2

Based on *Air Canada v British Columbia*  
(1989 SCC)

The government purportedly imposed a tax upon Dave's business. After paying the tax, Dave increased the prices that he charged to his customers in an attempt to recover his expense. Dave subsequently discovered that the tax was *ultra vires*. He therefore sued the government for restitution.

- Did Dave suffer the "expense" associated w/ the government's gain?
  - If we accept passing on, Dave did not suffer the "expense" because he passed it along to his customers.
- Did the government's gain correspond to D's loss?
- Should D be entitled to (fully) recover his mistaken payment?
- Should a government be entitled to retain an unconstitutional tax?
- Is any other party entitled to restitution from the government? (Consumers)
  - In Canada, we deny relief b/c we accept the "passing on" defence. While company did pay, they raised prices and it was the consumer that paid the money.
  - Problems: 1) there is a juristic reason for payment b/c customer is in contract w/ company 2) presumes that when company pays gov't, raises prices, it recoups some but not all b/c of the elasticity of demand has changed.

#### Example #3

Based on *Roxborough v Rothmans*  
(2002 HCA)

The government purportedly imposed a tax on cigarette sales. The legislative scheme required the defendant wholesaler to collect the tax from the plaintiff retailer, who in turn collected the tax from the customers. Given the product and the amount of the tax, elasticity of demand was zero. At the time that the tax was declared unconstitutional, the defendant held money received from the plaintiff (and hence from the customers).

- Is this case materially different from the last?
  - Yes, b/c D wholesaler was holding the tax. We know the nature of the tax (small) on an addictive substance (so no elasticity of demand)
- To what extent (if any) should liability be imposed?
  - Ct – as long as there is a transfer from P to D, there is enough standing to sue and it's for the full amount of tax. The retailer gets it back even if retailer has no corresponding loss. It's pure windfall b/c they are not going to redistribute to customers.
  - Dissent: No economic explanation to redistribute windfall, and should leave it where it lies.

#### *R v. Geller*

The defendant government purportedly imposed a tax on dressers of furs. The government identified Nu-Way to be such a party. Nu-Way consequently paid \$20 000 to the government. Under the terms of an agreement, the plaintiff reimbursed Nu-Way for that expense. It was then discovered that Nu-Way was not a dresser (because sheepskins are not furs). The legislative scheme provided Nu-Way with a right of restitution. Nu-Way failed, however, to commence its statutory claim within the limitation period. The plaintiff therefore brought a common law claim in unjust enrichment against the defendant government.

Decision: Geller was not entitled to refund.

Analysis: The person obliged to pay the tax is the dresser, and the person entitled to a refund is the dresser if the tax has been paid through mistake or fact. In the present case, the dresser Nu-Way paid the tax and it was the sole person entitled to a refund. Geller has no legal right to claim. While Geller reimbursed Nu-Way, but this payment does not give a right of action to the former, which the law denies.

- Was the government enriched? Yes.
- Was the government enriched vis-a-vis Nu Way? Yes.
- Was the government enriched vis-a-vis P? No.
- Is the decision reconcilable w/ *Air Canada v. BC*
  - Yes, b/c *Air Canada* case had a global price, whereas this case the price and tax were separate
  - “Passing on” is considered a different transaction and we don’t care whether Nu-Way shifted the burden onto Geller.
  - This case is recognition that (cf. *Kingstreet*) corresponding deprivation is about quantification of restitution. Passing off matters b/c we want to know if they shifted the burden upon somebody else or did they actually pay it.

#### Exercise #1

Assume the same facts as in *R v M Geller*, with the exception that: (i) the purported taxing statute did not provide a statutory scheme of recovery, (ii) the only possible source of relief is the common law action for unjust enrichment, and (iii) while the limitation period has *not* lapsed, Nu-Way has not made a claim against the government.

- Does Nu-Way have a right to recover from the gov’t? Yes.
- Does P have a right to recover against the gov’t? [No, because money did not come from P]
- Does P have a right to recover against Nu-Way?

#### *R v Geller*: Alternative Analyses

1. Actual: statutory claim no passing on defense
  - > *Nu-Way v Canada*
    - Statutory: lapsed period not unjust (juristic reason)
  - > *Geller v Canada*
    - Statute: no standing to sue
    - Common law: juristic reason for enrichment (scheme period)
  - > *Geller v Nu-Way*
    - Common law: payment within enforceable contract (allocated risk)
2. Alternative: common law claim + passing on defense
  - > *Nu-Way v Canada*
    - *Prima facie* liability under unjust enrichment
    - Claim defeated by passing on (no deprivation)
  - > *Geller v Canada*
    - Windfall to government + deprivation to plaintiff
    - Possible difficulty with reason to reverse
      - Discharge contractual obligation to Nu-Way (juristic reason)
  - > *Geller v Nu-Way*
    - Payment within enforceable contract (allocated risk)
    - Term possibly void or avoidable

#### Three Party Complications – Interceptive Subtraction

##### Subtractive Enrichment

- Paradigm – simple subtraction
  - D receives enrichment directly from P
- Variation – interceptive subtraction
  - D intercepts benefit otherwise passing from third party to P
  - When is interception the same as the above

##### **False Examples of Interceptive Subtraction**

- Mistaken deed of gift – donor dies before recognizing error

- Administration of estate – improper disposition – action by intended beneficiary

### Imperfect Gift

Based on *Re Rose* (1952 CA)

Xavier wished to establish a trust in favor of Pam. He therefore delivered shares to Dave to hold on trust for Pam. Although Xavier had done everything possible to create the trust, the share transfer would not be finalized until the company exercised its unfettered discretion to accept Dave as legal titleholder and Pam as beneficial titleholder. The company declared a dividend of \$5000 on the shares in question. Six months later, it accepted the share transfer. Dave now insists that he is entitled to full benefit of: (i) the shares, and (ii) the \$5000 dividend.

- Who will suffer the corresponding deprivation if Dave retains the shares for himself? **Pam.**
- Who will suffer the corresponding deprivation if Dave retains the \$5000 dividend for himself? Pam.
  - If X has done everything to perfect the gift, equity will perform a constructive trust and say that before the express trust forms, a constructive trust forms
  - Effect of a constructive trust: P has immediate benefit of the dividends b/c she has equitable title. If D takes dividends, P can sue D on her equitable title.

### Attornment

Xavier gave property to Dave with instructions for Dave to give the asset over to Pam. Dave “attorned” by acknowledging his obligation to perfect Pam’s gift. Dave nevertheless subsequently refuses to deliver the property to Pam.

- Who suffered the deprivation corresponding to Dave’s enrichment? Pam.
- Whose property did Dave hold after attornment? It’s Pam’s
  - As you as you “attorn”, it’s already P’s money
    - These above cases aren’t cases of interceptive subtraction b/c the person already had legal or equitable title even though P didn’t have possession.

### Interceptive Subtraction: Orthodox Formulation

- **Sufficient nexus iff P otherwise certain to receive benefit from 3<sup>rd</sup> party**
- **There are two tests that must be met**
  - **Certainty iff third party legally indebted to P**
    - No assurance otherwise that P deprived by D interception
  - **Deprivation iff D interception discharged third party debt to P**
    - Third party otherwise remains liable to P – no deprivation

### *Boyer v Dodsworth*

(1796 CP)

The plaintiff was the sexton of the Salisbury Cathedral. As such, he was in a position to show the cathedral to tourists. Although there was no regular fee for such tours, tourists often paid a gratuity, depending upon the sexton’s “behavior and civility.” The defendant usurped the plaintiff’s position as sexton, took tourists through the cathedral, and earned a substantial amount in gratuities. The plaintiff sued on the basis of an interceptive subtraction.

- Was D liable to P for unjust enrichment?
  - Not, he did not suffer deprivation b/c customers weren’t legally obliged to pay him (it was gratuitous)

### Exercise #1

Pam is a landlord. She was legally entitled to receive \$1000 in rent from Xavier (a tenant). Unjustifiably presenting himself as Pam’s agent, Dave received \$1000 from Xavier. Xavier has since become insolvent.

- If X does not remain liable to P, was D unjust enriched at P’s expense?
  - Third party was legally indebted to P
  - D interception discharged third party debt to P, so D was unjustly enriched at P’s expense
- If X does remain liable to Pam, was Dave unjustly enriched at P’s expense? If not, is Dave entitled to retain the money? No deprivation, if the X remains liable.

### Interceptive Subtraction: Canadian Formulation

- An ill conceived position

*Citadel General Assurance v Lloyds Bank Canada*  
(1997 SCC)

The plaintiff sold car insurance. It appointed Drive On to act as its collecting agent. Drive On was obliged to place premium payments received from customers into a special trust account. In breach of trust, Drive On deposited those payments into its general account with the defendant bank. That general account was overdrawn. The bank therefore treated funds in Drive On's account as repayment of the (overdraft) loan. Drive On then became bankrupt and ceased to operate. The bankrupt estate contained no assets. The plaintiff therefore sued the bank for knowing receipt (an equitable species of unjust enrichment arising from the misdirection of trust funds). Although the bank clearly was enriched by repayment of Drive On's (overdraft) loan, an issue arose regarding the plaintiff's corresponding deprivation. The court held that "the Bank's enrichment deprived Citadel of the insurance premiums collected on its behalf. ... [T]he fact that the premiums were never in Citadel's possession does not preclude Citadel from pursuing a restitutionary claim. After all, the insurance premiums *would have accrued* to Citadel's benefit. The Bank has been enriched at Citadel's expense."

- Can that decision be explained by the orthodox conception of interceptive subtraction
  - No, SCC watered the test down
- Could P establish a corresponding deprivation w/o relying upon the doctrine of interceptive subtraction?
  - SCC said it was interceptive subtraction b/c bank was in the middle
    - Test employed: "But for bank's interception, then Drive On would have paid to P". However, this is not the correct test to use. There is a difference b/w factual probability and legal certainty. Court fundamentally altered the test by watering the test down. Also, this was a trust (and therefore not interceptive subtraction). This was a direct subtraction b/c P had beneficial title and bank did take away from D.
  - SCC was very far off the paradigm of interceptive subtraction.

*Lac Minerals v International Corona Resources*  
(1989 SCC)

The plaintiff disclosed to the defendant confidential information regarding gold beneath land owned by Mrs. Williams. In breach of confidence, the defendant used that information to buy the land for itself. The trial judge found that if the defendant had not done so, the plaintiff "would *probably* have acquired the...property."

On appeal to the Supreme Court of Canada, LaForest J (wrongly) held that the plaintiff was entitled to a constructive trust over the property in the defendant's hands only if the plaintiff suffered the deprivation corresponding to the defendant's enrichment. Simple subtraction was impossible because the defendant acquired the property directly from Mrs. Williams C not from the plaintiff. LaForest J purportedly overcame that difficulty by means of the doctrine of interceptive subtraction.

"When one talks of restitution, one normally talks of giving back to someone something that has been taken from them.... [The plaintiff] never in fact owned the Williams property and so it cannot be >given back' to them. However, there are concurrent findings below that but for its interception by [the defendant], [the plaintiff] would have acquired the property. ... In my view, the fact that [the plaintiff] never owned the property should not preclude it from pursuing a restitutionary claim. ... [The defendant] has therefore been enriched at the expense of [the plaintiff]."

- Is the doctrine of interceptive subtraction relevant to a claim for disgorgement of property received through breach of confidence?
  - No, this is a proprietary disgorgement of gain of which the remedy would be constructive trust of the gold mine.
- Could the orthodox test of interceptive subtraction be satisfied on the basis of TJ's finding of fact?
- On the basis of this case, state the Canadian test of interceptive subtraction.
- Is the Canadian formulation of interceptive subtraction closely analogous to paradigm of simple (direct) subtraction?
- Does the Canadian formulation of interceptive subtraction create a nexus b/w the parties sufficient to trigger restitution under the strict liability action in unjust enrichment?
  - SCC said there was corresponding deprivation from P. The deprivation was land, not info.

- SCC said there was interceptive subtraction b/c probably the land would go from Mrs. Williams to P. This is not the test; the test has to be legal certainty that land would go from Mrs. Williams to P. Also, there were no facts that Mrs. Williams would sell land to P.
- Prof: this case was an absolute mess

*Jones v Jones*  
(1997 CA)

Mr. Jones was a member of a partnership. He legitimately wrote a cheque for 10 000 on the partnership's account and gave it to his wife. She used that cheque to invest in potato futures. Within six months, the investment had grown to 50 000. Mrs. Jones deposited that amount into her account with Raphaels (a bank). Sometime after Mrs. Jones initially received the cheque, the partnership became bankrupt. By virtue of a provision in the *Bankruptcy Act*, title to the initial cheque retroactively vested in the trustee in bankruptcy. The trustee in bankruptcy argued that it consequently was entitled to the full amount of, 50 000. Mrs. Jones rejected that claim. Raphaels extricated itself from the dispute by paying, 50 000 from Mrs. Jones's account into court.

- Who sued whom for what?
  - Trustee actually brought an action in debt against Raphaels
- On what basis did the court reach its decisions?
  - Judgment simply recognized that the trustee, rather than Mrs. Jones, was able to "give good receipt to Raphaels" in exchange for the enhanced fund?
- Do the facts support a claim based on simple subtraction?
- Do the facts support a claim based on basic interceptive subtraction?
- How did Millet LJ view the action in unjust enrichment on the facts?
- Who gets \$50 000? Millet says this is not a case of unjust enrichment.
  - Birks said the full \$50 000 would go to trustee. Restitution is the lesser of either D's gain or P's loss. The only transfer was \$10 000. What happens to other \$40,000?
    - Birks' new idea is that Mrs. Jones is enriched by a) principal of \$10,000 and b) enriched by the earning capacity of \$10 000 (time value of money/interest/potato futures) \$40,000.

Expanded Interceptive Subtraction #1: Creating Unjust Enrichment

- P did not intend D to receive benefits
  - P – entitled to restitution for principal and opportunity
- D did not intend P to receive investment service
  - D entitled to restitution for profitable service
- Quantifying the earning opportunity
  - P entitled to recover benefits actually conferred
    - D received 10 000
    - D received time use of 10 000
      - Time use represented by commercial lending rate
      - Restitution = 10 000 + compound interest
- Off setting the claims
  - D restores benefits received from P
  - D retains benefit received from third party
- By eliminating one unjust enrichment, we are creating another.
  - Mrs. Jones didn't intend to give investment skills to P.
  - There is a market for Mrs. Jones investment skills and P was enriched by windfall.
    - Time value of money isn't \$40 000, it's just commercial interest. McInnes believes giving \$40 000 to P is wrong, b/c it is not restitution, it's disgorgement of D's gain.
  - Historically, compound interest is not available unless there is a breach of fiduciary duty and could only get simple interest
  - If you want proper unjust enrichment restitution is \$10 000 + time value of money (commercial interest)
- What about taking money and buying a winning lottery ticket?
  - If we accept Birks' theory of interceptive subtraction – the lottery ticket winnings will be given to P
  - P then "gets" what she never (would have) owned

*Edwards v Lee's Administrator*  
(1936 Ky CA)

The parties owned neighboring properties. Those properties straddled a spectacular set of underground caves. The caves were, however, accessible only from the defendant's property. The defendant conducted tours through the entire structure, including the portion beneath the plaintiff's land, and earned considerable profits. The plaintiff claimed to be entitled to a proportionate share of those profits.

- How did P phrase his action?
  - "Ex contractu"
- On what basis did court award relief?
  - The ordinary actions in assumpsit to recover for the use and occupation of real estate
  - CL action for mesne profits
  - Like tortiously using a trade name, there may be no tangible loss other than violation of right. The law, in seeking an adequate remedy for the wrong, has been forced to adopt profits received, rather than damages sustained, as basis of recovery.
  - A wrongdoer shall not be permitted to profit from own wrong
  - Birks - Transfer b/w the parties was the earning opportunity – McInnes – if that's true, then every case of disgorgement for wrongdoing is restitution for unjust enrichment
- **If we accept the new test of interceptive subtraction – we start mixing unjust enrichment and unjust enrichment RQ a wrong**

Third Party Complications – Successive Recipients

Successive Recipients – Persisting Proprietary Base

- Persisting proprietary base creates direct nexus through successive recipients.

*Lipkin Gorman v Karpnale*  
(1991 HL)

Cass was a partner with the plaintiff law firm. In breach of obligation, he withdrew money from the firm's account. Because he had signing authority on that account, he was able to acquire good title. Cass then used the money to gamble at the Playboy Club. Upon discovering the misappropriation, the firm successfully sued the club for restitution. Contrary to the actual facts, the court approached the claim on the basis that the firm retained ownership at the moment that Cass paid the money to the club. The court held that the club was liable and that it was irrelevant that the money had passed through the hands of a third party (Cass).

- Was the club enriched at the firm's expense?
- Aside from its claim against the club, did the firm have a right to restitution from Cass? If so, would the firm be entitled to double recovery?
  - HL – Could recover from club. The only complication was this was a gambling club, and gambling is unenforceable debt. It didn't work on the facts:

Example #1

Assume the same facts as *Lipkin Gorman v Karpnale* with the exception that: (i) the firm truly did retain title to the money in Cass's hands, and (ii) Cass used the money to buy a lavish dinner at a five star restaurant, and (iii) Cass now has no assets and, being imprisoned for his theft, no prospect of earnings.

- Is the restaurant liable to the firm?
  - No. If instead of a club, it was a restaurant – could defeat liability all together b/c if you honestly received money in good faith or contract, then BFPV

Example #2

Pam lost \$5000 on a bus. Ben (age six) found the money and later gave it to his father, Dave. Dave in turn gave the money to a security firm that provides services to the bus company. Although Pam has proven that she retained title to the money through the various transfers, she is unable to collect \$5000 from the firm because the firm has become bankrupt and has no assets. Pam has therefore sued Ben and Dave.

- Was Ben enriched at P's expense?
- Was D enriched at P's expense?

- There was enrichment, but defense is change of position.

### Three Party Complications – Procured Enrichments

#### Procured Enrichments – Identifying the True Transferor

##### Example

Pam held an account at CIBC. She drafted a cheque for \$5000 and named Dave as the payee. CIBC honoured the cheque and Dave received \$5000 cash.

- Who suffered the deprivation corresponding to Dave’s enrichment if Pam’s account held \$6000 at the time that Dave presented the cheque to CIBC for payment?
  - P suffers deprivation b/c bank is agent. P can sue D for unjust enrichment
- Who suffered the deprivation corresponding to Dave’s enrichment if Pam’s account held \$1000 at the time that Dave presented the cheque to CIBC for payment?

#### *Khan v Permyer* (2001 CA)

Pam owned a restaurant and a lease of the premises. She wanted to sell the restaurant, and assign the lease, to Xavier. Dave, the landlord, agreed to allow the assignment only upon satisfaction of a debt that Pam allegedly owed to him. Pam therefore asked Xavier to pay Dave, on the understanding that Pam would subsequently repay Xavier. After Xavier paid Dave, however, it was discovered that the purported debt between Pam and Dave was non-existent. Pam therefore sued Dave for restitution.

- At whose expense was Dave enriched?
- If Xavier had refused to extinguish the purported debt, despite his promise to Pam, would Dave have been entitled to sue Xavier for payment of purported debt?
- If Xavier had paid the alleged debt, but was then unable to extract payment from Pam, would Xavier be entitled to restitution from Dave?
  - P has a right to sue. It’s like an attornment case. X is like an agent, and has right to look P for payment.

### Three Party Complication – Leapfrogging

#### Initially Valid Contract

- Unjust enrichment generally subsidiary to contract
  - Contract as voluntary allocation of risk
  - Voluntary allocation of risk cannot be avoided by unjust enrichment

##### Example

Pam held an account at CIBC. She drafted a cheque for \$5000 and named Dave as the payee. CIBC honoured the cheque and Dave received \$5000 cash. At the time of payment, CIBC mistakenly overlooked the fact that Pam’s account held only \$1000. By the time the bank realized its error, Pam’s account had been cleared out, she had become bankrupt, and she now has no assets. CIBC therefore wants to recover its mistaken payment from Dave

- Was Dave enriched by CIBC’s payment
- Was Pam enriched by CIBC’s payment?
- Can CIBC “leapfrog” Pam to sue Dave?
  - No, because if there is a contract – cannot go to unjust enrichment because the parties have allocated the risk.

#### *Brown & Davis v Galbraith* (1971 CA)

Dave purchased property insurance on his car from an insurer. After an accident damaged the car, the insurance company fulfilled the policy by entering into a contract with a garage for repairs. After the repairs were completed, the car was re-delivered to Dave. The garage now wants to be paid for its services, but the insurance company is bankrupt and has no assets.

- Was Dave enriched by the garage’s services?
- Was the insurance company enriched by the garage’s services?

- Can the garage “leapfrog” the insurer to sue Dave?
  - No, there was a contract b/w insurance company and garage and the risk had been allocated.

*Giffen Lee Wagner v Zellers*  
(1993 Ont Gen Div)

A claim was brought against Zellers. Under the terms of a liability insurance policy, an insurer took over conduct of the case. The insurer entered into a contract with Giffen Lee for the provision of services. Before the case was closed, the insurer became insolvent. Zellers then instructed Giffen Lee to proceed with the case and to settle the claim. After doing so, Giffen Lee demanded payment from Zellers. Zellers was willing to pay for the services rendered after it instructed Giffen Lee, but not for the services the Giffen Lee performed under its contract with the insurer

- Is Zeller’s liable to Giffen Lee wrt the earlier services?
  - No, because Giffen Lee had a contract with the insurer. The right result is Zellers should be only liable once insurer became insolvent and Zellers told Giffen Lee to settle the claim.
  - However, court gave restitution for the entire period

No Initially Valid Contract

Example #1

Pam mistakenly paid \$500 to Xavier. Honestly believing that he was entitled to that money, Xavier made an extraordinary gift of the same \$500 to Dave

- Did Pam suffer the deprivation corresponding to Xavier’s enrichment? If so, is Xavier liable to Pam for restitution of \$500?
  - Yes, but it will b/c of the defence of change of position.
  - Academics say you can only go to immediate enrichee, not subsequent enrichee. There is no precedent.

Example #2

Assume the same facts as Example #1, with the exception that Xavier did not use the same \$500 that he received from Pam - but rather a different \$500 - to provide the gift to Dave.

- Did Pam suffer the deprivation corresponding to Xavier’s enrichment? If so, is Xavier liable to Pam for restitution of \$500?
- Did Pam suffer a deprivation corresponding to Dave’s enrichment? If so, is Dave liable to Pam for restitution?
  - Do we RQ proprietary interest, or is it enough there is a causal relationship?
  - Precedent – no answer, but prof: if no proprietary interest, as long as you can show causal connection, that is enough

Example #3

Assume the same facts as Example #1, with the exception that Xavier immediately knew that Pam’s payment was mistaken.

- Did Pam suffer the deprivation corresponding to Xavier’s enrichment? If so, is X liable to Pam for restitution of \$500?
  - Yes and yes.
- Did Pam suffer a deprivation corresponding to Dave’s enrichment? If so, is Dave liable to Pam for restitution of \$500?
- Did Pam suffer a deprivation corresponding to Dave’s enrichment? If so, is Dave liable for restitution of \$500?
- In determining Dave’s liability, is it relevant that: (i) Xavier is bankrupt and has no money? Or (ii) although Xavier is solvent, Pam prefers not to sue him?
  - **P has 2 causes of actions, against X or against D. X did not use money as a good faith reliance on windfall. P can sue X or D, but not both (like joint and several liability)**

Unjust Factors

Before 2004 – we used “unjust factor”

After 2004 – we use “absence of juristic reason”

### Species of Unjust Factors

- Impaired intention “I didn’t mean it”
  - Ignorance – “I had no idea”
  - Powerlessness – “I couldn’t stop you”
  - Vitiating intent – “I didn’t really *mean* it”
    - Spontaneous error “I made a mistake”
    - Induced error “I was made to do it”
      - Duress “I was afraid”
      - Undue influence “I was under her thumb” – (psychologically manipulated”
    - Incapacity “I couldn’t make any decision”
      - Infancy “I was too young”
      - Senility “I was too old – you knew it”
      - Corporate ultra vires – “We had no authority”
  - Qualified intent “I intended the transfer – but only if...”
- Unconscientious receipt “You acted badly by receiving it” – (bad faith)
- Policy “You should give it back anyway”
  - Ultra vires taxation (no taxation w/o representation)
  - Emergency assistance (encourage intervention)
  
- Unjust factors are from the CL tradition. There is a belief in CL that there is a presumption against liability and that everyone is responsible for himself or herself. In order for the court to interfere, there must be a good reason – so P has to find an “unjust factor”. CL law comes from cases, not from broad and overarching principles like civil law. Civil law has a code and many areas of law to cover the situations. Whereas in CL – we draw ratios from the cases and develop a “heap of good learning”.
- Unjust factors make sense to the layperson, but there is inelegance and untidiness of a “grab bag” of reasons.

### Absence of Basis

- In the civilian tradition – there is a presumption for liability. They use broad abstractions and principles to decide their cases. The disadvantage is that it doesn’t make sense to the layperson – how do you prove the *absence* of something? But there is elegance and tidiness b/c there is the same explanation for every case.
- Conclusion: Two models – if you were to start from scratch, can choose from either model b/c each has advantages and disadvantages. However, in Canada we switched from common law “unjust factors” to civilian “absence of juristic reason” – made it very difficult to reinterpret the old CL cases.

### The Effect of the Swaps Saga

- The swaps saga is a bet b/w bank and English council that lasted for 10 years. Either picked fixed rate or floating to borrow money. English councils needed money. They assumed swaps were legal but HL said swaps were ultra vires.
  - Issue: If you lost the bet, could you get restitution, why?
    - Mistake or qualified intention?
  - Answer: It was policy. The city council didn’t have authority (capacity), and then have to give money back.

### *Kleinwort Benson v Lincoln County Council* (1999 HL)

The parties entered into a swaps agreement. At that time, the leading cases indicated that such agreements were *intra vires* and hence valid. The parties fully performed their swap. The plaintiff bank lost the wager and the defendant government received a net payment. *Hazell* then held, contrary to prior understanding, that swaps were *ultra vires* and hence void.

The plaintiff bank sued for restitution. The defendant government resisted on the basis of a lapsed limitation period. The plaintiff bank responded by pointing to a statutory provision that extended the limitation period in cases of “mistake” to the time of reasonable discoverability

- HL – said this wasn’t misprediction. Said the law has never been X, but you just didn’t realize it.

- Judicial theory of judge by overruling the old cases is recognizing what the law has always been.
- McInnes believes this is improbable b/c every lawyer in UK thought it was legal for 10 years, and only HL had declared them illegal. He believes this is an orthodox case of mistake (mistake in payment)
- Ratio: Automatic restitution b/c mistake of law

Birks used to believe in “unjust reasons” in 1993, but then changed his mind in 2003 b/c of Kleinwort b/c he believed there was a code language to suggest that HL was going to “absence of juristic reason”

An example that shows “absence of juristic reason” doesn’t work:

Example

Pam lives downstairs from Dave in an apartment building. The building is very poorly constructed. Pam spends a small fortune on heating during a particularly cold winter. Given the laws of convection, and the lack of insulation between floors, Dave is spared the same expense. His apartment is sufficiently heated by the warm air rising from Pam’s apartment. Pam is furious that her heating bill benefited both her *and* Dave. Is she entitled to restitution for Dave’s “unjust enrichment”?

- Analyze the claim in terms of the traditional unjust factors.
  - No claim b/c can’t find an unjust factor
- Analyze the claim in terms of Birks’ civilian-inspired model
  - There is no K, no intention of gift, no disposition of law statute
  - Civilian systems have to agree w/ CL. We don’t know the reason why they would agree b/c they have no cases like this.
  - We have to start from square one and find a new doctrine to deny relief.

*Deutsche Morgan Grenfell v IRC*  
(2006 HL)

The claimant company was a subsidiary of a German company. It paid tax in England, as it was required to do. The underlying tax debt was never invalidated. The claimant was, however, successful in arguing before the European Court that it should have enjoyed the option that was enjoyed by companies entirely situated within England to elect to have a tax paid instead by the parent. If that election had been made, the claimant would not have paid the English tax.

After its success in the European Court, the claimant sought restitution of its English tax payment. The House of Lords allowed recovery. That result is inexplicable and incompatible with the “absence of juristic reason” model. Regardless of an election that it *could have made*, the claimant paid a tax that was, in fact, due and valid. The result can be explained only on the basis of the claimant’s unjust factor of mistake

- HL – believes in using unjust factors (not absence of juristic reason)

Canadian Law

- Prior to *Pettkus v. Becker* we had consistently used traditional unjust factors
- In *Pettkus v. Becker* – used civilian language of “absence of juristic reason” in a CL case and using CL ideas
- After *Pettkus v. Becker*: general application of unjust factors, but w/ occasional application of absence of juristic reason.

*Garland v. Consumers’ Gas*

*Garland v Consumers’ Gas #1*  
(1998 SCC)

Consumers’ Gas is required to apply periodically to the Ontario Energy Board (OEB) for approval of its pricing scheme. Beginning in the 1970s, that scheme included a late payment penalty (LPP) of 5% of unpaid charges.

In 1981, the federal government introduced section 347 of the *Criminal Code* to prohibit the receipt of interest at a rate exceeding 60% per annum. The effect of that provision was not immediately apparent. In 1994, however, Gordon Garland, one of Consumers’ customers, commenced proceedings for the purpose of arguing that LPP scheme

was illegal. And indeed, if a customer paid very soon after the due date, the LPP could be astronomical when expressed as an annual interest charge.

In 1998, the Supreme Court of Canada agreed that the LPPs constituted a criminal rate of interest. Consumers' nevertheless continued to request, receive and enforce the same pricing scheme for another three years!

The scene therefore was set for a restitutionary claim. Since 1981, Consumers' had illegally collected \$150 million in LPPs. Garland demanded repayment on behalf of himself and a class of 500,000 customers.

- Was Consumers' enriched? Yes, money. Did Garland suffer a corresponding deprivation? Yes. Was the transfer caught by an unjust factor? Yes, b/c provision itself was illegal.

#### *Garland v Consumers' Gas #2*

(Ont SCJ and Ont CA)

Winkler J dismissed the claim on the basis that it constituted an impermissible "collateral attack" on the OEB orders. The proper avenue for relief, he held, required Garland to directly impugn the OEB orders, rather than simply seek recovery of the money that Consumers' had collected under the OEB approved scheme.

McMurtry CJO (MacPherson JA concurring) rejected the trial judge's analysis, but nevertheless dismissed the appeal on the bases that: (i) Consumers' had not been enriched by the receipt of \$150 million, and (ii) it would be contrary to "the equities" to impose liability upon Consumers' and hence onto that company's entire customer base.

#### *Garland v Consumers' Gas #2*

- McInnes thought it should have been an easy case to reverse b/c of mistake or it was an illegal contract but Iacobucci decides to restate unjust enrichment.

(2004 SCC)

Iacobucci J allowed the appeal. He found an enrichment and a corresponding deprivation on the basis of a "straightforward economic approach." He then subjected the third element of the action in unjust enrichment to "redefinition and reformulation." The reversibility of a transfer of wealth is now determined on the basis of a two-part test.

*First Branch* Having established an enrichment and a corresponding deprivation, the plaintiff must prove that the transfer did not fall within one of the "established categories" of juristic reason: **(i) contract, (ii) donative intent, (iii) disposition of law, and (iv) other valid common law, equitable or statutory obligation.** The plaintiff *prima facie* will be entitled to restitution upon satisfaction of that test.

*Second Branch* The defendant may then defeat the *prima facie* claim, in whole or in part, by pointing to some other juristic reason for the transfer. Two factors are particularly important: (i) **public policy**, and (ii) the **parties' reasonable expectations.**

*Analysis #1* At the first branch, the LPP payments appeared to constitute a "disposition of law" because they occurred under authority of the OEB orders. Those orders were, however, contrary to section 347 of the *Criminal Code* and consequently invalid under the doctrine of constitutional paramountcy. Consumers' was therefore *prima facie* liable for the LPP payments.

*Analysis #2* Two factors arose under the second branch. As a matter of public policy, a party should not be entitled to profit from its own illegality. That consideration was, however, offset by the parties' reasonable expectations. Prior to the commencement of Garland's action in 1994, Consumers' had no reason to suspect the invalidity of the LPP scheme. Furthermore, even after 1994, a reasonable person in either party's position would reasonably expect that some penalty would be applied to late payments.

*Conclusion* Having regard to all of the circumstances, it was "equitable" to: (i) deny relief with respect to all LPPs received *before* 1994, and (ii) allow recovery of LPPs in excess of 60% with respect to payments received *after* 1994. Consumers' was therefore allowed to profit handsomely from its illegal LPP scheme.

McInnes – this doesn't make sense b/c the case is saying if you're a criminal w/ reasonable expectations, you can keep the money. It does anything for deterrence b/c company keeps the vast bulk of it.

#### A Modest Reformulation – What McInnes Thinks the Test Should Be

- P's has to prove no basis for transfer
  - If not purposive transfer: prima facie entitled to restitution
  - If purposive transfer: restitution *if* purpose failed
- D's burden – reason to deny liability
  - Negation of prima facie claim: rebut P's proof's of claim
    - Not ultimate enrichment b/c change of positions
    - No ultimate deprivation b/c passing on
    - No absence of basis b/c transfer did fulfill valid purpose
  - Residual defence: extraneous reason to deny relief
    - Disqualifying conduct (e.g. officiousness or illegality)
    - Overriding policy concerns (limitation period)

#### Plaintiff's Burden

- Transfer w/o purpose
  - Theft or finding or transfer effected by a third party
- Transfer for purpose – purpose ultimately failed
  - Donative intention
    - Absolute gift or express trust or abandonment
      - Apparent intention vitiated
  - Contract
    - I.e. binding contract
      - Transfer outside of contract (discharge or terminate)
      - Possibly transfer within contract but outside of risk (Garland)
    - Disposition of law
      - Statutory obligation or court judgment
        - Purported basis avoided or inapplicable (ultra vires act)
    - Other valid obligation
      - Natural obligation or trustee's duty to distribute
        - Supposed basis invalid or escapable (misdirected trust fund)

#### Defendant's Burden

Public policy must be confined to discrete and clearly defined rules. (Officiousness, illegality, self-interest or criminal proceeds)

- We don't care about reasonable expectations – don't talk about it. Why?
  - Theoretical irrelevance
  - Moves into implied contract theory and we are trying to get away from that and expectations easily manipulated to get to desired result
  - Measure of relief – unjust enrichment looks back with restitution. If we import in “reasonable expectations” then that is looking forward and we would need expectation damages.

#### Example

Pam and Dave hold separate accounts at the same bank. As a result of a clerical error, the bank transfers \$5000 from Pam's account into Dave's account. Since neither party is aware of the transfer, neither have any expectations. The funds in Dave's account accumulate interest for six months before either party realizes the error. At what point did Pam become entitled to restitution?

- Liable immediately, when money goes into account. No reasonable expectations needed.

### NON-PURPOSIVE TRANSFER

#### Non-Purposive Transfer Defined

- Any transfer occurring w/o plaintiff's intention
  - > Ignorance
    - *E.g.* defendant finds wallet plaintiff lost
    - *E.g.* defendant steals wallet while plaintiff sleeps
    - *E.g.* bank misdirects funds between parties' accounts
    - *E.g.* defendant stowaway on plaintiff's ship
  - > Powerlessness
    - *E.g.* plaintiff watches helplessly as defendant steals car
- Effect of non-purposive transfer
  - > Mere physical transfer of asset insufficient to pass title
  - > Plaintiff - retains title of property in defendant's hands
    - Title does not pass
- Exigibility of restitutionary claim
  - > Plaintiff retains title - direct nexus to successive recipients
    - *E.g.* third party steals plaintiff's wallet and gives to defendant

#### Absence of Juristic Reason - Basic Analysis

- Defendant enriched by receipt of benefit
- Plaintiff correspondingly deprived through loss of benefit
- Absence of juristic reason for transfer
  - > Plaintiff's burden
    - Transfer did not intended to fulfill plaintiff's purpose
  - > Defendants burden: residual juristic reason
    - *Prima facie* no policy justifying retention
    - *Prima facie* no reasonable expectation of retention

### LAW

#### Non-Purposive Transfers - Traditional Difficulties

- Enrichment
  - > Argument: no enrichment if title does not pass
  - > Counter: sufficient if legal *or* factual enrichment
    - Subjective devaluation overcome by ability to return *in specie*
    - Use and possession are enrichment in and of itself
- Unjust factor
  - > Argument: ignorance and powerlessness never accepted as unjust factors
  - > Counter: unjust factor by analogy to paradigm of mistake
    - Mistake effective because of plaintiff's *impaired* intention
    - Ignorance and powerlessness *a fortiori* given *absence* of intention
    - If mistake works, then ignorance has to work
- Tracing
  - > Argument: tracing at law supposedly defeated by mixture
  - > Counter: unified (equitable) tracing rules not defeated by mixture
    - Necessarily artificial exercise of identifying location of value
    - Value is inherent in the objects
- Cause of action
  - > Argument: precedent and principle reject unjust enrichment action
    - Right of recovery arises from incident of pre-existing title
    - Property rights include right to vindicate interest
  - > Counter: results better explained as function of unjust enrichment
    - No *vindicatio* at law
    - Occasionally no tort

#### Common Law Protection of Persisting Property Rights

- Birks

- > Property as response *but not* event
  - Property triggered by various species of events
    - Consent (*e.g.* sale or gift)
    - Wrongdoing (*e.g.* constructive trust for breach of confidence)
    - Unjust enrichment (*e.g.* resulting trust for gratuitous transfer)
  - Property rights inert - require animation through recognized claim
    - Wrongdoing
      - Claims based on superior right to possession
        - Inapplicable to incorporeal asset (*e.g.* account)
      - Tort inapplicable to traceable proceeds
    - Unjust enrichment
      - Defendant enriched by possession
      - Plaintiff sacrifices title to receive right to restitution
        - o Property itself isn't a cause of action – it has to be the piece of property + (something happened to the property)
- Grantham & Rickett
  - > Property as both response *and* event
    - Property as response to variety of events
    - Property as generative of directly enforceable rights
      - *E.g.* right of possession eligible against world
        - Dispossessed owner - entitled to direct relief
          - o Property is enjoyment of the thing and property also creates rights

Property belongs to D; P did nothing to effect the transfer (all of them non-purposive transfer)

*Moffatt v Kazana*  
(1962 QB)

The plaintiff kept 2000 in denominations of 1 in a biscuit tin, which he hid in his chimney. He forgot about the tin when he sold the house to the defendant. The defendant later discovered the tin while working on the chimney. The court held that the money was not included in the house sale and that the plaintiff continued to be owner. The court also held that, aside from any wrongdoing, the plaintiff was entitled to restitution of the value of the notes.

- o Was the case decided on the basis of unjust enrichment?
- o What actions did the plaintiff enjoy against the defendant?
- o How would the case be decided today?
  - CL has never recognized *vindicatio* of pointing to the thing; “Mine” and taking it back. In CL – you never get the “thing” back, that constitutes as a cause of action and the relief is personal (only monetary value of the thing). The cause of action is mine + something happened to it.

*Holiday v Sigil*  
(1826)

The plaintiff lost 500 at betting shop. A witness saw the defendant pick up the note and the defendant later paid the same note to Ransom & Company in discharge of a debt. The plaintiff sued for money had and received. The court agreed that he was entitled to “damages” of, 500 against the defendant.

- o Was the case decided on the basis of unjust enrichment?
- o What actions did the plaintiff enjoy against the defendant?
- o How would the case be decided today?
- o Could the plaintiff have successfully sued Ransom & Company?
- o Claim was successful, there was recovery and we don't know why.

*Lipkin Gorman v Karpnale*  
(1991 HL)

Cass was a partner at the plaintiff law firm. He wrongfully appropriated money from the firm's general account, which he later used to gamble at the defendant's club. The plaintiff discovered the facts and sued the defendant. The defendant (somewhat curiously) conceded at the outset that it had received money that was traceable to the firm's account. Lord Goff, writing for the majority, held that the plaintiff was entitled to a personal order for restitution, subject to the defendant's plea of change of position (reflecting money that it had paid out to Cass on his occasional winning wagers).

- Was the case decided on the basis of unjust enrichment?
  - Yes, recognized unjust enrichment, but they never find an unjust factor of ignorance or carelessness.
    - Courts have never found absence of intention is the same as vitiated intention.
- Why did the defendant not have a defence of *bona fide* purchase?
  - Gambling is not a bona fide purchase
- Could the plaintiff have sued Cass or the defendant in tort?

## EQUITY

### Equitable Ownership

- Trust relationship
  - > Trustee administratively holds (legal) title on behalf of beneficiary
- Incidents of trust relationship
  - > Trust recognizable only in equity - not in law
  - > Special equitable relationship *as between* trustee and beneficiary
    - Trustee strictly liable for losses occurring in breach
      - *E.g.* liable for gains acquired through good faith breach
      - *E.g.* not liable for non-preventable theft or destruction of assets
    - Strangers outside relationship - *prima facie* immune to beneficiary
      - Stranger fictionalized as "constructive trustee" - can be sued
- Species of action by beneficiary against stranger
  - > Trustee *de son tort*
    - *If* assume role of trustee - same liabilities as true trustee
  - > Knowing assistance
    - *If* knowingly assist in breach - disgorgement or compensation
  - > Knowing receipt
    - *If* knowingly receive trust asset - restitution

### *Citadel General Assurance v Lloyds Bank Canada* (1997 SCC)

The plaintiff sold car insurance. It appointed Drive On to act as its collecting agent. Drive On was obliged to place premium payments received from customers into a special trust account. Drive On has legal title. In breach of trust, Drive On deposited those payments into its general account with the defendant bank. That general account was overdrawn. The bank therefore treated funds in Drive On's account as repayment of the (overdraft) loan.

Drive On then became bankrupt and ceased to operate. The bankrupt estate contained no assets. The plaintiff therefore sued the bank for knowing receipt. The bank clearly was enriched by repayment of Drive On's (overdraft) loan and the plaintiff suffered the corresponding deprivation because the bank had received money that Drive On held for the plaintiff's benefit.

- On what basis did LaForest J allow recovery?
  - Said it was a species of unjust enrichment in equity, (not in law).
- Explain LaForest J's decision regarding proof of fault.
  - We want to protect the bank; they are liable *iff* at moment of receipt, knew or ought to have known money belonged to P.
  - We require proof of fault. You got the money, and you should have known it was not your money.
    - Is that decision reconcilable with the traditional approach?

- No.
- Is that decision reconcilable with the *Garland* test?
  - No.
- Was the remedy personal or proprietary?

Example

Xavier stole \$5000 in cash belonging to Pam. Xavier gave that money to Dave, who was unaware of the circumstances underlying the gift. Dave may or may not have spent that money in reliance upon his apparent windfall. Pam has discovered the theft and wants to rectify her loss.

- If Pam initially held *legal* title to the money:
  - Explain her rights against Xavier.
  - Explain her rights against Dave.
    - **Strict liability – don't have to prove fault**
- If Pam initially held *equitable* title (under trust) to the money:
  - Explain her rights against the trustee.
  - Explain her rights against Xavier.
  - Explain her rights against Dave.
    - **Not strict liability – have to show some fault (knew or should have known)**

Different rules in equity and law for the same situation. There is no good rationale for having different results in law and equity. Usually, if there is a difference – the easier way is through equity b/c beneficiary is vulnerable b/c can't protect themselves whereas the person in law has control. If it's unjust enrichment – then strict liability. Should have to overrule *Citadel*

INCIDENTAL BENEFITS – Cannot recover incidental benefits because it a) lead to double recovery b) open the floodgates of litigation against an undefined class of persons who indirectly benefit

*Peel v Canada*  
(1993 SCC)

“While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice—once from the person who is the immediate beneficiary of the payment or benefit ... and again from the person who reaped an incidental benefit. It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do.”

*Ulmer v Farnsworth*  
(1888 Me SJC)

The parties owned neighboring quarries. The plaintiff dug its quarry to a somewhat lower level than the defendant's quarry. The plaintiff incurred considerable expense pumping water out of his quarry. Given the lie of the land, that exercise had the incidental effect of draining the defendant's quarry as well. The plaintiff sued the defendant for the benefit received.

- Was the action successful?
  - No, b/c there was no unjust factor. If you go to absence of juristic reason (have to find other reasons not to give relief).
- How would the case be decided under the *Garland* test? Did the plaintiff act pursuant to: (i) a contract, (ii) a donative intention, (iii) a disposition of law, or (iv) some other legal, equitable, or statutory obligation? Would relief be denied on the basis of: (i) public policy, or (ii) the parties' reasonable expectations?
  - If you act selfishly, can't get restitution b/c it was an incidental benefit. (Not always true)

*Exall v Partridge*  
(1799 KB)

The plaintiff left his carriage on the defendant's land. The defendant fell into rental arrears and his landlord distrained upon all goods on the property, including the plaintiff's carriage. The plaintiff paid the arrears owing from the defendant to the landlord in order to affect the release of the carriage. The plaintiff was entitled to restitutionary relief against the defendant for the payment.

- How would the case be decided under the *Garland* test?
- Is *Exall* reconcilable with *Peel* and *Ulmer*?
- Define the doctrines of *self-interest* and *incidental benefit*.
  - We don't know what the rule is b/c we never thought about it prior *Garland*.

## VOLUNTARY TRANSFER

### Voluntary Transfer General Analysis

- Absence of juristic reason
  - > Plaintiff must negate donative intent
    - *E.g.* mistake and illegitimate pressure
      - Relatively relaxed standard to negate intent
        - No concern regarding contractual allocation of risk
        - Volunteer recipient - attenuated interest in receipt
          - D got something for nothing, D can easily give up item b/c it was a windfall in the first place

### Proof in Law and Equity - Historical Inconsistency

- Law
  - > Burden on *plaintiff* to negate apparent donative intent
    - Limited reconciliation
      - Absence of juristic reason *because* no donative intent
      - No donative intent *because* mistake *or* illegitimate pressure
- Equity
  - > Presumption of advancement (*i.e.* presume donative intent)
    - Scope of application
      - Historical: husband to wife *or* father to child
      - Modern: parent to child
  - > Presumption of resulting trust (*i.e.* presume non-donative intent)
    - Scope of application
      - Historical: other than husband to wife *or* father to child
      - Modern: other than parent to child
    - Rationale: equity presumes bargains rather than gifts

### The Effect of Illegality

Paul gave a diamond ring worth \$25,000 to Donna. As Paul explained to Donna at the outset, the transfer was a fraudulent ruse - it was merely intended to put the ring beyond the reach of Paul's creditors. Several years passed. In the meantime, Paul's financial difficulties disappeared but his relationship with Donna fell apart. Paul now demands recovery of the ring.

- If Paul claims personal restitution at law, can he establish the elements of unjust enrichment? Can he prove his lack of donative intent by revealing his fraudulent scheme?
  - Court will not let you rely on evidence of illegality to get ring back
- If Paul claims proprietary restitution (*i.e.* a resulting trust) in equity, can he establish the action in unjust enrichment? Can he prove his lack of donative intent by revealing his fraudulent scheme?
  - Paul will get ring back in equity and will restitution in specie via resulting trust. Since equity presumes bargains, not gifts – this doctrine does all the work for Paul and he does not have to reveal his fraudulent intention.
- Is it relevant, at law or equity, that Donna is Paul's child?
  - It is relevant in equity. If Donna is Paul's child, then cannot get ring back b/c it presumes gifts.

## SPONTANEOUSLY MISTAKEN GIFT

### *Lady Hood of Avalon v MacKinnon* (1909 Ch D)

Lord and Lady Hood had two daughters: Emily and Fanny. The parents gave a substantial gift to Emily upon her marriage to MacKinnon. Several years later, after Lord Hood had died, Lady Hood gave gifts totaling, 8600 to Fanny. Because she wanted to keep an even hand between her daughters, and because she had forgotten about the earlier gifts to Emily, Lady Hood also gave, 8600 to Emily. Lady Hood was entitled to recover the ,8600 gift that she had given to Emily. The court found that the only explanation for that gift was Lady Hood's mistaken belief that she had not previously given any gifts to Emily.

- Under *Garland*, would recognize as transfer and purported juristic reason was donative intent, but this purpose doesn't take effect b/c induced by mistake

### *University of Canterbury v Attorney General* (2004 NZ CA)

Sir John MacKenzie established scholarship at the University of Canterbury. Many years later, the university stopped awarding the scholarship. Sir Roy MacKenzie, the donor's son, was under the impression that the scholarship funds had been exhausted. He therefore donated a substantial sum so as to reactivate the scholarship. He later discovered, however, that the scholarship fund had contained sufficient assets all along. Sir Roy therefore was entitled to restitution for his mistaken gift.

### *Morgan v Ashcroft* (1938 CA)

The plaintiff was a bookie and the defendant was a bettor. The defendant won a particular wager. The plaintiff paid the defendant on the bet and then, having forgotten its initial payment, paid the defendant again on the same bet. The plaintiff claimed restitution of the second payment.

- Should the defendant have been held liable?
  - No, because gambling is against public policy. Court will not try enforcing a gambling debt. There is no relief for bookie.
- Explain the court's decision in terms of the *Garland* analysis.
  - Public policy: Against gambling
  - Donative intent vitiated by mistake.

### Example

Pam gave a gift of \$25,000 to her nephew, Dave. Is Pam entitled to restitution if she later discovers that Dave is gay and explains that she is fanatically opposed to homosexuals?

- Is a causative mistake invariably sufficient to invalidate a gift?
  - Courts will not enforce restitution b/c it is against public policy.
- Must Pam prove (*pace* Birks) that Dave's sexual orientation was an active consideration in her decision to give the gift?
  - Birks says that the gift was either active mistake or passive mistake. An active mistake is if Pam gave Dave a gift b/c he was straight. A passive mistake is that his sexual orientation was not an active consideration. Birks says that if it was an active mistake, then can get restitution and if it was a passive mistake – no.
    - McInnes: very difficult to prove evidentiary when something is actively on person's mind. Also, people do a lot of things w/o giving thought to why they are making that choice.

## IMPROPERLY INDUCED GIFT

### Illegitimate Pressure

- Illegitimate pressure *may* negate apparent donative intent
  - > Two requirements: illegitimate pressure + causal connection
- Legitimate pressure *vs.* illegitimate pressure
  - > Gift not recoverable if induced by *legitimate* pressure

- *E.g.* love and affection within family unit
  - *E.g.* typically manipulative charity drive
  - > Gift recoverable if induced by *illegitimate* pressure
    - Illegitimate = illegal *or* legal for improper purpose
    - Species of illegitimate pressure
      - Duress (law)
        - Duress of person: against plaintiff or loved one
          - *E.g.* threat of injury, incarceration or defamation
        - Duress of goods: against plaintiff's goods
          - *E.g.* threat of detaining plaintiff's property
        - Economic duress: against plaintiff's economic interests
          - *E.g.* threat of ruining plaintiff's business
      - Undue influence (equity)
        - Excessive influence over decision-making process
          - *E.g.* nun's gift to mother superior
- Compulsion vs. voluntaries
  - > True altruism *or* induced transfer
    - Recovery *iff* illegitimate pressure was *a* sufficient cause of transfer
  - > Indicia of non-voluntary transfer (*Roebuck v Gordon* 1990 Ont CA)
    - Protest at time of transfer
    - Absence of reasonable alternative (most of the cases use this factor as a litmus test)
    - Absence of independent advice
    - Prompt call for relief upon cessation of pressure

#### DURESS

#### *Stoltze v Fuller* (1939 SCC)

The Reliance Lumber Company employed the plaintiff as general manager and the defendant as president. The plaintiff owned 10% of the company's shares and the defendant owned the remaining 90%.

In his capacity as general manager, the plaintiff occasionally purchased lumber from another business that was owned by his son. The defendant and two colleagues met with the plaintiff and accused him of improprieties that had adversely affected Reliance Lumber. The defendant threatened to make his allegations public unless the plaintiff resigned from the company and handed over his 10% interest as reparation for the company's losses.

The plaintiff denied the accusations, but complied with the demand for fear of scandal. The court subsequently ordered restitution of the value of the shares. The defendant's allegations were groundless and the plaintiff's actions were not truly voluntary.

#### Questions

- Would the result have been the same if the defendant had honestly - though incorrectly - believed that the plaintiff was liable to the company?
  - Not economic duress b/c P and D would think they have a contractual claim and P was paying for liability. Courts will not interfere if they think P and D made a bargain.
- Would the result have been the same if the defendant's allegations pertained to *criminal* rather than *civil* claims, such that the plaintiff transferred the shares in order to stifle a criminal prosecution? Could the plaintiff recover despite his participation in an admittedly illegal act (*i.e.* the suppression of a criminal matter)?
  - Does *Stoltze v Fuller* involve restitution for unjust enrichment or disgorgement for wrongdoing? Is duress an actionable wrong? How is duress relevant to the *Garland* test?

#### UNDUE INFLUENCE

#### Undue Influence

- Species of undue influence

- > Relationships raising a presumption
  - Traditional: *e.g.* solicitor, doctor, parent, and religious advisor
  - Open: relationship demonstrating *actual* trust and confidence
  - If either species of relationship...
    - Undue influence presumed *if* suspicious transfer
    - Burden on dominant party to *disprove* undue influence
- > Relationships not raising a presumption
  - Subservient party must prove actual undue influence
- Manifest disadvantage
  - > Is relief premised upon proof of substantial detriment to transferor?
    - Manifest disadvantage as essential element of claim?
    - Manifest disadvantage as mere indicia of undue influence?
  - > Manifest disadvantage in principle
    - Criterion irrelevant to existence of juristic reason
  - > Manifest disadvantage in precedent
    - *Goodman v Geffen*: relevant to contract but not gift (*Wilson dicta*)
    - *Barclay's v O'Brien* (1994 HL): not essential in any event
- Nature of undue influence

*Niersmans v Pestuccio*  
(2004 CA)

The insistence [that the defendant] had “done nothing wrong” is an instance of [a] “continuing misconception” ... about the circumstances in which gifts will be set aside on the ground of presumed undue influence. Although undue influence is sometimes described as an “equitable wrong” or even as a species of equitable fraud, the basis of the court’s intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives. The court scrutinizes the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. The court may set a transaction aside, even though the actions and conduct of the person who benefits from it could not be criticized as wrongful.

*Goodman Estate v Geffen*  
(1991 SCC)

Annie Goodman had four children: a daughter named Tzina and three sons. After making several other small provisions, Annie’s will gave Tzina a house absolutely.

Because Tzina suffered from mental illness and was prone to irrational behaviour, she often relied upon Annie, and following Annie’s death, upon her brothers, when making major decision.

The brothers became concerned that Tzina might alienate the house, thereby leaving herself destitute and dependent upon them. Consequently after consultations with her brothers, Tzina transferred the house into a trust under which she received a life estate and Annie’s grandchildren received the remainder.

Tzina died, leaving behind a will that gave the house to her own children. A dispute then arose between Tzina’s children and Annie’s other grandchildren. The dispute turned on whether Tzina’s trust was valid (in which case the house belonged to Annie’s grandchildren) or whether it had been procured by her brothers’ undue influence (in which case the trust was invalid and the house passed to Tzina’s children by virtue of her will).

The court held that the brothers were in a position to exercise undue influence over Tzina. Tzina was emotionally unstable and, as the brothers realized, she reposed trust and confidence in them. The disposition of the house therefore gave rise to a presumption of undue influence. The court then held, however, that the brothers had rebutted that presumption by proving that: (i) they had acted in Tzina’s best interests, (ii) they had little contact with Tzina at the time that the trust was created, and (iii) Tzina created the trust only after being advised by an independent solicitor.

Manifest disadvantage: Will undue influence allow someone let out of any transaction or just transactions that are really bad?

- If there is a gift – do not have to prove manifest disadvantage
- If there is a contract – have to prove a manifest disadvantage

Is undue influence a form of wrongdoing?

- If we argue no, then undue influence provides a reason for restitution (absence of juristic reason)
- If it is a species of wrongdoing – then can either get compensation or disgorgement.
  - Sometimes, all you want is restitution and there is a low threshold to prove in order to get restitution.
  - If it is a species of wrongdoing – need a higher threshold of showing undue influence and fault.
- Should be a 2 step test:
  - If you only want restitution – just have to show undue influence – strict liability
  - If you want compensation or disgorgement, then have to show undue influence + fault

## BENEFICIAL INTERVENTION

Beneficial Intervention and Voluntary Transfers

- Species of voluntary transfer
  - > Intended gift
  - > Induced transfers
  - > Beneficial intervention
- Beneficial intervention
  - > Emergency intervention on another's behalf
    - Intervention outside scope of obligation or duty
    - Intervention as either gift or non-gratuitous transfer
      - Intervention typically without regard to reimbursement
      - Issue - one of policy rather than fact
        - Legally classify as altruism (*i.e.* juristic reason of gift)?
        - Legally classify as involuntary (*i.e.* no juristic reason)?
        - Does classification depend on object of intervention?
          - *E.g.* one rule for life but another for property?
            - We have this principle for public policy reasons: we want restitution available for public policy reasons

### *Matheson v Smiley* (1932 Man CA)

Smiley attempted suicide with a shotgun blast to his stomach. Dr Matheson was called to the scene and provided emergency medical services. Despite the physician's best efforts, Smiley died a short time later. Dr Matheson then sued Smiley's estate for the value of his services.

Decision: P could recover for services b/c the service was necessary.

- Was Smiley enriched? If so, on what basis?
  - There is objective enrichment b/c services have a market value
    - Incontrovertible benefit – discharge of a necessary expense
  - Did Dr Matheson act voluntarily or under moral compulsion?
    - We don't know – so usually don't look at it b/c it's artificial to ask *why* he acted at the time. Most people act b/c of intuition
  - Should the result be the same whether or not Smiley's suicidal urges were the product of a sound mind?
    - Assume that suicide not product of sound mind
  - In order for Dr. Matheson to not get restitution one would have to prove Smiley had rational mind + positive evidence that he did not want intervention (e.g.

Jehovah's witness saying they don't want blood transfusion on the a little card)

#### Example

An aging woman was in need of care. She sought help from the two people closest to her: Pam and Dave. Although Dave declined to become involved, Pam paid to have the woman placed in an appropriate facility. After the woman's death, Pam sued Dave for 50% of the expense.

- Alternatively assume that Pam and Dave were: (i) the woman's only children, and (ii) the woman's only friends.
- Alternatively assume that Pam: (i) intended from the outset *to ask* Dave for a contribution, (ii) intend from the outset *to not ask* Dave for a contribution, and (iii) gave the issue no consideration at the outset.

#### *Trustee of Eron Mortgage v Eron Mortgage* (1998 BC SC)

Eron carried on business as a mortgage broker. It attracted about \$250 million from about 4000 investors. Those funds were held in trust for the investors. As a result of criminal activities within Eron, those investments were lost or jeopardized. Eron's business was suspended and the court appointed Price Waterhouse (PW) as legal trustee. A short time later, a meeting of about 25% of the investors created its own Eron Lenders Committee, which it said was entitled to reasonable remuneration and reimbursement. The Committee:

1. Performed part of the PW's function by communicating with investors
2. Worked with PW to preserve and enhance the value of the trust assets
3. Commenced litigation with the aim of securing relief for investors outside of the trust assets

After performing a substantial amount of work, the Committee applied to the court for a charge against the trust assets (so as to ensure that the Committee would be paid for its work). An issue arose as to the court's jurisdiction to award such relief.

The court held that relief was available in such circumstances *iff* the plaintiff provided work that was necessary for the preservation and management of the trust assets. The element of necessity requires proof that, but for the plaintiff's efforts, the trust would have been required to receive the same services from some other person.

On the facts, the court held that there was insufficient evidence to allow relief for any of the work performed. It did, nevertheless, recognize that the plaintiff would have a right to apply in the future for a charge with respect to its first and second functions (*i.e.* communication with investors and preservation of trust assets). Relief was not, however, available with respect to the third function (*i.e.* litigation looking beyond the Eron trust) because that work was not essential to the existence and preservation of the trust assets.

- Explain, in terms of *Garland*, why the court treated the third head of services differently than the first and second heads of services. Does the difference lie within the idea of "absence of juristic reason"?
- Should the law equally encourage intervention for the benefit of life *and* property?

#### OBLIGATORY TRANSFER NON-CONTRACTUAL

##### Obligatory Transfer - General Analysis

- Absence of juristic reason
  - > Plaintiff must negate purported non-contractual obligation
    - *E.g.* inapplicability or illegitimacy of purported obligation
      - Relatively relaxed standard to negate purported obligation
        - No concern regarding contractual allocation of risk
      - Occasionally countervailing interests
        - *E.g.* fiscal chaos and financial burden on government

## JUDICIAL OVERRULING

### Judicial Overruling

- Declaratory theory of judicial activity
  - > Judicial changes (almost) invariably operate retrospectively
  - New rule applies even to facts occurring before rule articulated

### Example

Dave sued Pam in negligence. The trial judge, relying upon an established rule, ordered Pam to pay \$25 000 to Dave. Pam immediately satisfied judgment. Two weeks later, the Supreme Court of Canada overruled the traditional precedents and created a new rule that limits liability to \$5000. Pam believes that she is entitled to restitution of \$20 000.

- Under what circumstances will Pam be entitled to restitution?
  - Sometimes don't have to worry about U/E – just appeal

### *Kleinwort Benson v Lincoln County Council* (1999 HL)

The parties entered into a swaps agreement. At that time, the leading cases indicated that such agreements were *intra vires* and hence valid. The parties fully performed their swap. The plaintiff bank lost the wager and the defendant government received a net payment. Several years later, the House of Lords held in *Hazell v Hammersmith* that, contrary to widespread belief, swaps were *ultra vires* and hence void. The plaintiff then sued for restitution. The defendant resisted on the basis of a lapsed limitation period. The plaintiff responded by pointing to a statutory provision that extended the limitation period in cases of “mistake” to the time of reasonable discoverability.

- HL – judgment overruling the earlier case operated retrospectively and, payments made under the prior understanding of the law would be recoverable on the basis of mistake, subject to the usual defenses.
- P can win iff they show initially paid by mistake. Mistake v. misprediction: everyone agrees that restitution is not available for misprediction. Mistake isn't something that might happen differently in the future, rather it is on the basis of wrong information at the present time (vitiating intention)
  - Was the defendant's enrichment caused by a “mistake”?
    - HL said there was a mistake and allowed for recovery
    - McInnes – it was misprediction
  - Would liability be imposed under *Garland*? Were the payments made pursuant to a valid obligation? Consider the “second branch” of Iacobucci J's test.
    - We would allow it under public policy
  - Declaratory view of judicial activity: CL is an immutable whole. What appear to be judicial changes are actually judges plugging into an eternal truth. Court: Truth always existed, just that the earlier courts didn't see it. Was it possible that someone could have whispered existing fact into your ear to dissuade you from the fact in the first place? (McInnes' def'n. of mistake)
  - If you have a rule that is subsequently overturned judicially, so people who acted initially on the basis of the rule were mistaken and should be entitled to relief.
  - If you have a rule that subsequently changes in the future, the original parties are treated as though they are MISTAKEN, and are able to get money back through restitution.

### Based on *Derrick v Williams* (1939 CA)

Dave sued Pam in negligence. On the basis of established precedents, Pam believed that she was liable and therefore settled the claim by paying \$25 000 to Dave. In separate proceedings, the Supreme Court of Canada overruled the earlier precedents and held that a person in Pam's position is not liable.

- Is Pam entitled to restitution?
  - No, b/c she settled to avoid litigation. When you settle you are settling b/c (a) settled to avoid under purported risk of liability (b) created another juristic reason under the settlement b/c a settlement is a contract.

- She was entering into K to take care of underlying debt; acting in response to that K and nothing will impugn it. Pam paid money for the purpose of avoiding liability. It seems like K is void b/c there is not reason for it, so prima facie should get restitution. However, nothing about change in precedent will change the fact that K exists.
- Was the purpose of Pam's payment voluntary or obligatory?
  - Pam's payment was voluntary.
- There may be more than one apparent purpose under *Garland*; in *Garland* they made that mistake. SCC sometimes just looks at first apparent purpose w/o being alive to fact that there may be another purpose that can bar restitution.

## STATUTORY LIABILITY

### Valid Demand

#### *Reference Re: Goods and Services Tax* (1992 SCC)

The federal government introduced a legislative scheme for the imposition and collection of the GST. That scheme unilaterally appointed businesses to be collection agents. A question arose as to whether or not businesses were entitled to restitution (as remuneration or at least reimbursement) for the services that they performed on the government's behalf.

Restitution was not available. The legislative scheme was valid and properly applied. Although the government was enriched and businesses suffered corresponding deprivations, the relevant services were performed pursuant to a statutory duty - the epitome of a juristic reason.

### Legislative Change

- Legislation presumptively operates prospectively - not retrospectively
  - > Legislative change cannot negate basis for *prior* payment
- Legislation exceptionally may operate retrospectively
  - > Is restitution available for payment made within retrospective window?

#### *Commissioner of Revenue (Victoria) v Royal Insurance Australia* (1994 HCA)

In 1985, the State of Victoria introduced legislation to eliminate tax on two types of insurance policies: "wages policies" and "cost plus" policies. Due to sloppy drafting, the statute in fact only applied to the former. In 1987, the government rectified that problem and, moreover, stated that the elimination of the tax on "cost plus" policies was retroactive to 1985. Between 1985 and 1987, the plaintiff insurer had paid taxes on "cost plus" policies. It therefore claimed restitution for those payments.

Is it necessary to rely upon the *common law* action for unjust enrichment?

- Did the plaintiff pay the tax by *mistake*? In that respect, is there a difference between retrospective legislative changes and judicial overruling? Which type of change more plausibly supports an allegation of mistake?
  - No, P did not pay by mistake. If it's a legislative retrospective change – go back and create legal fiction and deem otherwise. You can get money back b/c it's legislative response, but it's not an action in U/E.
- Would liability be imposed under *Garland*? Were the payments made pursuant to a valid obligation? Consider the "second branch" of Iacobucci J's test.

### INVALID DEMAND

### Invalid Demand - General Analysis

- Plaintiff's argument on juristic reason
  - > Payment made for purpose of satisfying ostensible obligation
  - > Obligation actually invalid; failed purpose was not a juristic reason
- Defendant's argument on juristic reason
  - > Payment made for *dual* purpose: satisfy demand + close transaction

- > Obligation actually invalid  failed purpose  no juristic reason *on that basis*
- > Transaction closed purpose; fulfilled juristic reason ON THAT BASIS
  - Courts have always said if you pay voluntarily to make hassle go away, you can't subsequently get your money back even if the underlying basis for your hassle turns out to be invalid
- Additional comments
  - > Defendant's argument not confined to context of invalid demand
  - > Nebulous distinction arguably *imposed* rather than *identified* in practice
    - Indicia of involuntary payment (*Roebuck v Gordon* 1990 Ont CA)
      - Protest at time of transfer
      - \*Absence of reasonable alternative\*
      - Absence of independent advice
      - Prompt call for relief upon cessation of pressure

*Eadie v Town of Brantford*  
(1967 SCC)

Because his wife was ill and in need of new accommodation, Eadie was anxious to sub-divide and sell a parcel of land. The town demanded payment of \$800 as a "severance fee." Eadie paid that amount, but later claimed restitution after learning that the purported fee was invalid.

A majority in the Supreme Court of Canada allowed recovery on the basis that Eadie had paid not only under mistake, but also under "practical compulsion." It further held that the alternatives open to Eadie (*e.g.* challenging the validity of the fee prior to payment) were unrealistic.

In contrast, the dissenting judges held: (i) that Eadie had paid voluntarily, and (ii) that relief is confined to payments made "under immediate necessity" of a "threatened evil" and with the intention of preserving the right to protest.

- How would the case be decided under *Garland*? Is it sufficient to simply say that the severance fee was invalid?
- How should concerns regarding "voluntary payments" now be addressed?
  - **Ratio: Monies paid under *ultra vires* law may be recovered even if it appears that the governmental agent responsible for collecting them did not know that the law was inapplicable.**

*2984 Holdings Ltd v Surrey*  
(1994 BC CA)

In 1979, a company paid \$11 000 to the defendant municipality for permission to develop a particular piece of land. That company did not, however, actually undertake the development. Instead, it sold the land to the plaintiff in 1990. After learning that the plaintiff intended to proceed with the development, the defendant demanded \$68 000 as additional "development cost charges." The plaintiff complied with the demand, but later sought restitution.

The defendant argued that the plaintiff had failed to satisfy a two-month limitation period. The court rejected that argument, however, because the legislation referred only to claims for "damages" and because the court held that an action for money had and received does not result in "damages."

The court nevertheless rejected the claim on the ground that the plaintiff had voluntarily paid to close the issue. In the circumstances, it was incumbent upon the plaintiff to directly challenge the purported fee before payment. There was a reasonable alternative for the company to litigate.

- Why is it supposedly desirable to require an immediate challenge rather than protest and later seek repayment?
- Did the court strike a fair balance between the competing interests?
  - Distinguish - In *Eadie*, tax was *ultra vires*. In this case, this tax was not applicable on the facts of the case – because the company already paid \$11 000 and can't get another \$68 000.

- If you are a sophisticated business and under pressure, but want to go ahead w/ business project – P paid 2<sup>nd</sup> purpose: get rid of hassle. He got what he paid for under that heading and can't get restitution.

### *ULTRA VIRES DEMAND*

#### *Ultra Vires Demand - General Analysis*

- Payment for purpose of satisfying statutory demand
  - > Obligation actually invalid  failed purpose  no juristic reason
    - Claim buttressed by fundamental constitutional principle
    - Relatively little concern with possibility of voluntary payment
    - Every single cent paid under this tax should be recoverable on *ultra vires* tax

#### *Air Canada v British Columbia* (1989 SCC)

The Province of British Columbia purportedly imposed a tax on gasoline used by airlines. Various airlines paid about \$6,000,000 to the province before the tax was declared *ultra vires* on the grounds that, due to a technicality, the statute as drafted was not within provincial jurisdiction. The province subsequently reintroduced essentially the same tax in valid form. The airlines sought restitution for payments made under the original statute.

While recognizing the relatively limited amounts at stake on the present facts, LaForest J was concerned that allowing recovery of *ultra vires* payments would create three difficulties: (i) it would *disrupt public finances* by requiring the government to re-allocate resources from other projects to satisfaction of liability, (ii) in cases of unconstitutional or *ultra vires* legislation, the amounts claimed may be astronomical and consequently could create *fiscal chaos*, and (iii) liability would require the government “to impose a new tax to pay for the old” so that “a new generation must pay for the expenditures of the old.”

LaForest J therefore devised a five-part scheme:

1. Restitution generally is available for mistaken payments...
2. But not if the statute was *ultra vires*, such that *every* dollar paid under the legislation would be impugned...(presumptively unrecoverable)
3. Unless: (i) the relationship between the government and the taxpayer was “oppressive and unfair,” or perhaps if (ii) the taxpayer was not *in pari delicto* (not equally to be claimed for the mistake) or (iii) the money was paid under compulsion and protest...
4. And recovery is available if a valid legislative demand was merely misapplied to the taxpayer...(presumptively recoverable, unless there public policy consideration)
5. Unless “exceptional public policy consideration” demand otherwise.

Wilson J forcefully dissented on the ground that it is unfair: (i) to expect a taxpayer to resist the weight of the state by litigating first, and (ii) to require individual taxpayers to bear the entire burden of the government's error.

- Was LaForest J in a majority? What is the status of his judgment?
  - No, he was not in the majority. There were only 6 judges in total that heard the case and Laforest was concurred by Lamer and L'Heureux-Dube. (3/6)
  - He had proposed that policy considerations operated to take claims for taxes paid pursuant to unlawful legislation outside of the restitutionary context. He proposed a general rule that the Crown should be immune to claims for recovery of unconstitutional and *ultra vires* levies. **But LaForest did not command a majority in that case and so the status of his proposed immunity was never clear.**
  - Abandoned the distinction b/w mistake of fact and mistake of law as it applies to unjust enrichment.

#### *Woolwich Building Society v Inland Revenue Commission* (1993 HL)

The government purportedly imposed a tax on institutions such as the plaintiff. The plaintiff realized at the outset that the tax was *ultra vires* and hence invalid. It nevertheless complied with the demand (under protest) for fear of adverse publicity. The House of Lords subsequently allowed recovery of the *ultra vires* payment.

- What unjust factor provided the reason for restitution?
- How would the case be decided under *Garland*?
  - **HL recognized a right to restitution for payments made pursuant to *ultra vires* taxes.**
  - **If there's *ultra vires* tax, there is a right to restitution.**

*Air Canada v Ontario (Liquor Control Board)*  
(1997 SCC)

The province purportedly imposed a tax on alcohol used by airlines. In 1984, Wardair refused to pay on the ground that the tax was *ultra vires*. Upon further investigation, the province agreed with that position. It then entered into an agreement whereby it would continue to collect the tax from every airline except Wardair. Some time later, Air Canada discovered the invalidity of the tax and claimed restitution of its previous payments. The Ontario Court of Appeal held that relief was available - but only with respect to payments occurring *after* the province learned of the *ultra vires* in 1984.

In the Supreme Court of Canada, Iacobucci J held that **relief was available with respect to all of the *ultra vires* payments.** While recognizing that the Court of Appeal's "compromise" approach might have an "equitable" appeal, he ultimately found it to be arbitrary and inappropriate. He specifically rejected the suggestion that liability is premised upon bad faith or proof of the government's knowledge of the defect in its demand. In such circumstances, the taxpayer is not *in pari delicto* with the government.

- Is *Air Canada* reconcilable with *Garland*? Why did Iacobucci J believe that the recipient's knowledge was a pre-requisite to liability in *Garland* but not in *Air Canada*? Which position is preferable?
  - **No, *Air Canada* is irreconcilable with *Garland*. The *Air Canada* position is preferable because unjust enrichment is a strict liability claim (fault is irrelevant) Under *Air Canada*, Once it the gov't had received the *ultra vires* tax, they were liable to pay it all back.**
  - In *Air Canada* stated that, "If the question is which of two parties should be responsible for guaranteeing the applicability of the law, and the choice was b/w the governmental agency charged w/ administering the law and the citizen who is subject to the law, the better choice is governmental agency. **Governments make laws and governments administer them. Citizens do not. The responsibility for taking care that the law is legal and applicable must rest w/ the party that makes and administers the law.**"

*Re Eurig*  
(1998 SCC)

The province of Ontario imposed a "probate fee" on the administration of estates. Those fees amounted to \$52 million per year. Upon her husband's death, Mrs. Eurig challenged the validity of the fee, but her arguments were rejected at trial. She consequently paid \$5710 under protest and continued to challenge the validity of the imposition.

The Supreme Court of Canada ultimately agreed that the "probate fee" was actually an indirect tax and hence *ultra vires* the province. Nevertheless, in the belief that the deprivation of that source of revenue would have "harmful consequences for the administration of justice," it suspended the effect of its order for six months (with the exception of Mrs. Eurig's right to restitution).

In the course of judgment, Major J openly questioned the merit of the scheme that LaForest J devised in *Air Canada*. He nevertheless held that, even if that scheme were law, Mrs. Eurig would fall within an exception pertaining to payments made in protest or within an exception pertaining to unfairness in the circumstances.

The province responded to the decision by enacting legislation that retroactively imposed a probate fee in valid form. That provision did, however, create a named exception for Mrs. Eurig.

- What is the status of the scheme that LaForest J devised in *Air Canada*?
  - Major seriously doubted the correctness of LaForest’s opinion openly, but not formerly overruled.
- Is it ever appropriate to deny restitutionary relief for fear of “fiscal chaos”? Does that fear ever trump claims in other areas of law (e.g. employment equity claims or residential school claims)?
  - **Retroactive ameliorating legislation is sufficient to guard against the possibility of fiscal chaos.**
- Who enjoyed the benefit of the \$52 million that the province illegally collected every year under the guise of “probate fees”? Should those beneficiaries bear the burden of providing restitution?
  - Payment under protest and the commencement of legal proceedings was held to be sufficient to trigger the exception allowing recovery.
  - Ct. said tax was invalid, and gave government the time to create ameliorating legislation.
  - Hard to prove “change of position” to the government.

*Kingstreet v. New Brunswick*

- Bastarache rejects rule which would immunize public authorities from restitutionary claims wrt to monies paid under invalid legislation
- If we accept *Kingstreet* goes against *Garland* and everything we learn in U/E.
- 

*Garland v Consumers’ Gas*  
(2004 SCC)

The defendant illegally collected \$150 million in LPPs between 1981 and 2001. Garland began to challenge the validity of the LPP scheme in 1994. Iacobucci J devised a new test of liability and limited recovery to payments received *after* 1994.

- How would *Air Canada v British Columbia*, *Air Canada v Ontario (Liquor Control Board)* and *Re Eurig* be decided under the test formulated in *Garland v Consumers’ Gas*?
- The Supreme Court of Canada has articulated at least four schemes governing the recovery of payments made under *ultra vires* or illegal demands. Summarize and assess the rules formulated in *Air Canada v British Columbia*, *Air Canada v Ontario (Liquor Control Board)*, *Re Eurig*, and *Garland v Consumers’ Gas*.
- Which concerns or considerations motivated the court’s decision in each instance? How are those concerns and considerations best resolved?

COMPULSORY DISCHARGE OF ANOTHER’S LIABILITY

Compulsory Discharge of Another’s Liability - General Analysis

- **Scenario: plaintiff legally compelled to discharge defendant’s debt to third party**
  - > E.g. guarantee on loan, joint and several liability, co-insurance of risk
- *Garland* analysis
  - > Enrichment and deprivation
    - Enrichment of third party: incontrovertible benefit (money)
    - Enrichment of defendant: incontrovertible benefit (necessary expense)
  - > Absence of juristic reason
    - First branch
      - Legal obligation to pay debt (contract or statute) unimpaired
        - Purpose fulfilled  no claim against third party recipient
      - No legal obligation to ultimately enrich defendant
        - No purpose fulfilled  *prima facie* claim against defendant
    - Second branch
      - Reasonable expectation
        - Parties expected ultimate burden upon defendant

- Public policy
  - Socially desirable to ensure “right” party pays

- **If D is legally required to pay off debt, P will always get restitution**

*Brook’s Wharf & Bull Wharf v Goodman Bros*  
(1937 CA)

The defendant imported squirrel skins from Russia and stored them at the plaintiff’s warehouse. The skins were stolen through no fault of the plaintiff. The plaintiff, as the warehouseman, was statutorily liable to pay custom duties on the skins regardless of the theft. Having satisfied that demand, the plaintiff sought reimbursement from the defendant. The court held that, while the plaintiff was directly liable to the government, the burden as between the parties fell upon the defendant. And since the defendant was *primarily* liable and the plaintiff was *secondarily* liable, the defendant was required to reimburse the plaintiff.

- Defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had no extra consideration and made no express bargain, should be left out of pocket by having to discharge D’s debt.
- One man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter
  - *Vis a vis* P and D, there is an absence a juristic reason for P to confer an enrichment to D.
    - Policy driven reason - Want the right person to pay

Non-Compulsory Discharge of Another’s Liability - General Analysis

- Scenario: **plaintiff voluntarily discharges defendant’s debt to third party**
  - CDN – third party can discharge debt voluntarily if *creditor* consents
    - Historically, it’s undesirable for a third party to interfere by paying debts officiously and then squeezing the debtor.
    - Debtor should have control for who your creditor is.
- *Garland* analysis
  - > Enrichment and deprivation
    - When can stranger discharge liability between debtor and creditor?
      - Traditional: *iff* debtor consents to intervention
      - Modern (Canadian): *iff* creditor receives in discharge
        - *E.g.* mistaken payment on countermanded cheque
    - Enrichment of parties *if* liability discharged
      - Third party: incontrovertible benefit (money)
      - Defendant: incontrovertible benefit (necessary expense)
  - > Absence of juristic reason
    - First branch
      - Voluntary choice to pay debt unimpaired
        - Purpose fulfilled  no claim against third party recipient
      - No legal obligation to ultimately enrich defendant
        - No purpose fulfilled  *prima facie* claim against defendant
    - Second branch and defenses
      - Reasonable expectation
        - What would parties expect to occur following discharge?
        - Can defendant reasonably expect to be relieved of *all* debt?
      - Public policy
        - Is it desirable to allow voluntary intervention on debt?
        - Is it desirable to discourage officious intervention?
          - Can debtor generally control identity of creditor?
            - *cf* modern rules for assignment of debt

*Owen v Tate*  
(1976 CA)

The defendant borrowed money from a bank. As security for that loan, Miss Lightfoot gave a charge over land that she owned. Lightfoot subsequently became anxious that the charge might be exercised. As a favour to Lightfoot -

and despite the protests of the defendant - the plaintiff deposited, 350 with the bank as security for repayment of the defendant's loan. The bank then released the charge over Lightfoot's property. Some time later, the bank began to press for repayment of the loan. At that point, the defendant encouraged the bank to have recourse to the plaintiff's security. The bank did so. The plaintiff then sued the defendant for restitution.

The court reconciled two general rules: (i) **a volunteer is not entitled to restitution for benefits conferred**, and (ii) restitution is available to a person who discharged another's debt under compulsion of law. On the facts, the former took precedence. **Although the plaintiff was subject to a legal debt to the bank at the time of payment, it had voluntarily entered into that situation at the time of providing security.**

Given the complex nature of the transactions, Ormrod JA also doubted whether the defendant actually received a benefit as a result of its debt being discharged *but* Lightfoot's charge being released.

- Did the court reach an appropriate conclusion?
  - Difficult decision – it's sympathetic but doesn't explain why D wanted Mrs. Lightfoot to be creditor and not P.
  - Bottom line: If P paying a legal obligation – restitution available
  - If P voluntarily pays (officiously interfering paying another's debts) – not sure when restitution is available.
- Analyze the facts under the *Garland* test. Did the impugned transfer fulfill an unimpeachable purpose from the plaintiff's perspective? What result is appropriate in light of: (i) the parties' reasonable expectations, and (ii) public policy?

## OBLIGATORY TRANSFER CONTRACTUAL

### Contract and Unjust Enrichment

- Contract: focus on fulfillment of expectations
  - > Expectations pertain to future - future inherently uncertain
  - > Enforcement reflects allocation of risks between parties
- Unjust enrichment: focus on reversal of unwarranted transfers
  - > Enforcement reflects benefits conferred *outside* of allocated risks
- Unjust enrichment within contractual context - general analysis
  - > Enrichment generally satisfied by (contractual) request
    - Request occasionally ineffective (*e.g.* lack of capacity)
  - > Absence of juristic reason
    - Benefit conferred in fulfillment of (purported) contractual duty
    - Plaintiff  must negate contract and avoid allocation of risk
      - *E.g.* non-existence of contract
      - *E.g.* non-materialization of anticipated contract
      - *E.g.* unenforceability of contract
      - *E.g.* invalidity of contract
      - *E.g.* frustration of contract
      - *E.g.* discharge of contract

### Restitution Within Valid Contracts

- Question: can restitution ever be ordered within context of *existing* contract?
  - > *cf* restitution within *existing* but *unenforceable* contract
    - *E.g. Deglman v Guaranty Trust Co* (below)
- Overriding concern: reallocation of contractual risk
  - > Contract *as a whole* represents voluntary allocation of risks
  - > **Restitution for some portion of performance may re-allocate risk**
    - *i.e.* different allocation *but for* presumed validity of *each portion*
- Birks' limited exception
  - > TEST: restitution *iff* certain that relief will not upset contractual allocation
    - **Impugned provision non-negotiable**
    - **Impugned provision did not affect allocation of risk**

- *i.e.* remaining provisions not affected by impugned provision
- truly rare situation

*Roxborough v Rothmans*  
(2001 HCA)

The government imposed a tax on cigarettes. The legislative scheme placed the burden on the wholesaler, in the expectation that the wholesaler would pass the cost on to the retailer, who in turn would pass the cost on to consumers. The retailer sold cigarettes, collected the appropriate amount from the consumers, and paid that amount to the wholesaler. Before the wholesaler actually remitted the same amount to the government, the tax was declared *ultra vires*. The retailer then sued the wholesaler for restitution of the amount that passed between them.

Aside from the impugned provision, the parties' contract was not invalidated by the fact that the statutory scheme was *ultra vires*. The court nevertheless ordered the wholesaler to provide restitution to the retailer. Restitution was allowed *within* the context of a valid contract. The court said that the relevant provision: **(i) was non-negotiable because it was statutorily required, and (ii) did not affect the price that the wholesaler otherwise would have charged the retailer for the cigarettes.** The court believed that the taxing provision within the contract could be severed without *any* effect on the remainder of the agreement.

- There can be a failure of a particular obligation w/I a valid contract
- When the obligation goes, the basis of the enrichment which it purported to explain fails totally
  - This taxing term was inelastic because it was an addictive substance. Satisfies Birks requirements b/c it 1) statutorily non-negotiable 2) plucking out the term leaves behind the same contract
    - **Can have restitution w/I a contract when those two requirements are met.**

*Garland v Consumers' Gas*  
(2004 SCC)

Consumers' was required to apply to the Ontario Energy Board for approval of its pricing schemes. The scheme as a whole was statutorily allowed to secure a certain overall revenue stream. Within that scheme, the OEB approved a late payment penalty of 5%. Consumers' entered into contracts with individual customers. Those contracts replicated the OEB approved scheme that contained the LPP. Consumers' collected \$150 million in LPPs over the span of 20 years. The LPPs were then declared illegal and hence ineffective. That declaration did not, however, automatically invalidate individual contracts.

Iacobucci J held that restitution is available for payments made in the absence of a juristic reason: (i) a contract, (ii) a disposition of law, (iii) a gift, or (iv) another legal, equitable or statutory obligation. He then focused exclusively on the fact that Garland had paid pursuant to a *statutory* obligation that was invalid and he ordered Consumers to provide restitution.

- Why did Iacobucci J not also consider the fact that Garland's LPP payment had been made pursuant to a *contractual* obligation?
  - Iacobucci didn't recognize the contract b/w the company and the individual
- Was the LPP provision cleanly severable, such that if it had been excluded from the parties' agreement at the outset, the remaining terms of the contract would have been unaffected?
  - No, because pricing mechanism had a total revenue stream, and that if we left out LPP – then it would affect the global amount collected.
  - D company was entitled to a certain amount of money, and the OEB determined which part came from LPP and other things. If we left out LPP, it would affect the other amounts collected to meet the overall total revenue stream
    - Roxborough v. Rothmans was a very rare case.

VALID THIRD PARTY CONTRACTS  
and  
SPECIAL RELATIONSHIPS

Third Part Contract - General Analysis

- juristic reason if plaintiff performed for defendant *or* third party

- > no leapfrogging valid contractual party to reach remote recipient
- > unjust enrichment not available to escape contractual risk to third party

*Nicholson v St Denis*  
(1975 Ont CA)

St Denis agreed to sell a building to Labelle. Title was not to be transferred until the price was paid in full, but Labelle was allowed to take immediate possession. Upon doing so, he contractually requested Nicholson, the plaintiff, to apply aluminum and rock siding to the premises. Although that work was done, Labelle paid only \$150 against the total price of \$1978. He also defaulted on his payments under his contract with St Denis. Nicholson successfully sued Labelle for breach of contract, but because of the defendant's financial problems, judgment could not be satisfied. Anticipating that possibility, Nicholson also sued St Denis in unjust enrichment on the basis that, as the owner of the improved property, he had received the benefit of the work.

The trial judge invoked a seemingly unfettered discretion to act "in accordance with good conscience" and allowed the claim despite the fact that St Denis had no knowledge of the plaintiff's services until after the project was finished.

The Court of Appeal reversed that decision. The *ratio* of the case is that **Nicholson was not entitled to use the action in unjust enrichment in order to escape the fact that he assumed the risk of non-payment by working for Labelle on credit.**

In *dicta*, MacKinnon JA also said "that in almost all of the cases the facts established that there was a *special relationship* between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff. ... This relationship in turn is usually, but *not always*, marked by two characteristics, firstly, *knowledge of the benefit* on the part of the defendant, and secondly, either an express or an implied *request* by the defendant for the benefit, or *acquiescence* in its performance."

- o Was St Denis enriched by Nicholson's services?
- o If so, was there a juristic reason for St Denis' enrichment?
- o Do the facts reveal a traditional unjust factor?
- o What is the effect of MacKinnon JA's *dicta*?
  - **Sometimes interpreted as a fixed rule that restitution is not available unless at the moment of enrichment, the parties shared a special relationship.**

*Greenwood v Bennett*  
(1973 CA)

The defendant car dealer owned a Jaguar that was valued at between, 400 and, 500. In preparation for its sale, he agreed to pay Searle, 85 to make minor repairs. Instead of fixing the car, Searle drove it into the ground and then wrongfully sold it to a third party for, 75. The third party then sold it at the same price to the plaintiff, who proceeded to spend, 226 on repairs. Searle's misconduct was detected and the police returned the car to the defendant. The plaintiff then claimed restitution for services rendered. After the trial, but before the appeal, the defendant sold the car for, 400.

- o Are *Greenwood* and *Nicholson* distinguishable?
- o Was the defendant *enriched* and *unjustly* enriched?
- o Should the plaintiff have been entitled to restitution? If so, how much?
- o **No relationship required in order to receive restitution, as long as enrichment is an incontrovertible benefit.**

*Olchoway v McKay*  
(1996 Sask QB)

In the mistaken belief that he had purchased a farm property, the plaintiff cleared the land of rocks and planted a canola crop at a cost of \$3000. The defendant, who knew that the plaintiff was laboring under an error, stood silently by. After the work was completed, the defendant purchased the land from the owner. The defendant subsequently harvested the crop for a profit of \$4000. The court denied relief on the basis that the parties did not share a special relationship.

- Was the defendant *enriched* and *unjustly* enriched? Yes.
- Would restitution have intolerably disregarded the defendant's autonomy?
- McInnes: Misconstruing Nicholson and court got to wrong result. Restitution should be available b/c D received an incontrovertible benefit.

#### ANTICIPATED CONTRACT THAT FAILS TO MATERIALIZE

##### Anticipated Contracts - General Analysis

- Underlying considerations
  - > Freedom to withdraw from contractual negotiations
  - > Commercial expectation of work in speculation of contract
    - Loss leader to get other business
  - > Unconscionability of retaining requested benefits without payment
- General analysis
  - > Enrichment
    - Request (free acceptance) relevant *iff* anticipation of payment
    - Incontrovertible benefit relevant regardless of expectations
  - > Absence of juristic reason
    - No obligation upon plaintiff to provide benefit to defendant
    - *Possibly* donative intention
      - Gratuitous work in the hope of a contract
      - Voluntary assumption of risk of non-payment

#### *Magical Waters Fountains v Sarnia* (1990 Ont GD - 1992 Ont CA)

Sarnia was experiencing water problems in a park area. It asked the plaintiff to prepare plans regarding possible solutions. As circumstances changed, the plans were revised. Although the plaintiff knew that a contract was not in place, he received (some) assurance from the Director of Parks. The problem was eventually rectified without intervention as the natural water table dropped. Sarnia then informed the plaintiff that it had no need for any actual work to be done in the park. The plaintiff sued in contract and unjust enrichment.

The contractual claim failed because: (i) the purported agreement had not satisfied the *Municipal Act*, and (ii) its terms were not sufficiently certain.

The trial judge upheld the claim in unjust enrichment on the basis that: (i) the plaintiff prepared plans at the City's request, (ii) the plans were far in excess of the sort of work normally done in anticipation of securing a contract, and (iii) the City's ultimate refusal to pay was unconscionable.

The appellate court reversed that decision on the basis that: (i) the plaintiff did not deal with an authorized delegate of the City, and (ii) the plaintiff did nothing more than what is normally expected in anticipation of a contract.

- Was the disagreement between the courts *legal* or *factual*?
  - Disagreement on the facts b/c judges had difference with opinion of what is reasonable work in order to get a contract
- Was the City enriched? If so, on what basis?
- Was there a juristic reason for the City's purported enrichment?

#### UNENFORCEABLE CONTRACT

##### Unenforceable Contracts - General Analysis

- Nature of unenforceable contract
  - > Valid but not subject to judicial enforcement
    - *E.g.* sufficient to pass legal title to property
    - *E.g.* non-contentious unless one party refuses to perform
- Enrichment and corresponding deprivation

- > Request (contractual) sufficient to overcome subjective devaluation
- Absence of juristic reason
  - > Benefit conferred pursuant to *unenforceable* contractual obligation
    - Sometimes the unenforceability of the contract is also the reason for unenforceability of restitution

*Deglman v Guaranty Trust*  
(1954 SCC)

A nephew agreed to provide personal services to his aunt in exchange for her promise to leave a particular house to him under her will. He performed as promised, but her will did not contain the relevant provision. He sued in contract and unjust enrichment. The contract was unenforceable because it pertained to land but was not, contrary to the *Statute of Frauds*, evidenced in writing. The court nevertheless allowed the claim in restitution.

- On what basis was the aunt enriched?
  - Services
- Why was there an absence of juristic reason?
- What did the nephew *expect* to receive? What did he *actually* receive?
  - Expected to get the house, and the actually received the value of the services that he provided

*Pavey & Matthews v Paul*  
(1987 HCA)

The plaintiff's renovated the defendant's house under an oral agreement. The defendant agreed to pay for the work. The contract was unenforceable because, contrary to a statutory requirement pertaining to construction work, it was not evidenced in writing. The court nevertheless ordered restitution.

The court reached that conclusion only after the plaintiff provided that restitution was not contrary to the legislature's purpose. The purpose of the statute was to: (i) prevent fraudulent claims by builders, and (ii) protect homeowners from non-conforming services. Neither mischief arose on the facts.

- All the mischief's that statute had wanted to avoid had nothing to do w/ unjust enrichment – that's why restitution was awarded

*Thomas v Brown*  
(1878 CA)

The plaintiff paid a deposit under an oral agreement to purchase the defendant's shop. Before execution, however, he tried to withdraw and claim restitution on the basis that the contract was unenforceable. His claim was rejected because the defendant was ready, willing and able to proceed.

- If the other party was ready, willing and able to perform – can't use unenforceability of the contract to slide out of the contract

## INHERENTLY INVALID CONTRACT

### Inherently Invalid Contract - General Analysis

- Sources of invalidity
  - > *E.g.* uncertainty of terms *or* incapacity
- Enrichment and corresponding deprivation
  - > Purported contractual request *usually* defeats subjective devaluation
    - *cf* invalidity due to incapacity (*e.g.* infancy or corporate *ultra vires*)
- Absence of juristic reason
  - > Benefit conferred in satisfaction of purported contractual obligation

*Clarke v Moir*  
(1987 NS CA)

The plaintiff, an elderly gentleman, gave all of his assets to his niece in exchange for her promise to let him with her family for the rest of his life. After sixteen months, the relationship became intolerable and the plaintiff left. He then claimed restitution of the initial transfer.

The court held that the contract was void for uncertainty. It nevertheless allowed the plaintiff's claim to restitution. And in recognition of the niece's services over sixteen months, she was effectively allowed counter-restitution. The plaintiff ultimately was entitled to the offsetting remainder.

Significantly, the court rejected the traditional rule that required proof of a "total failure of consideration" (*i.e.* proof that the plaintiff received *none* of the expected benefit). **The claim was resolved on the basis of a more modern rule that allows restitution (with counter-restitution) for partial failure of consideration.**

- Is the issue of *total* or *partial* failure of consideration relevant under *Garland*?
  - Restitution going both ways - aiming for a setoff

#### Example

Pam purportedly entered into a contract with Dave for the provision of music lessons. After the lessons were completed, Dave refused to pay. When Pam sued for breach of contract, she discovered that the apparent agreement was invalid because Dave was an infant and hence lacked capacity to create a valid contract.

- Should Pam be entitled to restitution for her services?
  - No, because incapacity knocks out restitution (like it does for contracts)
- Would your answer be different if Pam had provided housing to Dave, who had been homeless?
  - Yes, b/c it is a necessity. We allow restitution for necessities for public policy reason to encourage merchants to provide necessities.

#### *Pacific National Investment v Victoria* (2004 SCC)

A large piece of land sat undeveloped along the harbour of Victoria, British Columbia. During the early 1980s, the plaintiff (PNI) drafted an ambitious proposal that found favour with the public authorities. The province (which owned the land) and the city then entered into a Master Agreement that was designed to facilitate a multi-stage development. That document reflected several important points. (1) Although planning legislation generally required that 5 percent be set aside for public amenities, the city was adamant that 30 per cent of the affected property be landscaped as an oceanfront park. It also insisted that its citizens receive that benefit without cost to themselves. (2) While the province was content to undertake some of the preliminary work, both parties anticipated that PNI would soon step into the picture as a private developer. (3) PNI's interest stemmed from the fact that the park was to sit alongside a three-storey commercial-residential complex, which offered the prospect of substantial profit. (4) Everyone involved, including PNI, realized at the outset that the existing city council could not bind its successors. Nevertheless, while the Master Agreement was silent on point, the principal players fully expected that each stage of the development would receive and retain the requisite planning approval.

After performing a small amount of work, the province sold the land and assigned its interest under the Master Agreement to PNI for a total price of \$5,000,000. Half of that amount was to be paid in cash — the other half was represented by PNI's promise to develop the oceanfront park. PNI reiterated that undertaking in a contract that it concurrently signed with the city. While those agreements were, again, conspicuously silent on the issue of zoning permission, city council did grant approval for both parts of the project (*i.e.* the park and the three-storey complex).

PNI then completed construction of the park before starting preparations for the commercial-residential complex. The public quickly became enamoured of its new seaside playground and strongly objected to anything that might disturb its natural splendor. A fortuitously timed civic election accordingly returned a newly constituted city council that promptly re-classified the land to prohibit the anticipated development. Though it already enjoyed a net profit of \$2,000,000, PNI was distraught at the prospect of losing the more lucrative side of the project. It therefore brought two actions against the city.

PNI first alleged that the city had breached an implied term of the Master Agreement to the effect that it would either (1) maintain appropriate zoning as long as required, or (2) provide compensation for any resulting losses. The Supreme Court of Canada dismissed that claim in *PNI v Victoria (No 1)*. The narrow *ratio* said that, because a city council cannot bind its successors to a particular course of action, it couldn't, *as a matter of principle*, be contractually bound by an implied term to the contrary. Any such promise would be *ultra vires* and hence ineffective. Significantly, however, the majority judgment also contains *dicta* in support of the lower court's finding

that the alleged term further failed *as a matter of fact*. As the British Columbia Court of Appeal explained, the parties never even discussed the inclusion of the purported term. Given the city's repeated warning that it could not fetter its successors' discretion, "it was taken for granted ... that [the city] would give no such commitment." While the parties *non-contractually* assumed that zoning would stay in place, it was "clear that the City would not have agreed to such a term."

Having rejected the contractual claim, the Supreme Court of Canada returned the case to trial for a consideration of the plaintiff's action in unjust enrichment. Four years later, the parties were back in Ottawa. With respect to the first two elements of the restitutionary claim, the Supreme Court found that PNI had provided the city with a benefit, in the form of a landscaped park, that was worth \$1 080 000. The crucial question was whether or not that transfer ought to be reversed.

- Identify the relevant juristic reason(s). How did Binnie J address that part of the claim?
  - First mistake: Binnie glommed on the first "absence of juristic reason" of lack of a contract. Didn't consider the other type of juristic reason: donative intent.
    - Court didn't look at any other juristic reason of donative intent that the P took a chance of conferring enrichment for a future contractual opportunity.
  - Second mistake: Contract was still in place, and cannot get restitution unless the contract provision can be severed and it would not upset the risk allocation. Court didn't recognize that restitution would upset the entire contract (risk allocation)
  - Third mistake: Binnie says: If it wasn't the mistake, then we might have come to a different result. It seems to say that we have to show absence of juristic reason and an unjust reason such as mistake, which doesn't make sense. Upsetting to see reintroduction of unjust factors.

#### Stage One

- **Contract: it is not open to the City to rely on the contractual arrangements, which in their relevant parts flowed from the City's *ultra vires* demand, to defeat the appellant's claim on the particular facts of this case. Binnie separated the cost of lawful entitlement and the *ultra vires* demand**
- **Disposition of law: Binnie found the City was liable once PNI "put in place the extra works and improvements in the mistaken belief that its contract with the City in respect thereto was enforceable".**
  - Under *Land Titles Act* argument, "The City's argument amounts to the proposition that registration **allows the City to do indirectly what would be *ultra vires* if done directly, and thereby to subvert the legislative intent to limit a municipality's authority, even as the municipality itself escapes its side of the bargain by pleading the doctrine of *ultra vires***"
- **Donative intent: The City contends that it is common for developers to offer "sweeteners" in excess of what a municipality can demand for zoning and subdivision approvals. **The appellant did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate.****
- **Valid Common Law, Equitable Or Statutory Obligation: TJ found when City created "down zoning" statute which allowed PNI to confer benefits, that statutory provision created a juristic reason. Binnie rejects that b/c, "**However, the claim for unjust enrichment does not depend on the down-zoning. It depends on the fact that the City has obtained \$1.08 million worth of extra works and improvements at the appellant's expense to which, after securing a court order declaring that it had no power to do what it purported to undertake to do, the City has no legitimate entitlement**"**

#### Stage Two:

- Reasonable Expectation of the Parties and Public Policy Considerations
  - Neither the City nor the appellant expected the extra works and improvements to be

- donated
- Not good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith
- How did Binnie J resolve the difficulty of awarding restitution within an existing contract?
  - **One approach is to sever from the contractual arrangements the exchange of promises that flowed from that initial *ultra vires* demand** and award restitution from the initial *ultra vires* demand.
- How did Binnie J resolve the tension between juristic reasons and unjust factors?

## MISTAKEN CONTRACT -SPONTANEOUS MISTAKE

### Mistaken Contract - Spontaneous Mistake - General Analysis

- Underlying considerations
  - > Contract as voluntary allocation of risk - including risk of error
    - Expectations generally protected *iff* promise contained within term
  - > Spontaneous mistake seldom justifies avoidance of contract
- Enrichment and corresponding deprivation
  - > Purported contractual request *may* overcome subjective devaluation
    - *cf* operative mistake *may* impugn apparent choice
- Absence of juristic reason
  - > Contract as juristic reason *unless* fundamental mistake sufficient to invalidate
  - mistake must render contract *essentially* different than contemplated
- Must show that mistake is very “big” mistake in order to invalidate contract. It has a fundamental mistake – a mistake that if in place, and then the contract would not be entered into.

### *Bell v Lever Brothers* (1950 CA)

Lever Brothers paid 30 000 to induce Bell (its chairman) to retire. It subsequently discovered that it could have fired him without pay because he had speculated at the company’s expense. Lever Brothers therefore sought to set aside the retirement contract and recover its payment. It insisted that it would not have given the golden handshake if it had known of Bell’s misconduct.

The court rejected the claim. Even though the mistake had *caused* the agreement, it was not *fundamental* - i.e. it did not vitiate the very basis upon which the parties had contracted. Aside from Bell’s breach, it was still possible for the company to provide the payment as an inducement to early retirement.

### *Great Peace Shipping v Tsavliris Salvage* (2002 CA)

The defendant’s ship suffered serious structural damage on the high seas. It required prompt salvage services. It contacted the plaintiff, whose ship it believed to be 35 miles away, and entered into a salvage agreement. That agreement required the defendant to pay for a minimum of five days’ service. A short time later, the defendant discovered that the plaintiff’s ship was actually 410 miles away and that another ship was much closer. It contracted with that other ship and then purported to cancel its agreement with the plaintiff.

The defendant argued that while its mistake did not satisfy *Bell v Lever Brothers*, it did satisfy a much more lenient rule of equity that had been fashioned by Lord Denning. The Court of Appeal rejected the existence of any such equitable rule. A contract is vitiated by spontaneous error *only if* the error was so fundamental as to negate the essence of the agreement.

- Denning had tried to form “equitable mistake” which was a lower standard than the mistake required in law. HL – No such thing as an equitable mistake.

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*Norwich Union Fire Insurance Society v WH Price*  
(1934 HL)

An insurance company sold a policy covering damage to a shipment of lemons owned by the defendant. The defendant claimed a benefit under the policy in the honest belief that the lemons had been damaged. After making payment, the insurance company discovered that the lemons had not suffered a loss falling within the scope of the policy. It therefore claimed restitution.

- Was there a *juristic reason* for the defendant's enrichment?
- Should restitution be premised upon proof of a *fundamental* mistake? Are these facts structurally similar to those in *Bell v Lever Brothers*?
- Would the result have been different if the parties had honestly debated the occurrence of a relevant loss *before* the insurance company made payment?
  - Test of legal mistake is a high standard and says that you can't get out of contract. However, this case seems like it is a low standard of mistake.
  - Court held could set aside contract. Insurance company could recover. However, the mistake that insurance company made was they thought they were liable, so they settled on that basis.

*Central Guaranty Trust v Dixdale Mortgage Investment*  
(1994 Ont CA)

A property was subject to three mortgages: the plaintiff held the first, the defendant held the second and Stanco held the third. As a result of its own careless record keeping, the plaintiff mistakenly believed that the loan underlying its mortgage had been repaid. It therefore discharged its mortgage. The defendant subsequently foreclosed on its mortgage and had the property sold. When informed of the plaintiff's error, the defendant insisted that the *Registry Act* required the sale proceeds to be distributed in accordance with the registered interests. If that was correct, then the defendant would receive full payment, Stanco would receive part payment, and the plaintiff would receive nothing.

The plaintiff argued that it had acted on the basis of a mistake regarding the status of its loan to the landowner. It further argued that, unless it received relief, the defendant would be unjustly enriched at its expense.

The Court of Appeal agreed. (1) It held that, in the circumstances, a causative mistake was sufficient. The plaintiff was not required to prove a *fundamental* mistake or a mistake that the defendant had improperly induced. (2) It did, however, require the plaintiff to prove that restitution would not contradict the philosophy underlying the payment regime established by the *Registry Act*. (3) Finally, while the decision is ambiguous, it apparently secured the plaintiff's relief through either a lien or a constructive trust over the foreclosure proceeds.

- Was there a *juristic reason* for the defendant's enrichment?
  - Statutory disposition of the *Registry Act*
- Would the result have been different if the defendant had registered its mortgage in good faith *after* the plaintiff mistakenly discharged its mortgage?
- Have to ask: whether mischief is in play if we ignore the statute? *Registry Act* is to prevent people from hiding their caveats so one can get credit.

## MISTAKEN CONTRACT -INDUCED MISTAKE

### Induced Contractual Errors - General Comments

- Contractual errors
  - > Contractual formation error *prima facie* irrelevant
  - > Spontaneous error relevant *iff* misapplication *or* fundamental to creation
  - > Induced error relevant depending upon nature of inducement
- Species of induced errors
  - > Fraudulent misrepresentation
    - Damages at law (tort of deceit)
    - Rescission in equity (equitable compensation *possible*)

- > Negligent misrepresentation
  - Damages at law (tort of negligence if representation *is not* term)
  - Damages at law (breach of contract if representation *is* term)
- > Innocent misrepresentation
  - *No* damages at law
  - Rescission in equity *possible* + equitable compensation *possible*
- > Non-disclosure (*iff* exceptional duty of disclosure)
  - *No* damages at law
  - Rescission in equity *possible* + equitable compensation *possible*

#### Induced Errors and Unjust Enrichment - General Analysis

- Enrichment and corresponding deprivation
  - > Defendant's request sufficient to overcome subjective devaluation
- Absence of juristic reason
  - > Purported contract avoided *iff* effective mistake

#### *Ennis v Klassen* (1990 Man CA)

The defendant advertised a car as a BMW 733i. The plaintiff paid \$9000 to the defendant *plus* \$650 sales tax to the province. After four days and 250 miles, the plaintiff discovered that the car was actually a BMW 728 (a substantially inferior model of car). The plaintiff parked the car and sued for rescission four months later. Although the defendant had misled the plaintiff, he had done so innocently.

The court held that rescission is possible *iff* the representation was *fundamental* and *iff* the plaintiff sued prior to *acceptance*. (1) The representation was *fundamental* because the two models of car are essentially different. (2) Mere receipt of an item does not necessarily constitute acceptance. In this situation, there was no acceptance because the plaintiff claimed rescission shortly after delivery and promptly after discovering the error, and because he immediately stopped driving the vehicle. (3) Even if acceptance does occur, some authorities (doubtfully) hold that rescission may be possible if the misrepresentation created an *error in substantialibus*. It is not clear, however, that such an error is materially different than a fundamental error.

The appropriate remedy was restitution. (1) Restitution was effected through *rescission*: title returned to the defendant and the plaintiff was entitled to reimbursement (plus equitable compensation if necessary). (2) Where necessary, counter-restitution may now be effected monetarily. (3) The plaintiff's right to recover the sales tax lie, if at all, against the province.

- Rescission is not restitutionary if the contract is executory

#### *Moss v Chin* (1995 BC SC)

Mr. Chin ran down Mrs. Moss at a pedestrian crosswalk. Because she suffered severe brain damage, the Public Trustee represented Mrs. Moss' interests. The Public Trustee sued Mr. Chin in negligence and claimed, *inter alia*, damages for future medical expenses. Over time, as negotiations between the parties progressed, Mrs. Moss's physical condition deteriorated and she eventually died. The Public Trustee hid that fact from Mr. Chin and convinced him to settle the lawsuit for a certain amount of money.

Mr. Chin later learned that he had paid for future medical expenses for a woman who was already dead. The settlement contract was set aside and The Public Trustee was liable for restitution.

### ILLEGITIMATE PRESSURE

#### Illegitimate Pressure - General Considerations

- Pressure and contracts
  - > Pressure in creation of contract *prima facie* acceptable
  - > Rescission *iff* illegitimate pressure + causal inducement of contract
    - Courts concerned to protect expectation - especially commercial
    - No relief from voluntarily assumed obligations

- Contract *under* pressure vs. contract *because* of pressure

- Species of illegitimate pressure
  - > Duress (previously discussed)
  - > Undue influence (psychological manipulation)
  - > Unconscionability *or* exploitation of weakness
    - Sufficiently divergent from community standard of commercial morality
    - Requirements are:
      - Inequality of bargaining power (ignorance, distress, need)
        - (Situational weakness – barrister was in love w/ single mom, gave her a house and she took the house and didn't marry him)
      - Exploitation of weakness by dominant party
      - Inducement of substantively unfair agreement
        - Is substantive unfairness a *principled* criterion?
          - Probably not true that you need an unfair requirement. The principle of “unconscionability” protects “freedom of choice”. It makes no sense that if A induces B to sell a house at market value using exploitation of weakness that A can keep the house just b/c it wasn't substantively unfair to B.
    - Presumed fraud burden on defendant to establish fairness

*Blackmore v Cablenet*  
(1995 Alta QB)

The plaintiff worked as a sales agent for the defendant for three years. He was fired without notice or cause. His severance package was withheld until he signed a release that included severance pay equal to five weeks of earnings. He was financially in dire straits, he was advised by the Labour Standards Board to “take what he could get,” and he did not receive independent legal advice. He signed the severance agreement eight days later, but subsequently sought rescission of the agreement and proper severance payment in lieu of notice.

The court rescinded the agreement and set an inquiry into the appropriate notice period. It held that the defendant had illegitimately induced the plaintiff's signature by exploiting his situational weakness and extracting a substantially unfair bargain.

### CONTRACT DISCHARGED FOR BREACH

#### Contracts Discharged for Breach - General Comments

- Breach of contract and discharge
  - > Contractual terms: warranty *or* condition *or* innominate
    - Warranty or minor innominate: damages
    - Condition or serious innominate: damages *or* discharge *or* both
      - Discharge generally at option of innocent party
      - Discharge means there is performance of the primary obligations.
- Effect of discharge
  - > Contract not avoided *ab initio*
  - > Accrued rights remain effective
  - > Parties released from performance of outstanding *primary* obligations
    - Secondary obligations remain exercisable by innocent party.
    - E.g. Limitation clause still stays

#### Contracts Discharged for Breach and Unjust Enrichment - General Comments

- Discharge sufficient to avoid contractual allocation of risk
- Unjust enrichment *in principle* available to *either* party
  - > Innocent party claim for money paid or services rendered
  - > Guilty party claim for money paid or services rendered
    - Restitutionary claim subject to counterclaim for breach of contract

- If discharged for breach for condition can sue for services rendered or money back, which is subject to the counterclaim of the other party. The party that breaches can sue as well

#### Contract Ceiling or Valuation Ceiling

- Contract ceiling - restitution cannot exceed contractual price
  - > Argument: contract is discharged (not rescinded) □ allocation remains
  - > Counter-argument: autonomous unjust enrichment *outside* contract
  - Nobody believes this anymore
- Valuation ceiling - restitution cannot exceed parties' valuation
  - > Argument: request establishes enrichment *and* extent of enrichment
  - Contractual value irrelevant *iff* incontrovertible benefit

#### *Boomer v Muir* (1933 Calif CA)

The plaintiff was a sub-contractor of the defendant, who was involved in the construction of a dam in California. Under the terms of the parties' agreement, the plaintiff rendered services and received monthly payments. After 18 months, as the project neared completion, the defendant breached the agreement by failing to provide the plaintiff with supplies in a timely manner. The plaintiff accepted the breach, discharged the contract and claimed restitutionary relief for the value of his services. Under the terms of the contract, the plaintiff would have received an additional \$20 000 if the agreement had been fully performed. However, because the contract was discharged, the court awarded the true market value of the services. After taking into account payments already received by the plaintiff, the court ordered the defendant to pay \$257 000.

- Switching from breach of contract to unjust enrichment increased from \$20 000 to \$257 000
- Difficulty of this analysis – D didn't exercise freedom of choice to pay \$257 000. Request is relevant to the extent to what he was willing to pay. Autonomy was exercised at \$20 000, not at \$257 000.
- If you acting for P – use *Boomer v. Muir*
- If you acting for D – use subjective devaluation to show that freedom of choice was not exercised at \$257 000 and there was no exercise of freedom of choice.

#### MONEY PAID BY INNOCENT PARTY

#### *Palachik v Kiss* (1983 SCC)

An elderly couple married late in life. Her finances were far healthier than his. A house was purchased in her name. She agreed to change the title to a shared tenancy if he paid \$100 per month until he satisfied half of the purchase price. Upon the woman's death, the man was 36 months short of fulfilling his obligation. The woman's estate then evicted the man and refused further payments. The man sued for restitution.

Wilson J treated the action as a "constructive trust claim." She held that relief was available: (i) if the contract was breached, and (ii) if there was a "total failure of consideration" from the innocent party's perspective. Those requirements were satisfied on the facts. The relevant consideration was not temporary accommodation (which the man had enjoyed) but rather the receipt of title. Since he was denied the opportunity to acquire shared ownership, he received none of the expected "consideration."

- Was the doctrine of constructive trust relevant to the facts?
- Should relief be premised upon a *total* failure of consideration?
  - There is nothing about "constructive trust" claims
  - If we take away contract, then there is absence of juristic reason for the estate to keep the money.

#### MONEY PAID BY PARTY IN BREACH

#### *Rover v Cannon Films (No 3)* (1989 CA)

Cannon agreed to allow Rover to show nine films on Italian television. Rover was required to pay \$1.8 million in three installments: (i) \$360 000, (ii) \$540 000, and (iii) \$900 000. Rover paid the first two installments, but breached

the contract by failing to pay the third, which had accrued due. Cannon discharged the contract on the basis of the breach and sought payment of the third installment.

The court denied the claim on basis of the doctrine against the *circularity of actions*. (1) The third installment had accrued and *prima facie* was due to Cannon. (2) However, if the payment were made, Rover would be entitled to immediately recover it back through restitution. The party in breach enjoys a claim in unjust enrichment with respect to money paid (but is subject to a counterclaim for damages for breach of contract). (3) There was a *total* failure of consideration because Cannon's obligations (*i.e.* to deliver the films) had not yet arisen.

- A party in breach is also entitled to plead U/E
  - What error did Rover's lawyers commit?
    - For the first \$900 000, should have gotten the money because they received nothing in return. They left \$900 000 to the other side.

*Hyundai Heavy Industries v Papadopoulos*  
(1980 HL)

The plaintiff agreed to build a ship for the defendant. Work was to progress in stages and payments fell due at certain intervals. The defendant made several payments, but failed to meet one installment. The plaintiff discharged the contract on the basis of the defendant's breach and sued for payment of the outstanding installment. The House of Lords held that, in the circumstances, the installment was due and that, if paid, it would not be recoverable by the defendant.

- On what basis, if any, are *Rover* and *Hyundai* distinguishable?
  - What was the money being paid for?
    - They would have gotten the money back if the contract said the installments were for "delivery of the ship". They didn't get money back because the money was for final product AND work done along the way. You still got the work along the way, which is what you paid for.

*Mayson v Clouet*  
(1924 HL)

A contract for the sale of land required the purchaser to provide a deposit. The purchaser paid the deposit, but subsequently breached the contract. The vendor discharged the contract and sold the property to a third party. The original purchaser claimed restitution of the deposit.

- Was the purchaser entitled to recover the deposit?
  - No, because deposit is for 1) delivery of the TV 2) And to buy the right to come back and pay w/I a week. Deposit is buying time, as long as Company gives you time – then cannot recover the deposit

SERVICES RENDERED BY INNOCENT PARTY

*DeBernardy v Harding*  
(1853 Exch)

The defendant held tickets to view the funeral procession of the Duke of Wellington. He contractually requested the plaintiff's services in advertising the funeral overseas. The plaintiff partially performed the agreement by incurring expenses, advertising the funeral and compiling customer lists. The defendant then breached the contract by dismissing the plaintiff. The defendant nevertheless used the customer lists created by the plaintiff.

The court allowed the plaintiff to discharge the contract and to receive *quantum merit* under an unjust enrichment claim for the value of the services rendered.

- Would the result have been any different if the defendant had *not* taken advantage of the plaintiff's services (*e.g.* by relying upon the customer lists)?
  - Yes, there would be restitution because the request was for the *services* to get to the final product, not just the final product. (Same as the case where guy was the researching for the book)

SERVICES BY PARTY IN BREACH

*Sumpter v Hedges*  
(1898 CA)

The defendant asked the plaintiff to build two houses and a stable for 565. The plaintiff performed work worth 333, but was unable to complete the job and therefore abandoned the work site and the materials that he had obtained for the project. The defendant refused to pay for the plaintiff's services, but he did use the abandoned materials and completed the job himself.

- Was the plaintiff entitled to restitution?
- What is the relevance of an "entire contract"?
- Analyze the facts under the *Garland* test.
- Party in breach is entitled get restitution of materials but not the services rendered.
  - No restitution for services b/c no freedom of choice. P didn't exercise freedom of choice to get half a house.
  - Restitution for materials b/c P had freedom of choice to either use the materials or not.
    - If innocent party left the house unfinished, then no enrichment
    - If innocent party got someone else to finish the house:
      - Cost \$300 to complete and restitution should be \$265. Restitution should be capped by the contract. Difference given will be owed to worker. There is *some* enrichment from the work, because only needed to get \$300 to complete.

*Kemp v Williams*  
(1978 Sask CA)

The defendant agreed to pay \$550 to the plaintiff upon his completion of a painting job. The contract did not require the defendant to provide pre-payments. The plaintiff was responsible for purchasing his own paint. The plaintiff completed 75% the job, but stopped working when he no longer could afford to buy paint. The defendant discharged the contract for breach and then paid her boarder \$335 to complete the job.

The plaintiff was awarded \$375 for the value of his services. (1) While recognizing that the party in breach traditionally was denied relief for services rendered, it invoked an exception pertaining to "substantial performance." (2) The court recognized that while only \$175 of the contract price remained, the defendant had paid her boarder \$335 to complete the job. The court nevertheless disregarded the difference of \$160 because the wood was old and therefore required more paint than initially expected.

- Does 75% completion constitute "substantial performance"?
- Did the court sufficiently respect the defendant's expectation interest?
  - There is risk that if there is old wood would soak up the paint, and that's the risk you take when you enter in the contract
  - Is P entitled to restitution? Request was \$550 - \$335. The request was full job completed for \$550. If it's entire contract, you can't get paid, unless and until you finish completely.
  - This was an entire contract, which was subject to substantial performance. Problem: Substantial performance is usually 99% and court is very sympathetic. Court went too far in finding 75% was substantial performance.
    - Usually, substantial performance is when contractor completes a house but leaves a minor detail, like not putting on doorknobs.

## FRUSTRATED CONTRACT

### Frustration - General Comments

- Frustration = performance rendered impossible or essentially different
- Traditional effects of frustration
  - > Rights and obligations frozen at moment of frustration
    - Release from obligations that *have not* accrued due
    - Enforcement of obligations that *have* accrued due
    - Force majeure clause – parties can override frustration rules with this clause

*Cutter v Powell*  
(1795)

The plaintiff's husband contractually agreed to serve as a second mate on a voyage from Jamaica to Liverpool. Payment was due on arrival. The contract was frustrated when he died *en route*. The court held that the agreement was an *entire contract* and therefore denied the widow's claim for *quantum meruit*.

- Entire contract can't be split up into installments

*Chandler v Webster*  
(1904 CA)

The plaintiff agreed to rent a room from the defendant for the purpose of viewing the coronation of Edward VII. Under the terms of the contract, the plaintiff paid part of the price and had accrued an obligation to pay more. The contract was then frustrated when the procession was cancelled. The plaintiff was not entitled to recover his earlier payment - and the defendant was entitled to receive the outstanding installment.

- Freeze at the moment of frustration. Still have to pay the rest of the installment.

*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe & Barbour*  
(1943 HL)

An English company agreed to sell a flax hackling machine to a Polish company for 4800. After a pre-payment of 1000, the contract was frustrated by the outbreak of war. The plaintiff claimed restitution of its pre-payment. The House of Lords allowed relief on the basis of a total failure of consideration.

- Recognition of "unjust enrichment"
- On the traditional approach of frustration, would not have gotten relief.
- Can have restitution if there is "total failure of consideration". Received nothing of what you expected to get.
  - If it was 1000 rifles, and received 1 rifle – then there is no "total failure of consideration".

Rules Following *Fibrosa Spolka*

- *Accrued obligations* remain enforceable (*Chandler*)
- Restitution for *money paid* on total failure of consideration (*Fibrosa*)
- No relief for *wasted expenditures* (i.e. resources spent in reliance on contract)
- No relief for *services* rendered under *entire contract* (*Cutter*)

Alberta's *Frustrated Contracts Act* — Highlights

- Parties can override the statute w/ a force majeure clause
- Even if we can act of frustration, an installment contract can be severed.
  - Frustrating event only affects after the frustrating event.
- Statutory default rules subject to modification by parties [7]
- Severable portion of contract unaffected by frustration [8]
  - > Party entitled to enforce payment iff fully performed severable portion
- Money paid is recoverable (*Fibrosa* extended) [3(a)]
- Accrued monetary obligations are discharged (*Chandler* abolished) [3(b)]
- Expenditures compensable in court's discretion iff money received or due [4]
  - Expenditures capped by payments received or accrued
- *Beneficial services* recoverable in court's discretion for *quantum meruit* (*Cutter* abolished) [5]
  - Beneficial services have to have been accrued to other party.
  - Frustration Act is about allocating list. If you waste money, services – to the extent it would have accrued or was going to receive money would be some relief.
- Birks – "failure of reciprocation invalidates the obligation and the invalidity of the obligation constitutes the absence of explanatory basis which renders the enrichment unjust. Provided the obligation is invalidated, there is no longer a requirement that I must have received nothing at all [total failure of consideration])

*Can-Truck Transportation v Fenton's Auto Paint Shop*  
(1993 Ont CA)

The defendant's truck was badly damaged in an accident. It was taken to the plaintiff's garage, where it received \$28 000 in repairs. A fire then destroyed the truck. The cause of the fire is unknown. The defendant demanded delivery of the remains of the truck, but the plaintiff purportedly exercised a lien. The plaintiff also claimed relief for the value of its work.

The court reached three conclusions. (1) The plaintiff enjoyed a statutory lien over the remains of the truck pending payment. (2) The plaintiff did not enjoy a claim for the value of *beneficial services*. Since the truck was destroyed by fire, the plaintiff's services did not confer a benefit upon the defendant. (3) The plaintiff might, however, be entitled to relief for the *wasted expenditures*. By the time of frustration, the plaintiff had provided services and generated an accrued right to payment. The matter was therefore remitted to the trial judge to exercise discretion under section 3(2).

OBLIGATORY TRANSFER - NATURAL OBLIGATION

*Moses v Macferlan*  
(1770 Lord Mansfield)

"This kind of equitable action, to recover back money, which ought not in justice to be kept ... it does not lie for money paid by the plaintiff, which is claimed of him as *payable in point of honor and honesty*, although it *could not have been recovered from him by any course of law*; as in payment of a debt barred by the *Statute of Limitations*, or contracted during his *infancy*, or to the extent of principal and legal interest upon an *usurious contract*, or, for money fairly lost at *play*: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering."

Historical Overview of Natural Obligations

- Civil law
  - > Absence of juristic reason
  - > *Jus naturale* of Roman law
  - > Quebec *Civil Code* Article 1554
    - "Every payment presupposes an obligation; what has been paid where there is no obligation may be recovered. Recovery is not admitted, however, in the case of natural obligations that have been voluntarily paid"
- Common law
  - > Traditional mistake of law doctrine: *Bilbie v Lumley* (1802)
    - Recovery for payment under mistake of *fact*
    - Generally *no* recovery of payment made under mistake of *law*
  - > Natural obligation most likely to arise in connection with mistake of law
    - *e.g.* gambling debt honoured in mistaken belief of enforceability
      - Mistake of law—no unjust factor—no relief
      - Natural obligation bars recovery—but no need for plea
    - Mistake of law doctrine abolished: *Canadian Pacific v BC* (1989 SCC)
  - > *Garland* test of juristic reason
    - Transfer *prima facie* reversible—but barred by natural obligation
    - Challenge of formulating and populating novel concept
- Natural obligations under *Garland*
  - > Established categories: claimant's burden
    - Donative intent + disposition of law + contract + other legal ... obligation
  - > Residual reasons: defendant's burden
    - Public policy + reasonable expectations
  - > Placement of natural obligations
    - "Other legal ... obligation" or residual reason?

Test of Natural Obligations

- Policy dictating *limited* non-recognition of obligation

- > Policy precludes positive enforcement of *outstanding claim*
- > Policy does not require invalidation of *completed transactions*
  - Recovery of *transferred* benefits consequently barred
- Nature of effective policies
  - > Policy not intended to invalidate transaction *per se*
    - Possible to give effect to completed transfer
  - > Policy not intended to protect vulnerable transferor
    - Recovery not needed to fulfill policy

#### Wagering Debts

- Historical overview of wagers and law
  - > Wagers initially treated as enforceable agreements
  - > *Gaming Act 1845* rendered wagers “null and void” (*i.e.* unenforceable)
  - > *Criminal Code* renders wagers illegal *but* with exceptions
    - Organized gaming heavily regulated by statute
    - Private wagers legally permissible
    - *Gaming Act 1845* continues in force in Alberta
- Enforcement and recovery of wagered sums
  - > Wagers are not positively enforceable
  - > Completed transactions nevertheless are irreversible
    - Payment **treated as gift** (*Lipkin Gorman v Karpnale*)
      - **Payor’s purpose fulfilled**
      - **Natural obligation constitutes juristic reason**
  - > Stakeholders (stakeholder is a third party that holds the money before the bet)
    - Stakeholder obliged to return stake if requested before payment
    - Completed transfers irreversible

#### Limitation Periods

- Rationale of limitation periods
  - > Elimination of perpetual threat + avoidance of unreliable evidence
  - > *But* integrity of underlying obligation not impugned
    - Obligation in conscience remains
- Effect of lapse
  - > Traditional uncertainty
    - Procedural: underlying debt remains *but* enforcement barred
      - Underlying obligation constitutes juristic reason
    - Substantive: underlying debt extinguished
      - Natural obligation constitutes juristic reason
  - > *Tolofson v Jensen* (SCC 1994)
    - Lapse now generally treated as substantive
- Probable irreversibility of post-lapse payment
  - > Extinguishment of underlying debt suggests no juristic reason
  - > Subsisting natural obligation *however* constitutes new juristic reason

#### Contracts Ineffective for Infancy

- Categories of infants’ contracts
  - > Valid and enforceable
    - Necessities of life + beneficial employment
  - > Void and non-rectifiable
    - Uncertain scope
  - > Valid and enforceable unless avoided
    - Acquisition of “permanent assets” (*e.g.* land)
    - Less need to protect the child because child has a benefit of it
  - > Unenforceable unless ratified
    - All remaining contracts
- Restitution of infant’s payment under fourth category

- > Unenforceable *against* infant unless ratified within reasonable time
- > Transfer during infancy recoverable if no ratification
  - Overriding policy to protect folly of youth
    - Unenforceable contract—no juristic reason
    - Natural obligation eliminated under policy
  - Restitution *if* further requirement satisfied (criterion unsettled)
    - Total failure of consideration (traditional)
    - Counter-restitution of benefits received (modern)
- > Transfer during infancy irrecoverable if contract ratified as adult
  - Issue pertaining to juristic reason *at time of payment*
    - Contract unenforceable at time—no juristic reason
    - Natural obligation *however* constitutes juristic reason

#### Contracts Unenforceable for Want of Formality

- *Statute of Fraud* and others
  - > Contract unenforceable unless evidenced in writing
    - Objection to enforcement *but* usually no objection to performance
    - Unless objection to performance for protection of vulnerable party
- Restitution may be available for unremunerated services
  - > *cf Pavey & Matthews v Paul* (HCA 1986)
- Restitution generally not available for completed transaction
  - > Unenforceable contract—no juristic reason
  - > Underlying natural obligation—juristic reason

#### Others

- Categories of natural obligations are never closed
- *Moses v Mansfield*: usurious contracts
  - > *cf Garland* reasonable expectation of legal penalty payment
- Louisiana: overpayment of generally under-paid employee
  - > No recovery of money payable *in conscience*
  - > A dubious proposition
- United States: payment of debt discharged through bankruptcy
- Germany: marriage broker services

### FORMS OF RESTITUTION - AN INTRODUCTION

#### Restitution Defined

- Restitution = reversal of transfer of wealth
  - > Relief capped by highest amount common to gain and loss
    - No penalty: defendant cannot *give* back more than he received
    - No windfall: plaintiff cannot *get* back more than she lost

#### Forms of Restitution - General Comments

- Personal restitution (*in personam*) = right exigible against particular person
- Proprietary restitution (*in rem*) = right exigible against particular asset

### TECHNIQUES FOR RESTITUTION

#### Personal Obligation

- Personal obligation = defendant owes bare debt to pay money to plaintiff
  - > Satisfaction of right dependent upon defendant's financial status
  - > Destruction of particular assets irrelevant

#### Interest

- Interest = time use of money
- Complete restitution requires restoration of enrichment *and* time use of enrichment
  - > Trend toward compound interest where appropriate

- Compare: *Westdeutsche v Islington* and *Bank of America v Mutual Trust*

### Rescission

- Rescission = termination of transaction *ab initio* (contract, gift, trust)
- Grounds for rescission
  - > Invalidity of transaction
    - Duress
    - Undue influence
    - Unconscionability
    - Incapacity
    - Misrepresentation
- Non-restitutionary species of rescission
  - > Purely executory transactions
    - Rescission merely eliminates outstanding obligations
    - No transfers to reverse
- Restitutionary species of restitution
  - > Wholly or partially executed transactions
    - Rescission eliminates outstanding obligations
    - Rescission reverts title (if necessary) (proprietary restitution)
    - Rescission creates debt (if necessary) (personal restitution)
- Limits to rescission
  - > Affirmation
    - Adoption of transaction after discovering invalidity
    - Once in a position to make a choice, can't change mind subsequently
  - > Lapse (laches)
    - Passage of time regardless of act of positive acceptance
    - Prejudices the other party (it would be unfair to go back)
  - > Third party rights
    - Intervention of accrued third party rights
    - BFPV – gets clear title
    - BFPV extinguishes pre-existing equitable right
  - > *Restitution in integrum* impossible
    - Parties cannot be precisely restored *in specie* to *status quo ante*
      - Traditional view: property has to be exactly the same (if you rent the house, or add something to the house – can't have restitution)
      - Trend toward monetary counter-restitution for benefits received.
      - Now we allow restitution flexibility and allow for monetary relief.

### Subrogation

- Subrogation = substitution to another party's rights
- *Simple* subrogation = substitution to *persisting* rights

#### Example

An insurance company sold property insurance to Ann. Ann's property was tortiously destroyed by Zachary. The insurer paid a benefit to Ann. The insurer is entitled to be subrogated to Ann's persisting rights in tort against Zachary.

The insurer's right of subrogation arises to prevent unjust enrichment. (1) Ann would be unjustly enriched at the insurer's expense if, despite receiving a benefit under her policy, she received full damages from Zachary. (2) Zachary would be unjustly enriched at the insurer's expense if, despite tortiously destroying Ann's property, its liability was extinguished by the insurer's payment to Ann.

- *Reviving* subrogation = revival and substitution to *extinguished* rights

#### Example

Ann owed \$30 000 to Zachary. That debt was secured by a mortgage over Ann's land. By mistake, Pam discharged Ann's debt by paying \$30 000 to Zachary. Upon receipt of that money, Zachary discharged the security that he held over Ann's land. Zachary's security interest may be revived and transferred to Pam.

Pam's right of subrogation arises to *reverse* an unjust enrichment. Zachary held two rights against Ann: (i) a personal right to receive payment on the debt, and (ii) a proprietary security interest over her land. Pam's mistaken intervention discharged *both* of those rights. Restitution therefore requires that Ann give back *both* benefits received from Pam: (i) a personal obligation to pay money, and (ii) a proprietary security interest over her land.

#### Lien

- Lien at law
  - > *Possessory* security right: no right of sale
    - Right of retention pending payment
    - Lien lost if possession lost
  - > Anomalously available in disparate circumstances (e.g. garage, inn)
    - Innkeeper can keep luggage if you don't pay, garage can keep car if you don't pay
    - Possessor right can occur any circumstances but usually don't talk about this type of lien in U/E
- Lien in equity
  - > *Non-possessory* security interest: ultimate right of forced sale
    - Satisfaction of personal obligation secured by value of asset
    - Personal obligation unaffected by value of security asset
  - > More generally available to reverse unjust enrichment
    - Specific rules remain unsettled

#### Trust

- Trust = property administratively held for benefit of another
  - > Beneficial *ownership* interest - not merely *security* interest
- Species of trust
  - > Express trust = property held on trust according to settlor's intention
  - > Resulting trust = property "resulting" to transferor by operation of law
  - > Constructive trust = trust arising by operation of law for disparate reasons
- Unjust enrichment and constructive trusts
  - > Constructive trust as proprietary vehicle for restitution (*Pettkus v Becker*)
    - "Unjust enrichment lies at heart of constructive trust"
    - *Restatement of Restitution: Quasi-Contract & Constructive Trusts*
  - > Constructive trust as response to miscellaneous events
    - E.g. proprietary disgorgement for wrongdoing (*Lac Minerals v Corona*)
    - E.g. perfection of intention (specific performance - interim interest)
    - E.g. protection of detrimental reliance (proprietary estoppel)
- Unjust enrichment and resulting trusts
  - > Resulting trust as proprietary vehicle for restitution (Birks/Chambers)
    - Resulting = *resalire* ("to jump back")
    - Trust invariably effects proprietary reversal of unintended transfer
  - > Resulting trust ("to jump back") = restitution ("to give back")

### PROPRIETARY RESTITUTION

#### Proprietary Restitution - Lien or Trust?

- Canadian law
  - > Haphazard pattern of discretionary and unprincipled results
- Principled response: least intrusive remedy necessary for circumstances
  - > Lien = security interest
    - Defendant entitled to satisfy judgment otherwise
    - Defendant entitled to increase in value
    - Allows asset to be sold

- > Trust = ownership interest
  - Plaintiff entitled to receive asset *in specie*
  - Plaintiff entitled to increase in value
- Lien is less intrusive than trust because in lien D can either sell asset, and get money or otherwise get the money, allows person of a choice how to satisfy.
- Trust takes asset from D and gives to P.

#### Proprietary Restitution - Rules for Availability

- Canadian law
  - > Haphazard pattern of discretionary and unprincipled results
  - There is no test of when you use a trust or a lien
  - Proprietary is usually exercised in family law context (Pettkus v. Becker)
  - Should never be able to get the thing back, unless you gave the thing back in the first place.
  - Services should never be able to support proprietary restitution
- Principled response #1: non-beneficial intention + fettered interest
  - > Did plaintiff ever intend to confer unfettered interest on defendant?
    - Plaintiff cannot avoid intention through unjust enrichment
  - > Criteria for proprietary restitution
    - Enrichment: defendant must have received *and* retained asset
      - Proprietary impossible if beneficial *services*
      - Proprietary impossible if *no traceable property*
    - Reason for reversal: plaintiff never intended to relinquish dominion
      - Proprietary possible if intent to transfer *vitiated*
      - Proprietary possible if intent to transfer *qualified and fettered*
- Principled response #2: risk of insolvency
  - > Did plaintiff ever intend to assume risk of defendant's insolvency?
    - Plaintiff cannot avoid risk through unjust enrichment
    - P cannot get proprietary restitution, if P knew that insolvency could occur during the transaction
  - > Criteria for proprietary restitution
    - Enrichment: defendant must have received *and* retained asset
      - Proprietary impossible if beneficial *services*
      - Proprietary impossible if *no traceable property*
    - Reason for reversal: plaintiff never assumed risk of insolvency
      - Proprietary *usually* possible if intent to transfer *vitiated*
        - *cf* purported unsecured contract vitiated for uncertainty
      - Proprietary possible if intent to transfer *qualified and fettered*

#### DEFENCES

#### CHANGE OF POSITION

#### Change of Position

- Exceptional expenditure in good faith reliance upon enrichment
  - > **Exceptional expenditure**  no defence if expense incurred in any event
    - Possibly sufficient to prove increased standard of living (*Phil Collins*)
      - Studio musicians were overpaid, and could they get restitution? Musician's defence was change of position. Raised living of standard across the board (e.g. ate better) Flexible on the case of evidence.
    - Not change of position, if you otherwise you paid the money (rent)
    - An enrichee often allows his standard of living to drift up to match his additional liquidity. In such case, the courts will take a broad view and will not look w/ eagle eyes for proof that every item was induced by the enrichment.
  - > **Good faith**  no defence if defendant knew of plaintiff's claim
    - Uncertain as to standard of good faith
      - Constructive knowledge likely insufficient to preclude defence
      - D has to actually not know, not should have known

- > **Reliance upon enrichment** □ no defence if no causal connection
  - Likely sufficient in anticipatory expenditure
    - Relevant change of position in anticipation of an enrichment will be treated in the same way as one, which came afterwards
  - Likely sufficient to prove unintended destruction or loss
    - *E.g.* painting destroyed by fire or stolen by thief
    - Causal connection is enough; the fire would not have otherwise destroyed the painting

- Essence of defence

- > Balancing the equities (*Garland v Consumers Gas*)
  - Judicial discretion to reduce liability to extent necessary for justice
- > Protecting freedom of choice (*Dextra v Bank of Jamaica*)
  - Subjective devaluation at time of receipt: enrichment
  - Subjective devaluation at time of trial: change of position
    - Defendant did not *truly* intend to incur expenditure
      - Restitution must not adversely affect defendant
      - Unfair to require involuntary depletion of *status quo ante*
        - Defendant will have a defence to the extent that in changed circumstances it would be inequitable to require full restitution.

- The fact that the defendant no longer has the money or other asset receives is not conclusive of disenrichment. Has to be an expense that you would not have incurred otherwise.
- A recipient who is induced to pay off a mortgage or a credit card debt pays what would have been paid anyhow. Except to the extent that some figure can be put on the value of his reduced liquidity over time, he has not been disenriched.
- If the money is lost or stolen or used up in expenditure induced by its availability, the disenrichment will be set against the enrichment, and the recipient's liability will be reduced
- Once you know of your disentitlement you cannot expect to escape liability by hurriedly disenriching yourself
- You are not disqualified from the defence but honestly believe that you are under a duty to pass the money to a person other than to yourself. It may be that you are persuaded that you must hand it over to a third party or that you know the money was not due and must be sent back to the payer soon. You may come under a duty of care in the meantime, as one who knows he has the management of another's money. If the money is lost before you have done that which you know you must do, you be liable in that you have failed that duty. Although negligence does not disqualify you from the defence is disenrichment, you may in such a case have incurred an independent liability in negligence.

#### Example

As a result of an egregious clerical error, a large and highly profitable company miscalculated the amount that a woman was entitled to receive as a share dividend: it paid \$50 000 instead of \$500. Honestly believing that she was entitled to the windfall, the woman used the money to repay several long-standing debts. The woman's luck was, however, mixed. Shortly after she received the money: (i) her pension was virtually wiped out by a number of disastrous investments, (ii) her husband passed away suddenly and unexpectedly, and (iii) her house was destroyed by a fire and she discovered that her insurance policy had lapsed.

- Should liability be reduced on the basis of change of position?
- Do the two models of change of position produce the same response?
  - No b/c
    - "If we balance the equities" – then it be unfair and harsh to make the woman pay and so don't allow restitution
      - "Balancing the equities" tells you nothing at all b/c judge decides on intuition. New Zealand found "balancing equities" test to be unworkable.
    - The principled approach: Supervening hardships that were not induced by the enrichment, such as unemployment, ill health, and marital breakdown held not to be relevant. No causal connection.

*Rural Municipality of Storthoaks v. Mobil Oil Canada*

Facts: Company had oil leases and was obliged to pay royalties. However, they terminated their leases, but OilCo kept on sending cheques to the city every month.

Issue: Can OilCo recover payments made?

Decision: Yes, because City has failed to establish that it had so altered its position as a result of the receipt of the payments that it would be inequitable to require it to repay.

OilCo also argued estoppel but, “whatever representation might be spelled out of Mobil’s conduct in continuing to forward the cheques after the surrenders were made, it is incumbent on the Municipality to show it acted to its prejudice on the basis of the representation.” If payer has paid money under a mistake of fact, it does not mean the payer is estopped from recovering it merely because the recipient has spent it.

*RBC Dominion Securities v. Dawson*

Dawson was told she had 15,000 shares of Eureka, but she actually had 600. The value of 15,000 shares was \$6750, when it should have been \$270. She confirmed with her broker, who relied on erroneous info from the computer. Then she told RBC to sell her shares and she received \$5069.74 for the value of the shares. RBC recognized it’s mistake, asked for refund and Dawson said no. Trial judge found that Ms. Dawson would have not have made the purchases had she not received the windfall from the sale of the stocks. Ms. Dawson changed her standard of living when she would have otherwise done so. Same situation happened to husband, but husband to give back money that he used to pay off Visa and loans to family members because those were expenses, he would have incurred anyways. He did not have to pay restitution on a fishing trip and entertainment for out of town guests.

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ESTOPPEL

Estoppel

- Defendant’s good faith detrimental reliance upon plaintiff’s representation
- Change of position + representation
  - > Good faith
    - No defence if the defendant was responsible for the plaintiff’s error
  - > Detrimental reliance
    - Sufficient if liability would adversely affect *status quo ante*
  - > Representation
    - No representation in mere fact of enrichment
    - *Collateral* representation if extraneous assurance of entitlement
    - *Inherent* representation if exceptional duty of accuracy
      - Mere fact of payment is a representation. Inherent representation is usually from statute.
- **Total defence**
  - > Plaintiff unable to dispute truth of representation
  - > **Partial detrimental reliance** □ **precludes all liability**
    - If enrichment was \$5000, but spent \$10. D would keep everything.
    - *cf* change of position operates *pro tanto*
    - If enrichment was \$5000, but spent \$4000 on Tahiti – restitution would be \$1000
- Estoppel and change of position
  - > Uncertain co-existence of defenses (*Kenora Hydro v Vacationland Dairy*)
    - Estoppel traditionally necessary due to absence of change of position
    - Newer defence more sensitively addresses animating concerns

*Kenora Hydro Electric Commission v. Vacationland Dairy (SCC)*

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Due to an error by Kenora Hydro, the Coop was only billed for 50% of its electricity consumption for 7 years. Kenora sued to recover the unbilled amount. The Coop successfully proved that it acted to its detriment in reliance on the billing statements for its own billing and budgetary purposes and that therefore the value of the electricity no longer existed for the purposes of its relief

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*Avon County Council v Howlett*  
(1983 CA)

The plaintiff mistakenly gave the defendant 1000 in sick pay. When the defendant inquired, the plaintiff provided collateral representations that he had been paid the correct amount. The defendant then incurred an exceptional expenditure of 400. The plaintiff eventually discovered its error and claimed restitution. The defendant pleaded estoppel.

The Court of Appeal applied the defence and held that the defendant was relieved of *all* liability. It explained that since estoppel is a **rule of evidence, it must operate all-or-nothing. The statement was either true or false. As a matter of logic, a single representation cannot be subsequently sub-divided in accordance with the defendant's expenditures.**

- Change of position is more flexible, but estoppel is still available.

BONA FIDE PURCHASE

Bona Fide Purchase

- Context of application
  - > Defendant receives enrichment from plaintiff by way of third party
- Constituent elements
  - > *Bona fide* purchase for value without notice of pre-existing interest
    - *Bona fide* and without notice = no actual or constructive knowledge
    - Purchase for value = acquisition through payment of money
  - LAW – favor pre-existing owner, except in money
- Rationale #1: species of change of position
  - > *Bona fide* purchase invariably occurs within contract
    - No inquiry into adequacy of contractual consideration
      - Inter-subjectivity irrebuttably entails equality of exchange
      - Recipient  necessarily changed position to full extent of benefit
- Rationale #2: rule of commercial efficiency
  - > Exception to *nemo dat quod non habet* essential to efficacy of money
    - *Bona fide* purchase extinguishes pre-existing *proprietary* interest
    - *Bona fide* purchase must also extinguish possibility of *personal* claim
  - Only works in a three party situation
  - Like estoppel, BFPV is a total defence (not *pro tanto*)

Example

A thief used \$5000 stolen from Pam to purchase a lavish meal for himself and his friends at Dave's restaurant. Dave had no reason to suspect that he was receiving stolen money.

- Explain the operation of the defence in terms of change of position.
  - In taking \$5000, it was an exceptional expenditure. Problem: if thief pays \$5000, meal is worth \$3000. Two autonomous parties – don't get into inter - subjectivity. (Peppercorn theory)
- Explain the operation of the defence in terms of commercial efficacy.
  - We can't have restitution in this situation b/c if we held D liable, have to take steps that person has good legal title to the money, which is too cumbersome.

Passing On

- Whether the defendant should be relieved of liability if the claimant manages to recoup that loss from third parties?
  - Canadian law accepts this defence and it requires claimant to have suffered the corresponding loss

*Cherubini Metal Works Ltd v. Nova Scotia (A.G.)*

P sued the government to recover what it claimed was an overpayment of tax. P was a steel manufacturer that obtained most of its business by submitting competitive tender bids. These bids included in them, as expenses – the sales tax. CA found the claim was valid under statute and it was not barred by limitation. CA allowed it under unjust enrichment b/c P had suffered the economic burden of its errors. One of the examples showed that its bid was \$182 more than competitor because they had calculated the tax in, but if they hadn't calculated the tax in – they would have won the bid and generated a profit.

The enrichment of the province, receiving funds it was not entitled to, as directly related to respondent's deprivation. P was not the vendor; receiving a fee for collecting the tax from its customers...it was the taxpayer. This was a case where "prices were established by competition with suppliers who did not have to pay the tax"

**Ministerial Receipt**

- Could lead to that a ministerial receipt cannot be held liable in unjust enrichment at all, it will constitute a defence more absolute than change in position
- Not sure that "ministerial receipt" adds anything to disenrichment until it is held that no claim in unjust enrichment, personal or proprietary, can be brought against an agent recipient.

*ANZ Banking v. Westpac Banking*

Jakes banked w/ Westpac and had a debt balance of \$68 000. In error, ANZ transferred \$114 000 to Westpac to the credit of Jakes account, when it was supposed to transfer \$14 000. Jakes subsequently went into liquidation, and ANZ sued Westpac to recover \$100 000 it had transferred by mistake.

Issue: Whether the fact that an agent has paid over money received by him as agent to, or on behalf of, his principal will of itself constitute a good defence to an action against him for recovery of money paid under a fundamental mistake?

Decision: Yes. Westpac has good defence to ANZ's claim to the extent that it had on behalf of Jakes, paid out the proceeds of the telegraphic transfer before it received notice of ANZ's mistake. Westpac had at the time irretrievably paid out \$82,978.32 of the overpayment of the \$100,000 in honouring cheques that were drawn out by ANZ. Only liable for \$17,021.68.

Ratio: if money is paid to an agent on behalf of a principal and the agent receives it in his capacity as such and without notice of any mistake or irregularity in the payment applies the money for the purpose for which it was paid to him, he as applied it in accordance with the mandate of the payer who must look to the principal for recovery.

**G. Illegality**

*Vanderkerhove v. Litchfield*

Vanderkerhove borrowed money from Litchfield. By way of counterclaim, he sued Litchfield to recover money he had paid as interest on the loan; on the basis he had been charged an illegal interest rate contrary to s. 347 of Criminal Code.

Decision: Court will not order the lender to repay interest paid by the borrower. Rates of the interest called for by the loan agreements and paid by the borrower were legal rates because they had agreed to pay voluntarily. There was no loss inflicted on the borrower in respect of which the court may intervene to protect him. What the borrower is seeking to do is to punish the lender for the unwitting breach of s. 347. Court will not punish someone who did not know of the breach of s. 347 until after it occurred and who did not receive a single payment of interest at a criminal rate.

*Tinsley v. Milligan*

The parties purchased a house w/ their joint funds, but they put the house solely in the name of Tinsley. This was done to allow Milligan to fraudulently claim social service benefits. The parties then had a falling out, and Tinsley

brought an action to confirm her sole ownership of the house. Milligan counterclaimed for a ½ interest in the house. In response, Tinsely argued the defence of illegality based on Milligan's fraud.

Analysis: Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and there was a common understanding b/w her and Tinsley that they would own the house equally. She does not need to show *why* the house was conveyed in the name of Tinsley alone b/c it was irrelevant. It was enough to show that the house was in fact vested in Tinsley alone. No evidence to rebut that presumption of resulting trust, therefore Milligan should succeed.

## CHEQUES AND UNJUST ENRICHMENT

Cheque: Defined

- Cheque = negotiable instrument
  - > Also promissory note + bill of exchange
  - > Governed by *Bills of Exchange Act*
- Negotiable = transferable by delivery + (usually) endorsement
  - > Endorsement = signature
  - > Negotiation = transfer of rights represented by instrument
- Effect of endorsement
  - > Necessary for negotiation (unless instrument in *bearer* form)
  - > (Usually) promise of payment—endorser secondarily liable

Cheque: Cast of Characters

- Drawer = person creating cheque
- Drawee = bank holding account on which cheque is drawn
- Payee = person named as being entitled to payment on cheque
  - > Holder = person in possession of cheque

Cheque: Necessary Relationships

- Drawer and bank
  - > Contractual relationship
    - Bank obliged to honour cheque if sufficient funds or overdraft
    - Bank entitled to debit drawer's account accordingly
    - Bank authorized by drawer to discharge debt
- Payee and bank
  - > *Prima facie* no relationship
    - Payee has no legal right to demand payment from bank
- Payee and drawer
  - > Legal rights created by cheque itself
    - Payee entitled to sue drawer on cheque
  - > Usually legal rights underlying creation of cheque
    - Cheque usually drawn in discharge of debt owed to payee

Potential Problems

- Mistaken payment on *overdrawn* cheque
- Mistaken payment on *countermanded* cheque
- Mistaken payment on *certified* cheque

Mistaken Payment on Overdrawn Cheque

- Overdrawn cheque
  - > Definition: cheque drawn on account with insufficient funds
  - > Effect: implied request for (further) overdraft (*i.e.* loan)
    - Bank may *reject* implied request
      - No payment on cheque by bank
      - Payee sues drawer on cheque or debt
    - Bank may *intentionally* grant implied request

- Drawer granted sufficient overdraft
- Bank honors cheque with payment to payee
- Bank seeks repayment from drawer
- Bank may *mistakenly* grant implied request
  - Bank honors cheque with payment to payee
    - Does mistake trigger restitution from payee to bank?
- Orthodox analysis: no restitution because implied loan
  - > Causative mistake *prima facie* triggers restitution
  - > *But* mistaken payment on overdrawn cheque treated *as if* loan granted
    - Risk of drawer's insolvency on bank rather than payee
    - Bank (theoretically) entitled to repayment of (implied) loan
  - > Purported justifications
    - *Bank's negligence* justifies burden on bank
      - *But* negligence irrelevant in unjust enrichment
    - *Real dispute* lies between bank and drawer
      - Cheque acknowledge drawer's debt to payee
      - Only issue pertains to overdraft between bank and drawer
        - *But* overdraft *mistakenly* granted
- Preferable analysis: restitution subject to defences
  - > Causative mistake *prima facie* sufficient to trigger recovery
  - > Payee immediately enriched *but* ultimately dis-enriched
    - Drawn cheque authorizes bank to discharge debt to payee
    - Payee changes position by releasing drawer's debt
      - Payee no longer unjustly enriched by bank
  - > Drawer liable to reimburse bank
    - Explanation *not* based on fictional loan
    - Explanation based on unjust enrichment
      - Drawer enriched by *incontrovertible benefit* (debt discharged)
      - Bank suffered corresponding deprivation
      - No juristic reason (payment outside contract)
  - > Revised analysis if no debt underlying creation of cheque (*e.g.* gift to payee)
    - Payee liable to bank (no defence)
    - Drawer liable to bank
      - Enrichment in form of *request*
    - Bank not entitled to double recovery

#### Mistaken Payment on Countermanded Cheque

- Countermand = stop payment order
  - > Drawer rescinds instructions and authorizations inherent in cheque
  - > **What if bank mistakenly pays despite countermand?**
- English law: bank entitled to restitution from payee
  - > Countermand rescinds effect of cheque
    - Rescinds bank's authority to discharge drawer's debt to payee
      - Drawer's debt to payee persists
        - Payee not immunized by change of position
        - Drawer not enriched by discharge of debt
    - Rescinds bank's authority to debit drawer's account
    - Drawer unchanged + bank deprived + payee enriched
  - > Bank recovers from payee
    - Unresolved: disputed debt between drawer and payee
- Canadian law: rights dependent upon debt underlying cheque
  - > **Payee liable to bank if drawer not indebted to payee**
    - Payment does not discharge debt
      - Payee not dis-enriched by release of debt (no change of position)
      - Drawer not incontrovertibly benefited (no debt discharged)
    - Drawer unchanged + payee enriched + bank deprived

- **Bank seeks restitution from payee**
- > **Payee not liable to bank if drawer indebted to payee**
  - Payment discharges debt
    - Payee dis-enriched by release of debt (change of position)
    - Drawer enriched by incontrovertible benefit (debt discharged)
  - Payee unchanged + drawer enriched + bank deprived
- **Bank seeks restitution from drawer**
- > *But* bank has no knowledge of debt between drawer and payee
- > *And* second scenario (debt existing) defeats drawer's right of countermand
- If not debt b/w drawer and payee – same as English position
- If there is a debt, bank is not entitled to restitution
- Problem: banks' recovery is based on the existence of a debt, but how does bank know what happened?
  - Sue payee – if no debt discharged
  - Sue drawer – if there is still debt
- How does bank know whom to sue?
- Makes a mockery out of the countermand.

#### Mistaken Payment on Certified Cheque

- Certification
  - > Certification process
    - Cheque marked as certified *prior to* payment
    - Funds transferred from drawer's account to *suspense account*
  - > Certification = bank's assurance of honour
    - Account holds sufficient funds
    - Cheque not countermanded
    - Cheque bears authorized signature
  - > *General* effects of certification
    - If certified by drawer
      - Payee acquires right of enforcement against bank
    - If certified by payee
      - **Payee acquires right of enforcement against bank**
      - **Drawer released from cheque and underlying debt**
- Why because payee wants some assurance of payment. Have drawer's promise and the bank's promise that payee will get paid. Assures payment.

*AE LePage Real Estate Services v Rattray Publications*  
(1994 Ont CA)

LD Smith (1994) 11 Banking & Finance Law Review 126

(1) The drawer provided the payee with a cheque for \$50,000. (2) After deciding to dispute the purported underlying debt, the drawer then countermanded the cheque. (3) The payee then presented the cheque to the bank and requested certification. (4) Mistakenly overlooking the countermand, the bank complied and certified the cheque. The payee paid \$7 for the service. (5) When the payee presented the cheque for payment, the bank realized its error. It therefore re-transferred credit from the suspense account to the drawer's account *and* it refused to provide the payee with cash. (6) The drawer became insolvent. (8) The payee sued the bank for payment on the cheque.

Who must bear the loss? Must the bank pay the payee even though the drawer cannot cover the cheque? Or must the payee be denied payment despite the bank's certification?

The court conflated two issues: (1) must the bank make payment to the payee? (2) If the bank makes payment to the payee, can the bank immediately recover in unjust enrichment?

**The court held that the payee is entitled to receive *and* retain payment. The bank therefore suffers the loss.** Are the court's reasons persuasive?

- *Discharge of Debt*

- The court said that the bank's rights *vis a vis* the payee depend upon whether payment to the payee would discharge a debt between the drawer and the payee. That also is the Canadian analysis with respect to mistaken payment on countermanded cheques. Is it any more or less persuasive in the context of certification?
  - *Contract of Certification*
    - The court said that the payee obtained the right to irreversible payment when it contractually paid a fee for the bank's certification services. What would the reasonable person believe to be the terms of that contract? Would a reasonable bank provide a guarantee of payment on a large cheque (\$50,000) in exchange for receipt of a small fee (\$7)? What other set of valuable rights might the purchase of certification entail?
  - *Commercial Certainty*
    - The court justified its decision on the basis of the need for commercial certainty. And certainty undoubtedly is an important value. But does the decision impose a reasonable cost for the assurance of *absolute* certainty?
  - *Certification Equivalent to Cash*
    - The court most heavily emphasized the belief that a "cheque, once certified [is] the equivalent of cash." If a payee *does* receive cash from a bank, is the transfer necessarily irreversible? Should it be necessarily irreversible? Very often you can get restitution for mistaken payment.
- This decision is unsatisfactory. Right of countermand is immediately cut off when there is a certification.