

Improvements to Land, Equity, Proprietary Estoppel, and Unjust Enrichment

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Due to the high value that it placed upon the ownership of land, the common law traditionally was wary of intervening if the plaintiff non-contractually improved the defendant's land. For the most part, liability was imposed only if the landowner acted unconscionably according to the doctrine of proprietary estoppel. Recently, however, Canadian courts have expanded the scope of relief in two respects. First, the test for proprietary estoppel has been revised and relaxed. Second, the cause of action in unjust enrichment is now widely employed as an alternative source of liability. While neither development is necessarily wrong, the implications of those changes have received too little attention. A sensitive balance must be struck between the interests of worthy claimants and the interests of innocent landowners.

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I. Introduction

If the plaintiff improves the defendant's land, will the owner be held liable? From a historical perspective, that question was unlikely to receive a robust response. The defendant obviously was obliged to pay if the plaintiff acted pursuant to a contract between the parties. Absent an agreement, however, the improver's prospects were slim. That was particularly true in law. Active claims were refused recognition and the passive right of set-off was severely restricted. *Montreuil v Ontario Asphalt Co.*¹ provides a dramatic illustration. Believing that it had acquired a lease and an option to purchase from a landowner, a company spent a small fortune building a dock and a factory on the property. Unfortunately, the purported holder of the *fee simple* then discovered that he held a mere life estate, and, worse yet, died a few years later. The company was anxious to reach some agreement, but the gentleman's children, as the remaindermen, were uncooperative. Proceeding in law, they recovered possession through an action in ejectment and they were awarded *mesne*

1. (1922), 63 SCR 401 [*Montreuil*].

profits, representing reasonable rental value, with respect to the trespass that the company committed following the expiration of the lease. The company was not so fortunate. As both of the original parties had been mistaken as to the nature of the lessor's interest, the equitable doctrine of proprietary estoppel was inapplicable. Further, because the children had proceeded entirely in law, the company could not, by pleading that “[h]e who seeks equity must do equity”, invoke the equitable doctrine of set-off, which would have encompassed the full value of the improvements.² The company, instead, was limited to its legal remedies, which consisted exclusively of law's miserly right of set-off. Having made permanent improvements to the property in the *bona fide* belief that it was in lawful occupation, it was entitled to compensation, but only “to the extent of the rents and profits claimed” by the children.³ Since the trespass was worth a small fraction of the \$100,000 that the company had spent on the improvements, the children came away with a substantial windfall.⁴

The situation in equity was better, but far from generous. While proprietary estoppel (or the doctrine of acquiescence) has long provided relief, it historically was formulated narrowly. The claimant was required to satisfy the “five probanda” articulated in *Wilmott v Barber*⁵ (“*Wilmott*”):

[i]n the first place the plaintiff must have made a *mistake as to his legal rights*. Secondly, the plaintiff must have *expended some money or must have done some act* (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must *know of the existence of his own right* which is inconsistent with the right claimed by the plaintiff. ... Fourthly, the defendant ... must know *of the plaintiff's mistaken belief* of his rights. ... Lastly, the defendant ... must have *encouraged the plaintiff* in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.⁶

Proof of the five probanda demonstrated a form of fraud that led equity

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2. *Neesom v Clarkson* (1845), 67 ER 576 (Ch); *Richards v Collins*, 9 DLR 249 (Ont Div Ct).
 3. *Montreuil*, *supra* note 1 at 439. See also *Geldhof v Bakai* (1982), 139 DLR (3d) 527 (Ont HC); *Farquhar v Sherk*, (1979), 14 RPR 18 (Ont Dist Ct).
 4. The case was remitted to trial for a determination of precise values.
 5. (1880), 15 Ch D 96 at (Eng) 105-106 [*Wilmott*].
 6. *Ibid*. See also *Ramsden v Dyson and Thornton* (1866), LR 1 HL 129 [emphasis added].

to “restrain the possessor of the legal right from exercising it”.⁷ The precise means by which it did so was a function of an unusually broad discretion aimed at identifying “the minimum equity [required] to do justice between the parties”.⁸ The possibilities, which were virtually unlimited, included the transfer of title.⁹ By definition, however, proprietary estoppel traditionally was confined to a narrow band of cases. If the defendant did not, actively or passively, improperly induce the plaintiff to act, then there was no basis for judicial intervention and the landowner’s windfall was left to lie where it fell.¹⁰

The explanation for the historical reluctance to award relief for improvements to land is reasonably clear. Rights in real property were all but sacrosanct. Land, a scarce resource in a relatively small country, was the main repository of wealth and source of power prior to the industrial revolution. That fact, coupled with a fierce conception of personal autonomy, understandably resulted in an unwillingness to impose liability upon landowners. The danger was twofold. By its very nature, land is susceptible to services to an extent that other forms of property are not. It was easy to imagine a house mistakenly built on the wrong side of a boundary line, but impossible to conceive of a similarly substantial undertaking affecting a chattel. And even if liability was *in personam*, it might well entail a debt so large as to be satisfied only with the proceeds

7. *Wilmott*, *supra* note 5 at 106.

8. *Crabb v Arun District Council*, [1976] Ch 179 at 189 (CA (Eng)) [*Crabb*].

9. *Dillwyn v Llewelyn* (1862), 45 ER 1285 (QB); *Pascoe v Turner*, [1979] 1 WLR 431 (CA (Civ)(Eng)); *Brogden v Brogden*, (1920), 53 DLR 362 (ABCA); *Cowderoy v Sorkos Estate*, 2012 ONSC 1921 [*Cowderoy*].

10. It is occasionally said that proprietary estoppel may apply regardless of context: *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd*, [1982] QB 84 (CA (Civ)(Eng))(enforcement of loan guarantee); *Moorgate Mercantile Co Ltd v Twitchings*, [1977] AC 890 (HL)(existence of competing interest in vehicle). Canadian courts, however, have generally confined the equitable doctrine to interests in land, as Justice Crawford held in *Silverstone Trucking Ltd v Pacific Dispatch Ltd*, 2015 BCSC 533 (“[a]s this case does not relate to real property, any claim of proprietary estoppel fails” at para 68). See also *Maritime Telegraph and Telephone Co v Château Lafleur Development Corp*, 2001 NSCA 167 at paras 37, 50; *Sabey v Beardsley*, 2014 BCCA 360 at para 32 [*Sabey*].

from the sale of land.

Circumstances, of course, have changed. Land is not so scarce in a country the size of Canada. Moreover, while a home frequently remains a person's most valuable asset, wealth increasingly is held in other forms. Real property may be a single part of a diversified portfolio. Wealthy individuals in the twenty-first century are just as likely to trace their privileged positions to copyrights and patents as to land. Highly valuable services may be rendered with respect to chattels and intangible assets as easily as they may be conferred upon real property.

To some extent, the legal system has evolved in step with modern perspectives on land. The Supreme Court of Canada, for instance, has broken with the past by rejecting the presumption that every parcel is unique and hence capable of supporting an order for specific performance of a contract. "Residential, business, and industrial properties", it explained, are "mass produced much in the same way as other consumer products" and therefore do not warrant special protection.¹¹ The court has also recognized that traditional attitudes regarding title to land are no longer appropriate within the context of "joint family ventures".¹² The redistribution of property rights upon the dissolution of marriage historically was unthinkable not only because courts tended to denigrate the nature of female domestic labour,¹³ but also because they believed

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11. *Semelhago v Paramadevan*, [1996] 2 SCR 415 ("[t]his approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business, and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available" at para 20) [*Semelhago*].
 12. *Kerr v Baranow*, 2011 SCC 10 [*Kerr*].
 13. *Murdoch v Murdoch*, [1975] 1 SCR 423 (dismissing the claim of a woman who had laboured on the family property for twenty years because she merely had performed "the work done by any ranch wife" at 436).

that title to Blackacre was too important to be varied by judicial fiat.¹⁴ While English courts continue to resist the remedial constructive trust,¹⁵ Canadian judges no longer recoil at the prospect of awarding proprietary relief.¹⁶

Similarly, some provinces have adopted non-traditional attitudes towards land.¹⁷ If a structure or fence encroaches upon a neighbouring property in British Columbia¹⁸ or Manitoba,¹⁹ a judge is entitled to order its removal, grant an easement, or, most dramatically, vest title in the encroaching party upon payment of an appropriate price. Likewise, if, as a result of a mistaken belief that the land was the plaintiff's own, a "lasting improvement" is made to the defendant's property, betterment

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14. *Pettkus v Becker*, [1980] 2 SCR 834, Justice Martland ("[i]n my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust" at 859) [*Pettkus*].
 15. *Chapman v Chapman*, [1954] AC 429 (HL) at 444; *Re Polly Peck International (No 2)*, [1998] 3 All ER 812 (CA (Civ)) at 830.
 16. *Pettkus*, *supra* note 14. Matrimonial property legislation similarly rejects the traditional view. For constructive trusts outside of family law, see *Soulos v Korkontzilas*, [1997] 2 SCR 217.
 17. Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014) at 327-31 [McInnes].
 18. *Property Law Act*, RSBC 1996, c 377, s 36.
 19. *The Law of Property Act*, CCSM 1997, c L90, s 28 [*Law of Property Act*].

statutes in Alberta,²⁰ Saskatchewan,²¹ Manitoba,²² and Ontario²³ allow a court to either award the claimant a lien for the value of the improvement or require the claimant to retain the affected portion of the property and compensate the defendant's resulting loss.

In deciding to override the protection traditionally enjoyed by landowners, the Supreme Court of Canada and the provincial legislatures act upon policies formulated following careful consideration of competing interests. These decisions typically receive considerable attention among their target audience. As a result, there are normally opportunities, before or after the fact, for experts and affected parties to assess the situation and to comment on the wisdom of moving in one direction or another.

In other instances, however, the legal system's attitude regarding non-contractual improvements to land has evolved piecemeal and without broad oversight. In a sense, that is the genius of the common law. The "heap of good learning"²⁴ is forever changing, incrementally, one case at a time. That approach nevertheless provides pause for thought insofar as significant developments may occur largely unnoticed. That is true, to a lesser or greater degree, in the current context.

The reformulation of the proprietary estoppel doctrine has been

20. *Law of Property Act*, RSA 2000, c L-7, s 69.

21. *Improvements Under Mistake of Title Act*, RSS 1978, c I-1, s 2. See *St Pierre v St Pierre*, 2010 SKCA 20 ("[t]he claims he was entitled to statutory relief under *The Improvements Under Mistake of Title Act* and *The Frustrated Contracts Act* are without merit. The purpose of the former Act is to overcome the common law proposition that the true owner of land is entitled to everything attached to the land. It is intended to compensate someone who has an honest but mistaken belief that he or she was making lasting improvements to their own land. As the appellant was a wrongdoer, having induced someone to sell her home, he cannot expect to be compensated for his own wrongdoing" at para 18).

22. *Law of Property Act*, *supra* note 19, s 27.

23. *Conveyancing and Law of Property Act*, RSO 1990, c C-34, s 37(1).

24. Thomas Wood, *An Institute of the Laws of England in Their Natural Order According to Their Common Use* (1722), cited in Peter Birks, ed, *English Private Law*, 2d ed (Oxford: Oxford University Press, 2000) at xliv.

comparatively high profile.²⁵ For too long, the “five probanda” that Justice Fry articulated in *Wilmott*²⁶ had been treated like “a Procrustean bed constructed from some unalterable criteria”,²⁷ rather than simply a “valuable guide”.²⁸ The doctrine’s usefulness had been unnecessarily cramped by a test that supported redress only if the defendant had knowingly duped the plaintiff into action. As a result, while traditions die hard, a number of Canadian courts have expressly redesigned proprietary estoppel.²⁹

*Idle-O Apartments Inc v Charlyn Investments Ltd*³⁰ (“*Idle-O*”) is a prime example. *Idle-O* purportedly leased part of a parcel to Charlyn for a term of 998 years. That lease, in fact, was void because it constituted an informal subdivision lasting more than three years.³¹ Nevertheless, because neither party appreciated the problem, Charlyn greatly improved the property over the next two decades. When the defect finally came

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25. A great deal of commentary has arisen in response to recent English cases that have revisited the scope of proprietary estoppel: *Yeoman’s Row Management Ltd v Cobbe*, [2008] UKHL 55; *Thorner v Major*, [2009] UKHL 18; cf. *Blue Haven Enterprises v Tully and another*, [2006] UKPC 17 (Jam); David Neuberger, “The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity” (2009) 68:3 Cambridge Law Journal 537; Martin Dixon, “Confining and Defining Proprietary Estoppel: The Role of Unconscionability” (2010) 30:3 Legal Studies 408; Ben McFarlane & Andrew Robertson, “Apocalypse Averted: Proprietary Estoppel in the House of Lords” (2009) 125:3 Law Quarterly Review 535.
26. *Wilmott*, *supra* note 5.
27. *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, [1981] 1 All ER 897 (Ch) at 918.
28. *Crabb*, *supra* note 8 at 194.
29. *Murphy v MacDonald*, 2009 PESC 30 (applying traditional criteria and denying relief because the defendant was not aware of the plaintiff’s mistake) [*Murphy*]; *Dutertre Manufacturing Inc v Palliser Regional Park Authority*, 2012 SKQB 335 [*Dutertre*].
30. 2013 BCSC 2158 [*Idle-O*].
31. *Land Title Act*, RSBC 1996, c 250, s 73 (1)(b) provides: “[e]xcept on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of [...] (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years”.

to light and Idle-O asserted exclusive possession under a declaration of invalidity, Charlyn sought protection in the doctrine of proprietary estoppel. The traditional test, of course, could not be satisfied. While Charlyn had acted in the mistaken belief that it held a long-term interest in the land, Idle-O was oblivious to that error, as well as its own rights. The title-holder certainly had not engaged in the sort of cynical fraud contemplated in *Wilmott*. Charlyn’s plea was nevertheless successful. As Justice Newbury explained in an excellent judgment, the “five probanda” have been “overtaken by a broader and less literal approach to proprietary estoppel”.³² An “equity” will arise in the improver’s favour if:

- i. “There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property”, and
- ii. “The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance”.³³

If both hurdles are cleared, “the court must [then] determine the extent of the equity and the remedy appropriate to satisfy the equity”.³⁴ All of that was true on the facts of *Idle-O* even though both parties had laboured under the same mistake. While the invalid lease itself could not constitute an actionable representation, Idle-O’s conduct certainly encouraged Charlyn in the belief that it would enjoy the fruit of its own labour. Moreover, once Charlyn detrimentally relied on that inducement by spending a great deal of time and money on the property, it became unconscionable for Idle-O to strictly enforce its legal rights. Accordingly, Charlyn’s existing directors, as well as their children, were entitled to use the premises for recreational purposes for the remainder of their lives. Once the last member of that class has died, the cloud on Idle-O’s title will disappear.

The specific manner in which the court reformulated proprietary

32. *Idle-O*, *supra* note 30 at para 134, quoting *Trethewey-Edge Diking District v Coniagas Ranches Ltd*, 2003 BCCA 197 at para 64. See also *Erickson v Jones*, 2008 BCCA 379; *Sabey*, *supra* note 10; *The Owners, Strata Plan VR 10 v EE Management Corp*, 2015 BCSC 473; *Hawes v Dave Weinrauch and Sons Trucking Ltd*, 2015 BCSC 540.

33. *Sabey v Rommel*, 2014 BCCA 360 at para 30.

34. *Ibid.*

estoppel obviously is important, but the fundamental reorientation of the doctrine is even more significant. Liability does not necessarily require proof that the defendant was culpably complicit in the plaintiff's decision to act.³⁵ The doctrine now responds, much more broadly, to the fact that it would simply be inequitable for the defendant to assert its legal rights to the plaintiff's detriment. The essential element of unconscientiousness, which justifies equity in overriding the landowner's legal rights, may be entirely *ex post*.

In that sense, the modern Canadian conception of proprietary estoppel strongly resembles the action in unjust enrichment. The defendant may be held liable with respect to unrequested services even though it neither knew, nor ought to have known, that the plaintiff

35. Whereas British Columbia's Court of Appeal has adopted a two-stage test, its counterpart in Ontario has adopted a three-fold inquiry. See *Clarke v Johnson*, 2014 ONCA 237 (Peppal JA warned against rigid criteria, but said that proprietary estoppel occurs when "(i) the owner of the land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property; (ii) in reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner; and (iii) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive" at para 52) [*Clarke*]. See also *Eberts v Carleton Condominium Corporation No 396* (2000), 136 OAC 317 (Ont CA) at para 23; *Love v Schumacher Estate*, 2014 ONSC 4080 at para 36 [*Schumacher Estate*]; *Gold v Chronas*, 2014 ONSC 6763; *Brownlee v Kashin*, 2015 ONSC 1035 at para 69 [*Brownlee*]; *Alexander James Wright v Candice Holmstrom*, 2015 ONSC 1906 at para 50; *Servello v Servello*, 2014 ONSC 5035 at para 103, per Justice Koke [*Servello*]. The same approach now prevails in Alberta: *Parkdale Nifty Fifties Seniors Association v Calgary (City)*, 2012 ABCA 301 at para 12; *Rocky Mountain House (Town of) v Alberta Municipal Insurance Exchange*, 2007 ABQB 548 at para 22; *Nelson v 1153696 Alberta Ltd*, 2009 ABQB 732 at para 235, appealed on other grounds in *Nelson v 1153696 Alberta Ltd*, 2011 ABCA 203. Some judges proceed more cautiously. In *Cowderoy*, *supra* note 9 at para 84, Justice Tausendfreund observed that proprietary estoppel traditionally encompassed two categories of cases – depending upon whether the defendant *encouraged* or merely *acquiesced* in the plaintiff's acts – and held that the "five probanda" are not necessarily apposite in the former.

did not truly intend to confer a benefit. As a result, unjust enrichment, like the re-formulated model of proprietary estoppel, has the capacity to substantially undermine the courts' traditional reluctance to impose liability for non-contractual improvements to land.

II. The Risk of Restitution

Although the label is used ambiguously too often, “unjust enrichment” properly refers to the cause of action that governs unwarranted transfers between parties.³⁶ As authoritatively framed by the Supreme Court of Canada, it requires proof that (i) the defendant received an *enrichment*; (ii) the plaintiff suffered a *corresponding deprivation*; and (iii) there was an *absence of juristic reason* for the transfer. Reference sometimes is made to a final stage of inquiry, consisting of four *bars and defences*.³⁷ If the cause

36. Canadian courts sometimes use “unjust enrichment” to refer to a situation in which the plaintiff proves that the defendant committed some form of civil wrong (*e.g.* breach of confidence, trespass to land, “exceptional” breach of contract), but instead of seeking compensation for losses suffered, demands “restitution” (or, more precisely, disgorgement) of the defendant’s ill-gotten gain. Critically, whereas true unjust enrichment and restitution require no breach and are confined to benefits that the defendant received *from* the plaintiff, the alternative model of liability typically is invoked to capture benefits that the defendant obtained from a third party as a result of violating the plaintiff’s rights. That is true, for instance, if a Crown prosecutor abuses the fiduciary position by accepting bribes from criminals. The government does not recover money that it previously possessed. As the victim of the operative breach, it strips away the enrichment that its dishonest agent obtained from the third parties: *Attorney General of Hong Kong v Reid*, [1994] 1 AC 324 (PC (NZ)); *cf.* *Can Aero v O’Malley*, [1974] SCR 592.

37. *Pettkus*, *supra* note 14; *Garland v Consumers’ Gas Co*, 2004 SCC 25 [Garland]. The underlying principle was first recognized in *Degelman v Guaranty Trust Co of Canada and Constantineau*, [1954] SCR 725 [Degelman].

of action is made out, restitution is the only possible response.³⁸ The transfer between the parties is reversed and the *status quo ante* is restored. The plaintiff cannot get back more than was lost; the defendant cannot give back more than was gained.

The roots of the modern action in unjust enrichment date back hundreds of years, but it was only during the second half of the twentieth century that the subject came into its own.³⁹ It was even longer before the simple three-part claim was allowed to unfold naturally in the current context. Writing in 1992, Professor Fridman objected to the application of unjust enrichment as a “broad general principle” and insisted, in the event of non-contractual improvements to land, that “no claim will succeed where the defendant was given no opportunity to object to what was being done, *i.e.* did not actively acquiesce”.⁴⁰ To impose liability against an “entirely innocent” landowner “on a restitutionary basis”, he said, “would result in an injustice”.⁴¹ Similarly, in 2004, Professors Maddaugh and McCamus wrote that “the full implications of the unjust enrichment principle have not been adopted” and said that relief for improvements to land has been “narrowly restricted to mistakes of ownership in the traditional sense”.⁴²

Significantly, as Fridman reported, while case-law was sparse, there was “no congruence between the law relating to improvements to land

38. McInnes, *supra* note 17 at chs 32, 34, 35 (While the *measure* of relief is always the same, the *form* of restitution depends upon the circumstances. It is usually *personal*, but it exceptionally is *proprietary*. There is growing recognition that many traditional proprietary doctrines are best understood as restitution for unjust enrichment. That is true, for instance, of resulting trusts, rescission, and subrogation).

39. By 1760, Lord Mansfield was able to draw a generalized principle from a rich body of case law: *Moses v Macferlan* (1760), 97 ER 676 (KB).

40. GHL Fridman, *Restitution*, 2d ed (Scarborough: Carswell, 1992) at 334, 336 [Fridman].

41. *Ibid.*

42. Peter D Maddaugh & John D McCamus, *The Law of Restitution*, 2d (Aurora, Ontario: Canada Law Book Inc, 2004)(Loose-leaf) at § 12:400.20 [Maddaugh & McCamus].

and that pertaining to improvements to chattels”.⁴³ The action in unjust enrichment was available to one who, for instance, repaired a vehicle following an apparently valid purchase.⁴⁴ *Goff & Jones*, the pioneering English text, explained the essential difference:

It may seem odd to allow a bona fide improver of a chattel a claim for improvements and to deny a bona fide improver of land a comparable claim. But no English lawyer should be surprised that our law should treat chattels differently than land. Most chattels are not unique; they are fungible and replaceable. It may be unreasonable to require the owner of land to sell or mortgage in order to recompense the improver for unsolicited improvements. But it will not generally be unreasonable to require the owner of a chattel, who has obtained an unsolicited but incontrovertible benefit from another's improvements, to sell his chattel to make restitution for the benefit, if that is the only way he can do so.⁴⁵

As the preceding quotation suggests, restitution carries a substantial risk insofar as it may impose an unfair burden upon an innocent recipient. The explanation lies in unjust enrichment's unique nature.⁴⁶ Most causes of action turn on the breach of an obligation. Once it has been determined that the defendant is a wrongdoer, a court will be justified in disrupting the *status quo ante*. It may strip away ill-gotten gains (*i.e.*

43. Fridman, *supra* note 40 at 345. See also *Gidney v Shank*, [1995] 5 WWR 385 (Man QB), reversed in *Gxqidney v Shank*, [1996] 2 WWR 383 (Man CA) [*Gidney*]; *Thomas v Robinson*, [1977] 1 NZLR 385 (SC) [*Robinson*].

44. *Greenwood v Bennett*, [1973] QB 195 (CA (Civ)(Eng)) [*Greenwood*]; *Webb v Ireland*, [1988] IR 353 (HC) [*Webb*].

45. Robert Goff & Gareth Jones, *The Law of Restitution*, 3d (London: Sweet & Maxwell, 1986) at 147-48 [Goff & Jones].

46. McInnes, *supra* note 17 at 24-31 (“Strict liability” is an ambiguous phrase. It typically means that the defendant may be held liable for having breached an obligation even though the breach was neither deliberate nor negligent. That is true, for instance, under the actions for breach of fiduciary duty, breach of confidence, and trespass. In such circumstances, the defendant's breach of that primary obligation triggers the imposition of a secondary (remedial) obligation. Unjust enrichment, in contrast, entails *true* strict liability. The defendant incurs liability, without any breach at all, simply by receiving a benefit from the plaintiff in the absence of any legal explanation. And since there is no breach, there is never any question of a secondary obligation. The duty to make restitution is a primary obligation that arises from the transfer itself).

disgorgement), extract reparation of losses (*i.e.* compensation), or even impose deliberate pain (*i.e.* punitive damages).⁴⁷ The breach warrants the mistreatment. In other instances, the court's justification lies in a prior agreement. While it is human nature to grumble, the defendant has no real complaint if a court demands performance of a contractual undertaking. Judicial intervention merely reflects a choice that the defendant previously exercised.

Unjust enrichment, however, requires neither a wrong nor an agreement. The plaintiff may seek restitution for improvements to land even though the defendant was entirely innocent and unaware of those services at the time of conferral. If that claim is upheld, then there is a very real risk that the landowner will bear the burden of a benefit that was unnecessary, unwanted, and unaffordable. In the worst case scenario, as *Goff & Jones* contemplated, the defendant may be able to satisfy judgment only by liquidating the land. As a result of the plaintiff's mistaken decision to act, the defendant may be compelled to sacrifice a long-cherished family home. That is not an attractive prospect.⁴⁸

III. **Enrichment and Autonomy**

Broadly speaking, the risk that restitution may create injustice may be managed at either the first stage or the third stage of the action in unjust enrichment.

Enrichment is a deceptively simple concept. It serves at least three functions.⁴⁹ To begin, it obviously demonstrates that the defendant

47. Disgorgement almost always disrupts the *status quo ante* insofar as it leaves the plaintiff with a benefit that it never possessed and never would have obtained in the normal course of events. Punitive damages have the opposite effect insofar as they require the defendant to deplete untainted resources in order to satisfy judgment. Though the point occasionally is overlooked, the same is true of compensation. Unless the defendant coincidentally received a wrongful gain corresponding to the plaintiff's wrongful loss, the payment of reparations necessarily will draw upon pre-existing funds. Compensatory damages hurt, albeit not as much as punitive damages.

48. *Goff & Jones*, *supra* note 45.

49. McInnes, *supra* note 17 at ch 2.

received an objective benefit, which, when coupled with other elements, may support liability.⁵⁰ Moreover, assuming that liability has been established, the measure of relief is governed by the value of the transfer between the parties; this is a function of the defendant's gain and the plaintiff's corresponding loss.⁵¹ And, most importantly for present purposes, the concept of enrichment provides the primary means by which the courts protect innocent recipients from hardship. It does so by ensuring that the risk of liability is consistent with the defendant's autonomy.

It is not enough for the plaintiff to prove the transfer of an objective benefit. The common law “was founded on a philosophy of robust individualism which expected every person to look out after his or her own interests and which place[d] a premium on the right to choose how to spend one's money”.⁵² The recipient of an objective benefit consequently enjoys the right of *subjective devaluation*.⁵³ That label is a bit misleading. The defendant may be personally delighted to have a benefit, but still escape liability. The explanation lies in the fact that subjective

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50. *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 (“[t]he word ‘enrichment’ ... connotes a tangible benefit” at para 45) [*Peel*]; *Peter v Beblow*, [1993] 1 SCR 980 (“[t]his court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment” at 990) [*Beblow*].
51. *Air Canada v British Columbia*, [1989] 1 SCR 1161 (restitution “is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth ... it is restored to him” at 1202); *Kerr*, *supra* note 12 (unjust enrichment means “not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered” at para 39); *Quebec (Attorney General) v A*, 2013 SCC 5 (liability in unjust enrichment “will be allowed in the lesser of the following two amounts: that of the enrichment of [the defendant] and that of [the plaintiff's] own impoverishment” at para 119); *cf. Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1.
52. *Peel*, *supra* note 50 at 785-86.
53. *Stevested Machinery & Engineering Ltd v Metso Paper Ltd*, 2014 BCCA 91 at para 60; *Valley v McLeod Valley Casing Services Ltd*, 2004 ABQB 302 at para 145 [*McLeod*]; *Sherbeth v Sherbeth*, 2007 MBQB 50 at para 22 [*Sherbeth*].

devaluation is a test of autonomy. It allows the defendant to turn to the plaintiff and say, “it is not your job to make my choices”.⁵⁴ Suppose, for example, that a landscaping company, erroneously arriving at the wrong address, artistically sculpts the landowners’ hedges into fantastical shapes. That service has market value. Some people pay good money for it. Nevertheless, whether they are amused or horrified to discover the topiary on their front yard, the owners presumptively never chose to expend resources on such whimsy.

A. Request and Free Acceptance

Given the doctrine of subjective devaluation, recognition of a legal enrichment is premised upon proof that restitution would not intolerably override the recipient’s autonomy. There are two possibilities. First, the plaintiff may prove that the defendant actually chose to accept the risk of liability, either actively through a request⁵⁵ or passively through free

54. *Magical Waters Fountain Ltd v Sarnia* (1990), 74 OR (2d) 682 (Ont Ct J (Gen Div)) at 691, per Justice Gauthreau, appealed on other grounds in *Magical Waters Fountains Ltd v Sarnia* (1992), 8 OR (3d) 689 (CA). See also JRM Gauthreau, “When Are Enrichments Unjust?” (1989) 10:3 *Advocates’ Quarterly* 258 (“[t]he choice of how to invest one’s time, effort and money should not be forced on one. Freedom of choice is the dominant consideration in these cases” at 261).

55. Of course, a request that elicits performance may support recognition of a contract: *St John Tug Boat Co Ltd v Irving Refinery Ltd*, [1964] SCR 614. If so, unjust enrichment generally is a non-issue.

acceptance.⁵⁶ A request normally⁵⁷ demonstrates both a desire to receive and a willingness to pay.⁵⁸ Accordingly, if the plaintiff duly performs, the defendant cannot complain if the court compels payment. Much the same is true, under the doctrine of free acceptance, if the defendant chooses to accept a proffered benefit despite knowing that the plaintiff expects payment and despite a reasonable opportunity to reject.⁵⁹ In effect, silent acquiescence is deemed to constitute a decision to assume

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56. As of 2004, a transfer is reversible not because of the presence of an unjust factor, but rather because of the absence of juristic reason: *Garland, supra* note 37 discussed below at Part V.B. As a result, free acceptance has “now been overtaken” as a test of *injustice: Kerr, supra* note 12 at para 121. It nevertheless continues to serve, more narrowly, as a test of *enrichment*.
57. Exceptions do arise. Within a family unit, in which benefits are routinely conferred gratuitously, one may genuinely request a service without any expectation of subsequently being provided with a demand for payment. Much the same may be true even in a commercial context. For instance, an injured worker may seek out a psychologist’s services in the mistaken belief that the psychologist would look to the employer for payment: *Tang v Jarrett*, [2009] OJ No 1282 (Sup Ct J)(QL). So too, a homeowner may ask for a realtor’s help in selling a property in the mistaken belief that the agent expected payment only in the event of a sale: *Seale & Associates Inc v Vector Aerospace Corp*, [2009] OJ No 1456 (Sup Ct J)(QL); *Sugar v Kim Orr Barristers Professional Corp*, 2012 ONSC 6668 (firm requested lawyer’s assistance in drafting pleadings in belief that services were offered on a contingency basis).
58. The request doctrine is extended slightly if, for example, a benefit is either demanded at gunpoint or taken without permission. The courts will not allow a person to improperly frustrate the normal operation of the marketplace. One who demands or takes is treated as the same as one who requests: 720654 *Alberta Ltd v El Hajj*, 2011 ABPC 64.
59. *Pettkus, supra* note 14; *Binichakis v Smitherman*, 2009 BCPC 131; *Park Georgia Realty Ltd v Mayfair Lanes Canada Ltd*, 2009 BCSC 1322 at para 73.

the risk of liability.⁶⁰

B. Incontrovertible Benefit

The second category of enrichment is more controversial. Instead of turning upon the nature of the defendant's conduct, it turns upon the nature of the enrichment itself. As Justice McLachlin explained, normally, it "would be wrong to make the defendant pay" for an unsolicited benefit "since he or she might well have preferred to decline the benefit if given a choice".⁶¹ An *incontrovertible benefit*, however, is "demonstrably apparent and not subject to debate or conjecture". It is "not the antithesis of freedom of choice" — it "exists when freedom of choice as a problem is absent".⁶²

Money is an incontrovertible benefit.⁶³ As the very means by which value is recognized and expressed, it cannot be subjectively devalued. It is always valuable and it is equally valuable regardless of who holds it. If the recipient does not wish to be held liable, money can always be given back. Even if the specific notes and coins received from the plaintiff no longer are on hand, others can be returned in their place. Money, after all, is fungible. One \$20 bill is as good as the next.

Services, in contrast, can never be restored *in specie*. As Baron Pollock famously said, "[o]ne cleans another's shoes; what can that other do

60. That proposition is somewhat controversial. A person who requests a benefit outside of a social setting is indeed normally prepared to pay. In contrast, a non-solicited benefit may be freely accepted not because one intends to pay, but rather because one cares too little to even voice an opinion. In that sense, the doctrine constitutes a rare positive obligation in private law.

61. *Peel*, *supra* note 50 at 795.

62. *Ibid.*

63. *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, [1979] 1 WLR 783 (QB (Eng)), per Justice Goff ("[m]oney has the peculiar character of a universal medium of exchange. By its receipt the recipient inevitably is benefitted" at 799). See also *Sharwood & Co v Municipal Financial Corp* (2001), 197 DLR (4th) 477 (Ont CA) at 485; *Halifax (City) v Nova Scotia (Attorney General)*(1997), 163 NSR (2d) 360 (SC) at 370.

but put them on”⁶⁴ The courts consequently must exercise great care in recognizing non-monetary incontrovertible benefits. In effect, the court must be satisfied that, given the impugned transfer, it is *as if* the defendant received money. This will be true in two circumstances.

A benefit may arise *positively* through an accretion to pre-existing resources or *negatively* through the discharge of an obligation.⁶⁵ And if an obligation represents a *necessary expense*, either legally or factually, then its satisfaction creates an incontrovertible benefit.⁶⁶ Suppose, for instance, that each landowner bears a statutory obligation to upgrade a sewer line on its property. As a result of an error, the plaintiff upgrades the defendants’ line rather than its own, at a cost of \$25,000. Assuming that the expense would have been the same in either event, the defendants necessarily are enriched.⁶⁷ It is as if they received money. The pre-existing resources that they necessarily would have used to discharge their statutory duty can be directed to the claimant instead. And while they have no choice about reversing the unjust enrichment, they similarly had

64. *Taylor v Laird* (1856), 25 LJ Ex 329 (Eng) at 332. The same observations apply, *mutatis mutandis*, with respect to goods that have been consumed.

65. *Peel, supra* note 50 at 790; *Carleton (County) v Ottawa (City)*, [1965] SCR 663.

66. A legally necessary expense is relatively simple because the operative obligation usually admits little, if any, scope for dissent. A tax demand, for instance, normally dictates the amount and the timing of the required payment. In contrast, because a factually necessary expense may be a function of personal circumstance, a court must take care to ensure that the defendant had no real choice in the matter. For instance, does the installation of an air conditioning unit represent a factually *necessary* expense? What if the defendant lives in Arizona or the Yukon? What if the defendant is fabulously wealthy or desperately poor? As the category of factually necessary expense expands, the defendant’s autonomy contracts.

67. The incontrovertible benefit exists insofar as a necessary expense has been anticipated. Consequently, if the defendants could have satisfied their statutory obligation at a cost of \$20,000, then that is the value of their enrichment even if it cost the plaintiff \$25,000 to upgrade the sewer line. By the same token, restitution will be limited to the lesser amount, under the second element of the action in unjust enrichment, if the plaintiff spends only \$20,000 in order to discharge an obligation that would have cost the defendants \$25,000.

no choice about upgrading their sewer line. Restitution leaves them none the worse for wear.

The same is true if the defendants receive a benefit from which they *realize a financial gain*. Suppose, for instance, that the defendants own an empty parcel that they intend to sell for \$50,000. Before they do so, the plaintiff acts in error and builds a house on the property at a cost of \$150,000. The defendants then sell the improved lot for a price of \$200,000. They are in the same position they would have enjoyed if they had sold the land in its original state for \$50,000 and received \$150,000 cash from the claimant. By the same token, liability will restore the *status quo ante* on both sides. Restitution, again, will leave the defendants none the worse for wear.

The analysis, however, may be more contentious. Assume that while the plaintiff mistakenly built a house on the defendants' property and thereby raised its value from \$50,000 to \$200,000, the landowners never intended to sell and, indeed, still hold title. Should an incontrovertible benefit be recognized on the basis of a *realizable* financial gain? The defendants *could* sell the improved parcel for \$200,000, pay \$150,000 as restitution to the plaintiff, and use the remaining \$50,000 to buy a replacement for their original asset. And, if they wish to retain the improved property, they could satisfy judgment from other resources. While rearranged, the totality of their wealth would be unchanged relative to the *status quo ante*. Instead of holding land worth \$50,000 and other assets worth \$150,000, they would hold land worth \$200,000.

For many years, case-law was sparse, the law was unsettled, and academic analysis provided the primary point of discussion. As might be expected, scholarly opinions vary. At one extreme, the interest in autonomy is said to permit recognition of an enrichment only if and when a profit *has been realized* from a non-monetary benefit.⁶⁸ That approach, of course, puts the plaintiff at the defendant's mercy. A landowner may escape liability simply by holding onto the improved property until the limitation period has passed or perhaps until the improvement has

68. Peter Birks, *Unjust Enrichment*, 2d (Oxford: Oxford University Press, 2005) at 61-62; Peter Birks, *An Introduction to the Law of Restitution* revised ed (Oxford: Clarendon Press, 1985) at 121-24.

sufficiently depreciated. At the other extreme, the defendant may be considered enriched as long as a financial gain *can be realized* from the claimant's efforts. Most commentators, however, prefer to soften that position through the addition of qualifiers. A beneficial service is said to be incontrovertible if a financial gain is *readily realizable*⁶⁹ or *readily realizable without undue hardship*.⁷⁰ Depending upon its precise formulation, that test may allow a landowner to escape liability if, for instance, the affected property is not marketable or genuinely treasured. Accordingly, while the underlying premise no longer holds in Canada,⁷¹ landowners previously were thought to be protected from the risk of restitution by the belief that every parcel of land is unique and irreplaceable.⁷²

Courts elsewhere in the Commonwealth continue to proceed cautiously in this area. As will be seen, however, Canadian judges have adopted a surprisingly broad test of incontrovertible benefit. While the issue has never received the attention that it deserves, an enrichment is commonly recognized as long as the plaintiff's services have increased the market value of the defendant's property. A realizable financial gain, it seems, may be sufficient.

69. Andrew Burrows, *The Law of Restitution*, 3d (Oxford: Oxford University Press, 2011) at 47-49.

70. A variation on the same theme holds that if recognition of an incontrovertible benefit would expose a landowner to intolerable hardship, liability may take the form of an equitable lien that is exercisable only if and when the defendant sells the relevant asset for an enhanced price: Maddaugh & McCamus, *supra* note 42 at § 3:200.10, § 5:300; *Gareau Estate (Re)*(1995), 9 ETR (2d) 25 (Ont Ct J (Gen Div)).

71. While each parcel of land historically was considered unique and irreplaceable, the Supreme Court of Canada has adopted a more flexible test: *Semelhago*, *supra* note 11; *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51.

72. Goff & Jones traditionally endorsed that view: Goff & Jones, *supra* note 45 at 147. The most recent edition of that text, under new authorship, now supports a very different approach: C Mitchell, P Mitchell & S Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 8d (London: Sweet & Maxwell, 2011) c 5.

C. **Change of Position: Autonomy Front and Back**

The test of enrichment protects a recipient's autonomy at the time of transfer. In order to satisfy the first element of the action in unjust enrichment, the plaintiff must prove that the defendant either chose to accept the risk of financial responsibility (request, free acceptance) or received a benefit for which responsibility cannot be denied (incontrovertible benefit). Without more, however, the risk of restitution remains. Having been unjustly enriched, entirely innocent recipients may, in good faith, become disenriched prior to trial. Suppose, for instance, that the defendants, finding their property improved and honestly believing that the windfall is theirs to keep, sell the land and distribute the additional proceeds to charities that no longer can be identified. If the plaintiff then steps forward and the court awards full recovery, the defendants will be justifiably aggrieved. Liability will be contrary to their freedom of choice. If they had known that they would have to restore the value of the claimant's services, they never would have given to charity. Additionally, they will have to deplete other resources (*e.g.* children's education fund) in order to satisfy a judgment. Restitution will hurt. It will leave the defendants with less than they had before the unjust enrichment occurred. This cannot be right.

That problem is solved by protecting the defendants' autonomy front and back. Just as the tests of enrichment respect freedom of choice at the moment of receipt, the change of position defence performs the same function at the time of trial.⁷³ Liability, ultimately, is reduced to the extent that dis-enrichment occurs in good faith before judgment.⁷⁴ Consequently, if the defendants donated the full value of their enrichment to charity, the plaintiff would recover nothing. Alternatively, if the defendants gave away forty per cent of their apparent windfall, the plaintiff's claim would be reduced accordingly. In contrast, the defendants would have no defence at all if they spent their enrichment

73. McInnes, *supra* note 17 at ch 36.

74. *Mobil Oil Canada Ltd v Storthoaks (Rural Municipality)*, [1976] 2 SCR 147; *RBC Dominion Securities Inc v Dawson* (1994), 111 DLR (4th) 230 (NFCA).

on rent and groceries; those expenditures would have occurred regardless of the unjust enrichment and they do not implicate the defendants' autonomy. The funds that the defendants would have otherwise spent on their home can be directed toward the plaintiff instead. The defence similarly would be denied if the defendants knew of the plaintiff's claim when they experienced their dis-enrichment. That would be true if they gave to charity *after* being served with a statement of claim. Having made an informed decision, they cannot reasonably expect the plaintiff to bear the cost of their charitable donation.

IV. Injustice and Autonomy

For the purposes of unjust enrichment, it would be difficult to overstate the significance of the preceding analysis. The tests of enrichment, supported by the change of position defence, ensure that restitution never hurts relative to the *status quo ante*. They do so by allowing liability only insofar as it is consistent with the defendant's freedom of choice. That proposition also carries an important corollary. Because the recipient's autonomy is protected at the first and fourth stages of inquiry, it need not dominate the third. The issue of injustice can — and indeed, must — be resolved primarily by reference to considerations other than the recipient's freedom of choice.

Granted, freedom of choice could be protected in terms of injustice rather than enrichment. Liability could be premised upon proof that, within a pre-existing relationship, the defendant requested or acquiesced in the receipt of a benefit despite knowing that the plaintiff expected payment in return. Significantly, however, whereas the nuanced test of enrichment sensitively provides protection only to the extent that it is required, an injustice-based approach broadly operates on an all-or-nothing basis.

Consider a simple situation in which the parties have no relationship at the time of transfer. The plaintiff mistakenly improves the defendant's property and thereby raises its value from \$10,000 to \$15,000. Oblivious to the claimant's mistaken services, the defendant incurs transaction costs of \$1,000 while selling the improved asset for \$15,000, purchases a non-improved replacement for \$10,000, and pockets the remaining \$4,000.

The plaintiff then discovers the error and sues for restitution.

The defendant's autonomy will receive all the protection it requires under the enrichment-based approach. Regardless of the fact that the parties remained strangers throughout the episode, the defendant incontrovertibly is enriched as a result of realizing a \$4,000 profit from the plaintiff's services. Liability will very nearly restore the *status quo ante*. The defendant once again will have property worth \$10,000; the plaintiff will recoup \$4,000. Of course, the claimant would prefer to recover \$5,000, but the additional \$1,000 would run contrary to freedom of choice. Judgment could be satisfied only if, for instance, the defendant used funds that had been earmarked for a brief holiday in the mountains. Despite doing nothing wrong, the defendant would be adversely affected. Restitution would hurt.

Now consider the outcome under an injustice-based approach. Since the defendant was unaware of the plaintiff throughout, and therefore neither requested nor freely accepted the services, liability must be denied altogether. The plaintiff will have no means of reversing any part of the \$5,000 transfer; the defendant will retain both an asset worth \$10,000 and \$4,000 in cash. It is difficult to imagine a clearer case of unjust enrichment. And yet, for many years, that is precisely the analysis that Canadian courts employed.

A. **The Rise in Special Relationships**

The modern Canadian law of unjust enrichment began in 1954 when *Degelman v Guaranty Trust Co*⁷⁵ recognized an independent restitutionary claim.⁷⁶ Understandably, early judgments were somewhat unsophisticated and results were decidedly mixed. In cases involving improvements to land, it seems that the issues of enrichment and injustice were often resolved through unreasoned intuition.

*Estok v Heguy*⁷⁷ is a notorious example. Having apparently purchased

75. *Degelman*, *supra* note 37.

76. *Ibid.*

77. (1963), 40 DLR (2d) 88 (BCSC). See also *T & E Development Ltd v Hoornaert* (1978), 78 DLR (3d) 606 (BCSC); *Reeve v Abraham* (1957), 22 WWR 429 (ABSC); *Phippis v Pickering* (1978), 8 BCLR 101 (BCSC).

a rural property, the plaintiff spread a great deal of manure in preparation for planting crops. The purported agreement was then determined to be void for lack of a *consensus* and the land was returned to the defendant. Against the ensuing claim for restitution, the defendant insisted that since he intended to resume using the parcel for pasture, he had no need for the fertilizer. The court nevertheless imposed liability for the value of the service. The error in that decision is now easy to see. There was no enrichment. Although the manure deposit was an objective benefit with market value, the plaintiff could not overcome the plea of subjective devaluation. The defendant never chose to bear responsibility. He had not requested the service and, because he never had an opportunity to reject the manure, there was no question of free acceptance. Nor did the fertilizer constitute an incontrovertible benefit. Given the defendant's intended use of the property, he had not been saved a necessary expense, and there was no evidence that he was in a position to realize a financial gain.

*Republic Resources Ltd v Ballem*⁷⁸ (“*Republic Resources*”) stands on firmer ground. The plaintiff entered onto the defendant's land under a natural gas lease but, as a result of an error, successfully drilled a well only after the term had expired. Since it was no longer able to exploit the well, the plaintiff sued the defendant in unjust enrichment. It claimed that it had conferred an incontrovertible benefit because the defendant was either saved the expense of drilling a well or able to realize a financial gain whenever the well was put into production. Justice Holmes disagreed. In the circumstances, he said, there was no need to drill a well and it was impossible to know if or when the capped well might be put into profitable production. Thirteen other wells in the area had been shut down and the market for natural gas was in precipitous decline. Consequently, since the plaintiff had created, at most, an “unascertained benefit”,⁷⁹ restitution was unavailable because it would unfairly override the defendant's autonomy.

78. [1982] 1 WWR 692 (ABQB) [*Republic Resources*]. See also *Ross Cromarty Developments Inc v Arthur Bell Holdings Ltd*, [1994] 3 WWR 142 (BCCA).

79. *Republic Resources*, *supra* note 78 at 708.

1. The Misinterpretation of *Nicholson v St Denis*

Despite denying liability on the facts, the court in *Republic Resources* observed that restitution may be awarded, on the basis of an incontrovertible benefit, even if the defendant was unaware of the plaintiff's services at the time of performance.⁸⁰ In that sense, *Republic Resources* closely resembles *Nicholson v St Denis*⁸¹ ("*Nicholson*"). Unfortunately, the latter case came to be misinterpreted with occasionally disastrous results.

Nicholson itself is an innocuous decision. It began when the defendant agreed to sell a property, which contained a building, to Labelle. Though the purchaser would not receive title until the price was paid in full, he took possession immediately and hired the plaintiff to place siding on the building. The job was completed, but as Labelle had become insolvent, he could not pay. The plaintiff therefore demanded restitution from the defendant who had resumed possession of the parcel. Justice MacKinnon rightly dismissed that claim; there was no enrichment. The defendant had neither requested nor freely accepted the plaintiff's services despite knowing that he expected payment. Nor did the siding constitute an incontrovertible benefit. It did not anticipate a necessary expense and there was no evidence to suggest that it raised the property's market value so as to create a realizable financial gain. Moreover, as a Canadian court would say today, there was a juristic reason for any enrichment that might exist. By entering into a contract and extending credit, the plaintiff took the chance that Labelle might not be able to pay.⁸² Unjust enrichment cannot be used to circumvent a contractual allocation of risk.⁸³

All of this is entirely orthodox. *Nicholson's* enduring legacy is found instead in Justice MacKinnon's *dicta*.⁸⁴ After surveying cases in which restitution had been awarded, he offered a general observation.

[I]n almost all of the cases the facts established that there was a *special relationship*

80. *Ibid.*

81. (1975), 57 DLR (3d) 699 (Ont CA) [*Nicholson*].

82. The plaintiff similarly became the author of his own misfortune when he neglected to secure his rights under the *Mechanics' Lien Act*, RSO 1970, c 267.

83. McInnes, *supra* note 17 at ch 12.

84. *Nicholson*, *supra* note 81.

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.⁸⁵

As long as it is confined to situations involving services, rather than money or property, that statement is absolutely true. The explanation pertains to the element of enrichment. As previously discussed, services are problematic because they can never be restored and because they are not equally valued by everyone. There consequently is a danger that liability will hurt. The court may effectively dictate an innocent party's allocation of resources. The defendant may have to pay money for a service that, while objectively beneficial, was not a spending priority.

To combat that danger, the law normally requires the plaintiff to prove the defendant either requested or freely accepted services with knowledge that payment was expected. Significantly, however, MacKinnon J qualified his statement. He referred to “almost all of the cases” and said that a special relationship “is usually, but not always”, required.⁸⁶ Exceptions do exist. Even if the defendant did not actually choose (actively or passively) to bear responsibility for a benefit, the autonomy interest may be overcome by the nature of the services themselves. That is true if the plaintiff provided the defendant with an incontrovertible benefit.

MacKinnon J supported his position by citing *Greenwood v Bennett*.⁸⁷ The plaintiff purchased a badly damaged Jaguar and spent considerable time and money on repairs. In fact, although the claimant had acted in good faith, the car previously had been stolen from the defendant and run into the ground. After the police intervened and returned the vehicle to its rightful owner, the plaintiff sued for the value of the mistaken improvements. Although the other members of the Court of

85. *Ibid* at 701-702 [emphasis added].

86. *Nicholson, supra* note 81 at para 8.

87. *Greenwood, supra* note 44. See now *Benedetti v Sawiris*, [2013] UKSC 50 (“there are circumstances in which the receipt of a service may call for restitution of its monetary value even if the receipt was involuntary” at para 113).

Appeal recognized a passive claim of equitable set-off, Lord Denning held that the mistaken improver was entitled to restitution of an unjust enrichment. Stated in more modern language, the defendant obtained an enrichment when he sold the Jaguar, in its improved state, for an increased price. By realizing a financial gain from the plaintiff's efforts, the defendant incontrovertibly was benefitted.⁸⁸

A careful reading of the *dicta* in *Nicholson* reveals a sound proposition: in the absence of a “special relationship” that involves either request or free acceptance, the defendant is not enriched, and consequently cannot be held liable, unless the plaintiff conferred a benefit that, by its very nature, is incontrovertible. Soon enough, however, the case was misinterpreted as support for a very different proposition: a mistaken improver of property must demonstrate a pre-existing “special relationship” with the defendant in order to prove that the impugned transfer was unjust, and hence, reversible. A misplaced desire to protect innocent recipients from unwanted obligations elevated the concept of a “special relationship” to the status of an “essential nexus”, the “*sine qua non* of success”,⁸⁹ without which a restitutionary claim for services rendered must fail.

Because it effectively insists that the autonomy interest can be satisfied only through an actual exercise of choice, the purported “special relationship” rule precludes recovery any time the plaintiff must prove an incontrovertible benefit in order to overcome the defendant's plea of subjective devaluation. An entire category of legitimate claims is placed beyond the reach of the action in unjust enrichment. The result, predictably, is injustice. Undeserved windfalls are left where they fall.

*Olchowy v McKay*⁹⁰ (“*Olchowoy*”) perfectly illustrates that possibility. Mistakenly believing that he had purchased a parcel of land, the plaintiff spent \$3,889 clearing it of rocks and planting canola seed. The defendants,

88. Canadian courts have applied the same reasoning in cases dealing with land: *Sabna v Awad*, 2011 ABCA 20; *Sanderson v Campsall*, 2000 BCSC 583; *Maggio Flooring Ltd v Gipson*, [2011] OJ No 1751 (Sup Ct J)(QL); *Park Lane Ranch Ltd v Fleetwood Village Holdings (Phase II) Ltd* (1980), 17 RPR 35 (BCSC).

89. *McLaren v The Queen*, [1984] 2 FC 899 at 905 (FCTD).

90. [1996] 1 WWR 36 (SKQB) [*Olchowoy*].

who were aware of the claimant's error from the outset, cynically sat silent until the work was done. They then purchased the property for a price that did not account for the crop and harvested 600 bushels of canola worth \$4,386. The court agreed that the plaintiff had conferred an incontrovertible benefit to the extent that the defendants realized a financial gain from the plaintiff's services. Restitution nevertheless was denied on the grounds that the defendants had not requested the enrichment, and, because they did not own the property when the services were provided, they were not subject to the obligations inherent in the doctrines of free acceptance or proprietary estoppel.⁹¹ In the end, they were literally allowed to reap what the plaintiff had sown.⁹²

Olchoway was a remarkable case, but the court's analysis was anything but. Beginning in 1975, restitution claimants routinely were required to

91. *Ibid.* Though harsh, *Olchoway* might be defended on the basis that, by virtue of their purchase, the defendants acquired an absolute right to both the land and the crop growing on it. The judgment, in fact, contains reasons along those lines. Significantly, however, the plaintiff did not dispute *ownership* of the canola. His claim pertained to its *value*. And, in any event, Justice McLellan's reasoning is mirrored in countless other decisions that are not complicated by questions of title. For a discussion of the intersection of unjust enrichment and Torrens indefeasibility, see McInnes, *supra* note 17 at ch 26.

92. The plaintiff's only relief, for \$428, stemmed from the fact that the clearing of rocks constituted a "lasting improvement" under Saskatchewan's betterment legislation. See *Improvements Under Mistake of Title Act*, RSS 1978, c I-1, s 2.

establish “special relationships”.⁹³ And as long as that practice continued, the action in unjust enrichment very often would deny relief to those who improved land.

V. Restitution for Improvements

Late into the twentieth century, liability was unlikely if one improved another’s land. Leaving aside betterment statutes and passive rights of set-off, proprietary estoppel and unjust enrichment provided the best hope of relief, but both were subject to very similar limitations. Even though Canadian courts have distanced themselves from the “five probanda” in favour of more relaxed criteria, proprietary estoppel continues to require proof that services were rendered in reliance upon the landowner’s active or passive representation that the claimant enjoyed, or would acquire, some interest in the affected property. The action in unjust enrichment was doubly restricted. As courts refused to recognize incontrovertible benefits in connection with land, an enrichment could be established only by means of a request or free acceptance. And on the issue of injustice, liability was said to depend upon the existence of a “special relationship”.

The situation today is dramatically different. Proprietary estoppel has

93. *Jones v Craig*, [2009] OJ No 2365 (Sup Ct J)(QL); *Grant Design Group Inc v Neustaedter* 2008 MBQB 336; *Litemor Distributors (Edmonton) Ltd v Midwest Furnishings and Supplies Ltd*, 2007 ABQB 23; *Agrium Inc v Chubb Insurance Co of Canada*, 2002 ABQB 495; *Nu-Way Kitchens Ltd v Smallwood* (2000), 187 Nfld & PEIR 251 (SC); *Elmford Construction Co v South Winston Properties Inc* (1999), 45 OR (3d) 588 (Sup Ct J); *JE Weaver Enterprises Ltd v Hardy* (1998), 44 CLR (2d) 243 (NSSC); *Turf Masters Landscaping Ltd v TAG Developments Ltd* (1995), 143 NSR (2d) 275 (CA); *Robert D Sutherland Architects Ltd v Montykola Investments Inc* (1995), 142 NSR (2d) 137 (SC); *Alyea v South Waterloo Edgar Insurance Brokers Ltd*, (1993) 50 CCEL 266 (Ont Ct J (Gen Div)); cf. *MacLellan v Morash*, 2006 NSSC 101 (lack of “special relationship” fatal to legal claim for *quantum meruit*, but irrelevant to equitable claim in unjust enrichment for “compensation”) [*Morash*].

lost its traditional status as the primary source of liability.⁹⁴ Of course, that claim remains relevant if the plaintiff seeks to do something other than reverse a transfer, or if the facts do not fall within the restitutionary action. In the majority of cases, however, the focus falls upon unjust enrichment. Even those situations that historically would have triggered a plea of proprietary estoppel are now commonly addressed exclusively in terms of unwarranted transfers.⁹⁵ That change is a function of two fundamental developments within the Canadian law of unjust enrichment. Together, they facilitate liability, even if, prior to performance, the plaintiff had no contact with the defendant.

A. Readily Realizable Gains

The first development is the remarkable expansion of incontrovertible benefits. If the landowner did not actually choose to accept the risk of financial responsibility, the plaintiff must prove that the benefit itself was undeniable. And unless the services anticipated a necessary expense, that benefit must pertain to the realization of a financial gain.

There should be little scope for debate if the defendant actually did turn the plaintiff's contributions into cash.⁹⁶ That was true in *Sanderson*

94. In practice, the detrimental act that lies at the heart of proprietary estoppel often entails an enrichment to the landowner, such that the claimant can satisfy both heads of liability as they are now formulated. See *Idle-0*, *supra* note 30; *Clarke*, *supra* note 35; *Schumacher Estate*, *supra* note 35. Nevertheless, because it does not require a beneficial transfer, proprietary estoppel may provide help to those whom unjust enrichment turns away: *Schwark Estate v Cutting* (2008) 46 ETR (3d) 120 (Ont Sup Ct J) reversed in 2010 ONCA 61; *Brownlee*, *supra* note 35; *cf. Cowderoy*, *supra* note 9.

95. *No 151 Cathedral Ventures Ltd v Gartrell*, 2003 BCSC 1801; *Sherbeth*, *supra* note 53; *Stewart v Stewart*, 2014 BCSC 766; *cf. Sabey*, *supra* note 10 (disputing lower court's proprietary estoppel analysis and returning parties to trial level for consideration of restitutionary claim).

96. *Port Abino Association v Lee* 73 ACWS (3d) 44 (Ont Ct J (Gen Div)); *cf. Olchoway*, *supra* note 90. See also *Spicer v Middleton (Town)*, 2014 NSSC 66; *Pekurar v Hummingbird Farms Ltd*, [2015] OJ No 378 (Sup Ct J) (QL).

v Campsall.⁹⁷ While sharing possession of a parcel that belonged to her husband's parents, a woman affixed a mobile home to the land and made other improvements. When her marriage ended and she was removed from the property, she sued in unjust enrichment. Although the parents argued that they "just wanted the home — which they do not consider an improvement — off the land",⁹⁸ they rented out the unit, which was worth \$34,000, for \$600 per month. The court recognized an enrichment accordingly. *Conrad v Feldbar Construction Co Ltd*⁹⁹ came to a similar conclusion on the enrichment issue. The defendant owned an isolated property in an undeveloped area of Toronto. The plaintiff constructed an arterial roadway that serviced all of the properties in the area, including the defendant's. The defendant then sold his parcel for a price that was substantially inflated by reason of the improvement. He was held liable for those additional profits.

Far more remarkably, Canadian courts now frequently allow the first element of the action in unjust enrichment to be satisfied by proof that the plaintiff's services created a realizable financial gain by increasing the market value of the defendant's property.¹⁰⁰ In *Love v Schumacher Estate*¹⁰¹ ("*Schumacher Estate*"), the defendant owned an unused cottage that he allowed the plaintiff and her daughters to occupy beginning in 1985. Over the next twenty-five years, the claimant spent approximately \$100,000 on repairs and improvements, thereby raising the property's

97. 2000 BCSC 583.

98. *Ibid* at para 8.

99. (2004), 70 OR (3d) 298 (Ont Sup Ct J). The court's attempt to explain its decision in terms of free acceptance is fatally undermined by the fact that the defendant expressly informed the plaintiff, even before the work commenced, that he did not wish to contribute to the cost of the roadway. The defendant's enrichment must be explained instead by reference to the profit that he realized from the sale of the improved parcel.

100. *Idle-0*, *supra* note 30; *Clarke*, *supra* note 35; *Dutertre*, *supra* note 29; *Murphy*, *supra* note 29; *Simonin Estate v Simonin*, 2010 ONCA 900 [*Simonin Estate*]; *cf.* *Birch Paving & Excavating Co v Clark*, [2014] OJ No 1637 (Sup Ct J)(QL)(enrichment not proven because "there is no evidence supporting any increase in the value of the property" as a result of the plaintiff's services at para 64) [*Birch Paving*].

101. *Schumacher Estate*, *supra* note 35.

value from \$35,000 to \$174,000. She did so in part because the defendant promised, in 1993, that she would receive legal title on his death. In 2010, however, he executed a new will that gave his entire estate to his son. In the ensuing litigation, Justice Tausenfreund upheld claims in both proprietary estoppel and unjust enrichment. The issue of enrichment was resolved on the simple basis that the “value of the cottage property increased over the years based on the plaintiff’s time, her labour, and her financial resources”.¹⁰²

*Servello v Servello*¹⁰³ (“*Servello*”) involved a large immigrant family that successfully developed a business that operated out of a property that also contained their home. The youngest son, working alongside his father, substantially enlarged the onsite workshop, but subsequently became estranged from his family. In the litigation that followed, he sued for both proprietary estoppel and unjust enrichment. Despite ultimately rejecting both “equitable” claims because the son’s behaviour during the squabble left him with “unclean hands”, Justice Koke did agree that the parents had been enriched. Having valued the son’s “contribution to the workshop ... to be approximately \$68,133.66”, he observed that while “the overall value of the property” had not necessarily “increased by this much, it still represents an enrichment”.¹⁰⁴

*MacLellan v Morash*¹⁰⁵ (“*Morash*”) similarly arose from a familial dispute. Having long allowed her seven children recreational use of an island that she owned, an elderly woman also permitted one son, named Ronald, to operate a lobster business from the property. He accordingly devoted more than \$20,000 and 3500 man-hours to the construction

102. *Ibid* at para 40.

103. *Servello*, *supra* note 35.

104. *Ibid* at para 105. See *Servello v Servello*, 2015 ONCA 434 at para 7, where, while affirming the decision below, the Ontario Court of Appeal said that there was “no evidence that the property increased in value as a result of the [son’s contributions]”. In fact, Koke J said that there was “no evidence ... to indicate *how much* the value of the property has increased” in *Servello*, *supra* note 35 at 116 [emphasis added]. Despite the difference, both statements are consistent with the recognition of an enrichment on the basis of increased value.

105. *Morash*, *supra* note 93.

of a “fish shed”, as well as a causeway and a bridge that linked the island to the mainland. That connection both furthered his economic interests and made it much easier for family members to access the property. Against that backdrop, the mother’s decision to devise title to two other children understandably enraged Ronald, who tore down the bridge and blocked up the causeway with machinery. Even after that fit of pique, however, the remaining improvements enhanced the island’s value by some \$300,000. Ronald consequently was entitled to relief. Although his claim for proprietary estoppel failed, because his acts were a product of his own initiative rather than any promise of title from his mother, his plea of unjust enrichment was successful. Justice MacLellan considered it “clear that the owner of the island” was enriched. Just as the “family started making considerably more use” of the island once the causeway was in place, the property became “much more valuable” once it could “be reached without using a boat”.¹⁰⁶

*Sherbeth v Sherbeth*¹⁰⁷ (“*Sherbeth*”), the final case for consideration, provides the most robust illustration of the incontrovertible benefit doctrine. After the plaintiff announced his desire to start a construction business, his father offered the use of a section of land for that purpose. The plaintiff then spent almost \$100,000 building business premises. The situation predictably turned ugly when the father transferred title to the plaintiff’s brother. And when the brother demanded vacant possession, the plaintiff countered with a claim in unjust enrichment. Against that restitutionary claim, the brother explained that he had no use for the improvements, which he intended to remove. Justice Menzies was prepared to accept that seemingly irrational threat, “not because there is no value in the building and yard site but rather because [the brother] would wish to remove any reminder of [the plaintiff]”.¹⁰⁸ He nevertheless found that the plaintiff’s services “represent an incontrovertible benefit to the [d]efendants even if they do not wish to take advantage of it”.¹⁰⁹ It might be different, he said, if the claimant left “behind some type of

106. *Ibid* at para 74.

107. *Sherbeth*, *supra* note 53.

108. *Ibid* at para 24.

109. *Ibid*.

structure that could serve no useful purpose to the [d]efendants on their farming operation”.¹¹⁰ On the facts, however, the plaintiff constructed “a yardsite which could be productively used in a farming operation or at very least could be sold or rented to realize on its value, whether the [d]efendants elect to take advantage of it or not”.¹¹¹ In the absence of any juristic reason, that enrichment entitled the plaintiff to recover the value of the improvement.

1. A Step Too Far?

On reading the preceding cases, those who champion the cause of unjust enrichment are apt to echo Lord Mansfield’s admonition: “I am a great friend to the [restitutionary] action . . . and therefore I am not for stretching, lest I should endanger it”.¹¹² The crucial question, it will be recalled, is whether the plaintiff can overcome the right of subjective devaluation by demonstrating that liability is consistent with the defendant’s freedom of choice.¹¹³ The mere receipt of an objective benefit must not be enough. To hold otherwise is to potentially impose an intolerable burden upon an innocent party. Irreplaceable property, having been improved without request or acquiescence, may have to be sacrificed for the purpose of satisfying judgment. That is why scholarly opinion, even at its broadest, formulates the relevant branch of incontrovertible benefit in terms of *readily realizable* financial gains. The restitutionary interest is reconcilable with the landowner’s autonomy only to the extent that the claimant’s contribution can be treated *as if* it consisted of a transfer of money.

At a glance, however, it is clear that Canadian courts have gone somewhat further. Granted, *Schumacher Estate* arguably fell within the spirit of the doctrine.¹¹⁴ The plaintiff had greatly improved the property while enjoying exclusive possession for a quarter century; the defendant had no connection to the cottage before inheriting it from his father at the end of that period. In the circumstances, the court’s decision to allow

110. *Ibid* at para 27.

111. *Ibid*.

112. *Weston v Downes* (1778), 1 Doug KB 23 (Eng) at 24.

113. Discussed above at Part III.B.

114. *Schumacher Estate*, *supra* note 35.

the claimant to remain in possession for another fifteen years does not seem an intolerable infringement of the titleholder's rights. *Servello* was more problematic. Restitution would have created genuine hardship.¹¹⁵ Given the degree of acrimony within the family, as well as the defendant's residence on the property, shared use was not feasible; given the value of the improvements, *in personam* relief would have constituted a substantial debt. As a result, the court, presumably, was much relieved to be able to (speciously)¹¹⁶ invoke the clean hands doctrine and make the case go away. That option was not available in *Morash*, which similarly involved an ugly family dispute.¹¹⁷ Since the squabbling siblings "simply [could not] live together as joint owners", restitution took the form of a personal judgment for \$65,000.¹¹⁸ While the titleholders' financial status was not reported, most people do not have that kind of money close at hand and it is easy to imagine that the defendants were compelled to sell or mortgage the affected property in order to satisfy the judgment. The island, which several generations of the family had enjoyed for decades, undoubtedly held much more than monetary value. Is the law of unjust enrichment ever justified in effectively requiring innocent parties to sacrifice prized possessions?

Even those who agree with the decision in *Morash*¹¹⁹ may question *Sherbeth*.¹²⁰ Acting entirely for his own benefit, the plaintiff dug down to bedrock, laid foundations, and built his business premises on an otherwise undeveloped piece of land. His father, who owned the parcel at the outset, permitted that work to be done, but had no use for the improvements. More dramatically, his brother, as successor in title, intended to exercise his right of exclusive occupation in order to remove the structures and allow nature to resume its course. The court nevertheless recognized an enrichment and imposed liability on the ground that — regardless of what a landowner wishes to do, or is likely to do, or can afford to do

115. *Servello*, *supra* note 35.

116. Discussed in Part VI, below.

117. *Morash*, *supra* note 93 at para 87.

118. *Ibid* at para 87.

119. *Morash*, *supra* note 93.

120. *Sherbeth*, *supra* note 53.

— the ability to realize a financial gain constitutes an incontrovertible benefit.¹²¹

The branch of incontrovertible benefit governing the realization of financial gains is inherently controversial. There is no singularly correct way to formulate the doctrine and, until the Supreme Court of Canada settles the issue, opinions will vary as widely as individual judicial philosophies. *Sherbeth* falls well to one side of that continuum. Without any discussion of the debate, Justice Menzies overwhelmingly privileged the plaintiff's restitution interest above the defendant's autonomy interest. Unless he had a substantial sum of money that he was willing to allocate to the judgment, the titleholder was at serious risk of losing control over his own property. And, while Canadian law may eventually regard such risks as an acceptable cost of reversing unjust enrichments, it is worth observing that *Sherbeth* raises precisely those concerns that traditionally inhibited courts from entertaining such claims.

B. The Decline of Special Relationships

While Canadian courts continue to struggle with incontrovertible benefits, they largely have overcome the troublesome doctrine of “special

121. Several aspects of the decision may appear to hedge that proposition. First, the defendants surprisingly “admit[ted] liability ... but dispute[d] the Plaintiff's entitlement to any relief”, *ibid* at para 1. The existence of an enrichment, however, was not treated as a foregone conclusion. Justice Menzies proceeded as though the elements of the action in unjust enrichment were contested. Second, the father initially had given the plaintiff some assurance that he eventually would receive title if he developed the land. Nevertheless, while that fact undoubtedly coloured the judge's perception of the dispute, it was logically irrelevant to the recognition of a realizable financial gain. Interestingly, notwithstanding the father's “promise”, the plaintiff did not sue for proprietary estoppel. He relied exclusively on unjust enrichment. Third, the court referred to the defendants' “wrongful actions” and said that the “object of unjust enrichment is to compensate the Plaintiff for the losses he has suffered”, *ibid* at para 52. Of course, if the facts did truly call for the reparation of wrongful losses, then any comments regarding restitutionary benefits would be *dicta*. Notwithstanding occasional terminological errors, however, the court properly focused on the issue of unjust enrichment.

relationship” that needlessly restricted the scope of restitutionary relief for a quarter century. Granted, old habits occasionally die hard. The purported rule of “bilateralism”¹²² — a misinterpretation of *Nicholson*¹²³ — continues to be expressed from time to time.¹²⁴ Beginning in the late 1990s, however, judges increasingly employed a model of unjust enrichment that is capable of imposing liability for unsolicited services between strangers.¹²⁵ In *Wacky’s Carpet & Floor Centre v Joseph*,¹²⁶ for instance, Justice Edwards revisited *Nicholson’s dicta* and correctly observed that while the concept of “special relationship” is a “thread that runs through the jurisprudence”, it is not “an additional burden that must be met by a claimant”.¹²⁷ “The absence of a special relationship”, he explained, “will not necessarily defeat a claim”.¹²⁸ Likewise, in *Bond Development Corp v Esquimalt (Township)*,¹²⁹ Justice Huddart focused on the actual message of *Nicholson* before stressing that, given the evolution of the action in unjust enrichment, it is no longer appropriate to determine rights of recovery on the basis of some vague principle of “special relationship”.¹³⁰

Huddart J undoubtedly was right in regarding the decline of “special relationships” as a mark of maturity. When MacKinnon J first formulated that doctrine in *Nicholson*, the Canadian law of unjust enrichment was under-developed and poorly understood.¹³¹ There was no Canadian text on point and the three-part cause of action had yet to be authoritatively

122. *Campbell v Campbell* (1999), 173 DLR (4th) 270 (Ont CA) at paras 32-34 [*Campbell*].

123. *Nicholson*, *supra* note 81.

124. *J Lepera Contracting Inc v Royal Timbers Inc*, 2012 ONSC 271 at para 83; *Skibinski v Community Living British Columbia*, 2010 BCSC 1500 at para 192; *Murphy*, *supra* note 29 at para 86; *cf. Birch Paving*, *supra* note 100.

125. *Clearwater Well Drilling Ltd v Wile* (1996), 148 NSR (2d) 306 (SC) (restitution “may be granted in an exceptional case where no special relationship exists between the parties” at 309); *Gidney*, *supra* note 43.

126. 2006 NSSC 353.

127. *Ibid* at para 12.

128. *Ibid* at para 15.

129. 2006 BCCA 248.

130. *Ibid* at para 47.

131. *Nicholson*, *supra* note 81.

articulated. Mistakes were inevitable and, given the traditional fear that restitution may threaten individual autonomy, courts understandably erred on the side of caution. However, by the turn of the twenty-first century, the situation had changed dramatically. Courts at the highest level routinely resolved restitutionary disputes, a substantial body of literature served the subject, and the profession had grown comfortable with the governing principles. As unjust enrichment evolved and expanded to its natural dimensions, it no longer had any need for “special relationships”. Relief rightly became available between strangers.

That development gained additional impetus in 2004, when the test of restitutionary injustice was fundamentally reformulated. *Garland v Consumers’ Gas Co*¹³² (“*Garland*”) provided an opportunity to resolve a long-standing debate regarding the precise basis upon which transfers are reversed.¹³³ Within common law systems, the reason for restitution consists of an *unjust factor* that positively justifies recovery (*e.g.* mistake, compulsion). Civilian systems, in contrast, generally award restitution in the *absence of any juristic reason* for a transfer (*e.g.* contract, donative intent). Though they usually come to similar conclusions, those two tests proceed in opposite directions. Whereas the former looks at the plaintiff and says, “[n]o restitution unless ...”, the latter looks at the defendant and says, “[r]estitution unless ...”. For complicated reasons that lie beyond this paper,¹³⁴ the Supreme Court of Canada decided to embrace the juristic reason approach.¹³⁵ Anomalously within the common law world, the Canadian action in unjust enrichment now operates on a civilian model.

Though the concept could be accommodated within either approach, a “special relationship” provides a positive reason for the claimant’s

132. *Garland*, *supra* note 37.

133. *Ibid.*

134. McInnes, *supra* note 17 at ch 4 II-III.

135. The language, though not substance, of juristic reasons was introduced in *Rathwell v Rathwell*, [1978] 2 SCR 436 at 455, and adopted in *Pettkus*, *supra* note 14 at 848. See also *Lauréat Giguère Inc v Cie Immobilière Viger Ltée*, [1977] 2 SCR 67 at 77 which addressed, on appeal from Quebec, the civilian action *de in rem verso*. See now art 1493 CCQ.

recovery and therefore fits more naturally within a test of unjust factors.¹³⁶ In contrast, a “special relationship” has no real role to play within a test of juristic reasons. If the parties shared a “special relationship” insofar as the impugned transfer was undertaken pursuant to, say, a contractual obligation, then there will be a legal explanation for the defendant’s enrichment and restitution will be denied. And if the parties shared a “special relationship” that fell outside the categories of juristic reason, then it is irrelevant.

1. Claims Between Strangers

By its very nature, the decline of “special relationships” is difficult to prove positively. A few judges have expressly disavowed the purported rule, but recent decisions dealing with unsolicited improvements to land are notable for what they do *not* say. While the late twentieth century cases were dominated by talk of “special relationships”, Canadian courts now routinely proceed simply by reference to the three-part cause of action.

That development can be illustrated by re-visiting *Campbell v Campbell*¹³⁷ (“*Campbell*”), the decision that provided the most thorough attempt to justify the supposed need for “special relationships”. Gordon Campbell operated a dairy farm for many years. Shortly before his death in 1977, he transferred his milk quota, which was essential to

136. The point is complicated by the fact that *Garland* did not adopt a classic civilian test of juristic reasons. The Supreme Court of Canada instead formulated a two-stage analysis. The first stage requires the plaintiff to disprove the “established categories” of juristic reason — *i.e.* contract, donative intent, disposition of law, and “other valid common law, equitable or statutory obligations”. Satisfaction of that burden raises a *prima facie* right to restitution, but the defendant is entitled to rebut that presumption by proving the existence of a “residual” juristic reason. That second stage of inquiry is guided by “all of the circumstances of the transaction”, but focuses on “two factors: the reasonable expectations of the parties, and public policy considerations”. See *Garland*, *supra* note 37 at para 44. Rules regarding “special relationships” could be accommodated within either of those factors.

137. *Campbell*, *supra* note 122.

the business, to his sons, John and Robert. His land and equipment, in contrast, passed to his widow, Laura, under his will. The survivors continued the business. The two sons assumed responsibility for day-to-day operations while the widow permitted use of her property and contributed her bookkeeping and household services. By 1988, the farm required modernization in order to remain economically viable. John and Robert accordingly replaced several pieces of equipment, renovated an existing barn, and constructed a new barn. The farm functioned in its improved state for three more years until Robert's death in 1991. At that point, John sold the milk quota to a third party and informed his mother that she no longer would be able to sell milk to the marketing board. Shortly thereafter, he and Robert's executor sued Laura for the restitutionary value of the improvements.¹³⁸ Having accepted an expert opinion that the farm's value continued to be enhanced as a result of the brothers' contributions, Justice Kent imposed liability for \$151,200.

That decision was overturned by the Ontario Court of Appeal. Justice Borins stressed that "the absence of Laura's consent to the ... improvements to the farm — indeed, the absence of any evidence that she expressly requested her sons to undertake this work — is the essential reason why the ... claim ... should fail".¹³⁹ Rephrasing his reasons as a general proposition, he baldly stated that "the law of unjust enrichment

138. The plaintiffs also sought, in the alternative, a declaration that the farm assets were partnership property held equally between themselves and the widow. That claim was dismissed at trial and not pursued on appeal.

139. *Campbell*, *supra* note 122 at para 26.

refuses recovery for unrequested benefits”.¹⁴⁰ Of course, that simply is not true. The absence of a “bilateral” relationship, marked by the recipient’s request or free acceptance, merely means that the plaintiff must show that the benefit, by its very nature, is incontrovertible and consequently consistent with the defendant’s autonomy. On the facts of

140. *Ibid* at para 34. Though typically traced to *Nicholson*, *supra* note 81 and presented in terms of “special relationships”, Justice Borins JA drew his demand for “bilaterality” from an academic source: Abraham Drassinower, “Unrequested Benefits in the Law of Restitution” (1998) 48:4 *University of Toronto Law Journal* 459 at 460. See *ibid* at para 36. Regardless of the details, however, the purported requirement was irreconcilable with the rules of restitutionary liability as a matter of policy, principle, and historical precedent. The court similarly was led astray on another fundamental point, *Campbell*, *supra* note 122 at para 26. Borins JA stated the issue of juristic reasons should be treated as a “narrow question of fairness as between the parties. Courts should consider whether, having regard to the particular circumstances giving rise to an enrichment and to subsequent events, it is fair for the defendant to retain the benefit”, quoting MM Litman, “The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust” (1988) 26:3 *Alberta Law Review* 407 at 451. That conception of injustice invites precisely the sort of “palm tree justice” that nearly proved fatal to unjust enrichment during the early part of the twentieth century. See *Holt v Markham*, [1923] 1 KB 505 (Eng) at 513 (rejecting “well-meaning sloppiness of thought” as a basis of liability); See *Beblow*, *supra* note 50 (Of course, the restitutionary action is not actually “a device for doing whatever may seem fair between the parties” at 987).

Campbell, liability might have been refused on other grounds,¹⁴¹ but the improvements undertaken by the defendant's sons increased the value of her farm and provided her with a realizable financial gain.¹⁴² And once an enrichment and a corresponding deprivation have been established, a transfer is reversible as long as it occurred without juristic reason.

Significantly, all of that would hold true even if the parties did not share a pre-existing relationship. Cases of that sort understandably are rare. It is easy enough to imagine a person acquiring possession

141. *Campbell, supra* note 122 at para 11. When the issue first arose, Laura was “[n]ot agreeable” with her sons’ plans to upgrade the farm. Because they “just ignored her and went ahead”, their ensuing claim might have been barred on the grounds of *officiousness*. The law of unjust enrichment does not protect those who knowingly foist themselves on others. The plaintiffs resisted that conclusion by arguing that Laura’s objections were a function of the fact that “her mind was so screwy”. And indeed, given “her impaired state of mind”, the court was “doubtful” that she was able “to properly acquiesce in what was taking place”; see *Campbell, supra* note 122 at para 38. Even if that was true, however, relief might have been refused on the basis that the defendant had received an *incidental benefit* from the claimants’ self-interested acts. As Borins JA interpreted the situation, the brothers undertook the improvements because dairy production was their business. While their mother had stopped drawing an income several years earlier, their livelihood depended upon the efficient operation of the farm. They knowingly had acted without any expectation of compensation other than the profits generated by the business. See also *Simonin Estate, supra* note 100; *cf. Morash, supra* note 93 (relief available if plaintiff motivated only partially by self-interest). The concepts of *officiousness* and *incidental benefit* may be incorporated within *Garland’s* test of juristic reasons, but they are better addressed at a fourth stage of analysis, dealing with bars and defences: *McInnes, supra* note 17 at chs 41-42.

142. *Campbell, supra* note 122. So too, by replacing old equipment and building a new barn, the claimants arguably discharged a factually necessary expense. Without those improvements, the family business was not viable.

of a chattel and improving it without any knowledge of the owner.¹⁴³ Because it stays in one place, land does not readily lend itself to similar treatment. Restitutionary claims nevertheless may arise, outside of “special relationships”, if, for instance, the plaintiff improved a parcel under a mistake of title.¹⁴⁴ Fortunately, the Canadian principle of unjust enrichment is now sufficiently mature to resolve such claims without the need for extraneous requirements.

VI. Conclusion

This paper is misleading in one respect. Its title suggests that improvements to land are remedied primarily, if not exclusively, in equity. As explained in the introduction, that largely was true in the past. Leaving aside the law’s ability to reduce a landowner’s right to *mesne* profits by the value of improvements provided by a *bona fide* trespasser, the only hope for relief was found in equity’s passive right of set-off or its doctrine of proprietary estoppel. Since the turn of the century, however, the situation has changed dramatically. The criteria for proprietary estoppel have been relaxed, but much more importantly, the action in unjust enrichment has been allowed to operate according to its own logic. The concept of “special relationships”, initially adopted in a misguided attempt to protect the autonomy of innocent recipients, increasingly has been abandoned. Canadian courts have recognized that, regardless of any request or acquiescence, beneficial services may incontrovertibly enrich the defendant, and, in the absence of any juristic reason, trigger a restitutionary obligation. The principle of unjust enrichment sufficiently

143. *Gidney*, *supra* note 43; *Mayne v Kidd*, [1951] 2 DLR 652 (Sask CA); *Ings v Industrial Acceptance Corp Ltd*, [1962] OR 454 (CA); *Greenwood*, *supra* note 44; *Robinson*, *supra* note 43; *cf. Webb*, *supra* note 44; *Munro v Willmott*, [1949] 1 KB 295 (Eng); *Mutungih v Bokun* (2006), 40 CCLT (3d) 313 (Ont Sup Ct J).

144. Even when the parties are aware of each other, they are not joined by a “special relationship” or “bilateralism” unless the defendant requests or receives beneficial services with knowledge that the plaintiff expects something in return. As a result, the parties effectively are strangers if, for instance, a purchaser makes improvements after taking early occupation under a contract that is later struck down: see *Nicholson*, *supra* note 81.

protects freedom of choice and the addition of extraneous requirements like “bilateralism” merely serves to defeat legitimate claims.

All of that would seem to reinforce the title of this paper: improvements to land are remedied in equity through the action in unjust enrichment. In truth, however, there is nothing inherently equitable about restitutionary relief. Indeed, the vast bulk of the subject now known as “unjust enrichment” derives from the ancient courts of law, rather than chancery.¹⁴⁵ Canadian judges come close to recognizing that fact when they address improvements to land in terms of *quantum meruit*, which, as one of the common counts under the writ of *indebitatus assumpsit*, operated in the courts of law.¹⁴⁶ Nevertheless, although the same error seldom is seen in other common law jurisdictions,¹⁴⁷ most Canadian lawyers believe that the whole of unjust enrichment is equitable in origin and nature.¹⁴⁸ The explanation for that belief is unclear, but there is simply no debate on the central point.¹⁴⁹ As with tort and contract, unjust enrichment is an essentially legal concept. Equity typically enters into the picture, as needed, at the margins. For instance, just as a tortious nuisance may attract injunctive relief and a contract to sell land may trigger specific performance, an unjust enrichment may be remedied by

145. McInnes, *supra* note 17 at 31-54.

146. *Idle-0*, *supra* note 30 at para 79; *McLeod*, *supra* note 53.

147. *Sinclair v Brougham*, [1914] AC 398 (HL) (“the notion that [the restitutionary action] was an equitable action” has been “exploded” — it “was not devised by the Court of Chancery, nor was it applied there either in form or in substance” at 454-456); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001), 208 CLR 516 (HCA) (“a perfectly legal action” at 562); American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (St. Paul: American Law Institute, 2011), *Comment A* (warning against “the common misperception that liabilities or remedies described in terms of ‘unjust enrichment’ are necessarily equitable in origin” at § 4).

148. *Cf. Communities Economic Development Fund v Canadian Pickles Corp*, [1991] 3 SCR 388 (the restitutionary action “does not lie in equity” at 415); *Federated Co-Operatives Ltd v Canada*, 2001 FCA 23 at para 5; *Michelin Tires (Canada) Ltd v Canada*, 2001 FCA 145.

149. Mitchell McInnes, “The Equitable Action in Unjust Enrichment” (2007) 45:2 Canadian Business Law Journal 253.

a proprietary form of restitution (*e.g.* a trust or a lien) if a simple money judgment would be inadequate. While the response may be equitable, the underlying cause of action generally operates in law.¹⁵⁰

Nearly 150 years after the *Judicature Acts* fused the administration of law and equity, pedigree should be largely irrelevant.¹⁵¹ Within the context of this paper, however, it bears mention for one reason. Canadian lawyers tend to believe that unjust enrichment is “equitable” in two respects. Having attributed the cause of action to the courts of chancery, they further insist that the availability of restitution “necessarily” turns, to an unusual degree, on “discretion and questions of fairness”.¹⁵² That would suggest that one who improves another’s land must both satisfy the three-part cause of action and bring the episode within the judge’s concept of “good conscience”. In *Servello*, for instance, the improver’s claim was dismissed because he had not come to court with “clean hands”.¹⁵³ In truth, that additional requirement is both unprecedented and unprincipled. As Lord Goff once explained, “restitution is not ... a matter of discretion ... A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is

150. Exceptions do exist. That is true of the action for knowing receipt, which provides restitution if a stranger obtains property that beneficially belongs to the plaintiff under a trust. See *e.g.* *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805. Because the misdirection of trust assets cannot be remedied by law, the Chancellor developed a species of the claim in unjust enrichment.

151. Andrew Burrows, “We Do This at Common Law But That in Equity” (2002) 22:1 *Oxford Journal of Legal Studies* 1.

152. *Garland*, *supra* note 37 at para 44.

153. *Servello*, *supra* note 35.

denied, it is denied on the basis of legal principle”.¹⁵⁴ Just as it has no need for a “special relationship” doctrine, so too, the modern Canadian principle of unjust enrichment can consistently resolve restitutionary claims without recourse to ill-defined notions of “equitable” fairness.

154. *Lipkin Gorman v Karpnale Ltd*, [1991] 2 AC 548 at 578 (HL). See also *Beblow*, *supra* note 50 (cautioning against the “tendency ... to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties” at 987); *Peel*, *supra* note 50 (rejecting the suggestion that “recovery can be awarded on the basis of justice or fairness alone” at 767); *Pavey & Matthews Pty Ltd v Paul* (1987), 162 CLR 221 (HCA) (denying that unjust enrichment entails a “judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate” at 256).