
Enrichments and Reasons for Restitution: Protecting Freedom of Choice

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This article analyzes the role of freedom of choice in the Canadian law of unjust enrichment. Courts must balance the plaintiff's interest in recovering a benefit, with which she did not freely part, against the defendant's interest in controlling the allocation of resources in his possession. The primary means of resolving this tension lies in the element of enrichment: The defendant will not be considered legally enriched unless he either chose to assume financial responsibility for the benefit that he received from the plaintiff or, in the circumstances, had no choice to make.

The author argues that, since the defendant's autonomy is sufficiently protected by the element of enrichment, the courts should not additionally protect that same interest when formulating the reasons for restitution at the third stage of the unjust enrichment analysis. Liability generally should be strict—it should be triggered by the plaintiff's lack of intention. Decisions that premise liability upon a "special relationship" or "knowing receipt" unduly favour the defendant's interests and therefore should be reconsidered by Canadian courts.

Cet article analyse le rôle de la liberté de choix en matière d'enrichissement injustifié au Canada. Les tribunaux doivent équilibrer l'intérêt de la partie demanderesse à récupérer un bénéfice auquel elle n'a pas librement contribué, avec l'intérêt du défendeur à contrôler la répartition des ressources en sa possession. Le principal moyen de résoudre cette tension repose sur l'élément d'enrichissement. Le défendeur ne sera pas réputé enrichi à moins qu'il ait choisi d'assumer sa responsabilité financière pour le bénéfice reçu de la partie demanderesse, ou si les circonstances ne lui permettaient pas de faire ce choix.

L'auteur affirme ensuite que puisque l'autonomie du défendeur est suffisamment protégée par l'élément d'enrichissement, les tribunaux ne devraient pas ajouter à cette protection lorsqu'ils énoncent les motifs de restitution à la troisième étape du test de l'enrichissement injustifié. La responsabilité devrait généralement demeurer stricte, en ce sens qu'elle devrait être déclarée par l'absence d'intention de la partie demanderesse. Les décisions qui fondent la responsabilité sur un «relation spéciale» ou un «*knowing receipt*» favorisent indûment les intérêts du défendeur, et devraient par conséquent être reconsidérées par les tribunaux canadiens.

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Introduction

The law must carefully balance competing interests when formulating the scope of restitutionary relief. It must respect the plaintiff's claim to recover the value of a benefit that she conferred upon the defendant. It must also, however, respect the defendant's desire to control the disposition of wealth in his possession. Rules that unduly favour one interest over the other will produce unfair results. Too little restitution will allow the defendant to be improperly enriched at the plaintiff's expense. The defendant will be allowed to retain a benefit that, in justice, ought to be returned. Too much restitution, ironically, will allow the plaintiff to be improperly enriched at the defendant's expense. The former will be allowed to take from the latter more than is unjustifiably received.

There are various strategies for striking a balance between the parties' interests. These strategies are tied to the three elements of the cause of action in unjust enrichment, to which restitution invariably responds:¹

- I. an enrichment to the defendant,
2. a corresponding deprivation to the plaintiff, and
3. an absence of any juristic reason for the enrichment.²

The second element of unjust enrichment provides relatively little scope for mediating a compromise between the parties. Although greater subtlety occasionally is

¹ Strictly speaking, the remedy of restitution is always triggered by the cause of action in unjust enrichment. Unfortunately, courts and commentators sometimes suggest that restitution is also a response to various forms of wrongdoing, including trespass to land, breach of fiduciary duty, and most recently, breach of contract. See *Bank of America Canada v. Mutual Trust* (2002), 211 D.L.R. (4th) 385, 287 N.R. 171, 2002 SCC 43; *Attorney General v. Blake*, [2001] 1 A.C. 268, [2000] 4 All E.R. 385 (H.L.). The relief available in such circumstances is, however, conceptually distinct from restitution in both purpose and operation. It is animated not by a desire to reverse a transfer of wealth between the parties but rather to strip a wrongdoer of an ill-gotten gain. Consequently, it is not limited to benefits that the defendant acquired from the plaintiff. It can also reach benefits that the defendant received from a third party as a result of committing a wrong against the claimant. For this reason, it is better classified as "disgorgement" (which broadly means to give up), rather than "restitution" (which more narrowly means to give back). See Mitchell McInnes, "The Measure of Restitution" (2002) 52 U.T.L.J. 163 [McInnes, "Measure"]; Mitchell McInnes, "Restitution, Unjust Enrichment and the Perfect Quadrature Thesis" [1999] R.L.R. 118 [McInnes, "Quadrature Thesis"]; Lionel D. Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672. This paper is concerned with restitution in the narrow sense.

² *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848, 117 D.L.R. (3d) 257 [*Pettkus* cited to S.C.R.]. A right to restitution *prima facie* arises if the plaintiff establishes those three elements. At a fourth stage of analysis, however, the defendant may avoid liability, in whole or in part, by proving a defence.

required,³ there are, for the most part, only two options.⁴ Moreover, the difference between these options tends to be significant only in a narrow band of cases that involve the concept of passing on. The Australian case of *Roxborough v. Rothmans of Pall Mall Australia Pty. Ltd.*⁵ provides a useful illustration.⁶ In that case, the government had imposed a tax upon a cigarette wholesaler. The wholesaler collected the appropriate amount from a retailer, who in turn shifted the expense onto individual consumers in the form of increased prices. Before the wholesaler paid the money over to the government, the tax was declared invalid. The funds clearly were not available to the government, and there was no real possibility that the money would ever be returned to the individual consumers.⁷ The issue therefore was straightforward: should the windfall representing the consumers' payments remain with the wholesaler or should it be shifted back to the retailer in the form of restitutionary relief?

There is no obviously correct answer to this sort of question. A balance must be struck between the desire to reverse an unwarranted transfer and the desire to let an enrichment lie where it fell. A choice must be exercised between two possible interpretations of the notion of a corresponding deprivation or, as it is sometimes phrased, "the plaintiff's expense". Canadian law tips the balance toward the

³ The common law has yet to settle the rules that apply in cases of indirect enrichment, when the plaintiff enriches a third party, who in turn enriches the defendant. See Peter Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law" in David Johnston & Reinhard Zimmerman, eds., *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002) 493; Daniel Visser, "Searches for Silver Bullets: Enrichment in Three-Party Situations" in Johnston & Zimmermann, *ibid.* 526. The plaintiff may wish to sue the defendant rather than the third party. If so, it is necessary to decide whether the defendant was enriched at the plaintiff's expense, notwithstanding the intervention of the third party.

⁴ Mitchell McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" (1998) 57 Cambridge L.J. 472.

⁵ (2001), 185 A.L.R. 335, 76 A.L.J.R. 203 (H.C.A.) [*Roxborough* cited to A.L.R.]. This case is noted in Mitchell McInnes, "Enrichments, Expenses and Restitutionary Defences" (2002) 118 Law Q. Rev. 209 [McInnes, "Enrichments"].

⁶ *Roxborough* was free of two complications that frequently affect cases of passing on. First, this concept usually arises because a business seeks restitution from a government with respect to the payment of an invalid tax. In such circumstances, there is a strong incentive to allow relief, even if the taxpayer shifted the burden on to its customers, in order to vindicate the constitutional principle against unauthorized taxation. The dispute in *Roxborough*, however, was between two equally innocent private parties. Second, the issue of passing on is usually clouded by insuperable evidentiary difficulties. If a taxpayer attempts to shift the burden of a tax onto its customers in the form of increased prices, it normally will, to some unknowable extent, lose business due to the elasticity of demand. See Mitchell McInnes, "Passing On in the Law of Restitution: A Reconsideration" (1997) 19 Sydney L. Rev. 179 at 199-203. In *Roxborough*, however, the court assumed that the demand for tobacco was inelastic within the relevant price range and that the plaintiff's profits consequently were unaffected.

⁷ See e.g. *Gainers Inc. v. Canadian Pacific Ltd.* (1994), 120 D.L.R. (4th) 143, [1995] 1 W.W.R. 649 (Alta. C.A.); *Cauvin v. Philip Morris Ltd.*, [2002] N.S.W.S.C. 736.

defendant.⁸ It imposes liability only to the extent that the defendant's gain ultimately corresponds to the plaintiff's loss. On the facts of *Roxborough*, the loss attendant upon the wholesaler's gain was, in the final analysis, suffered not by the retailer, but rather by the retailer's customers. As between two innocent parties, there is no compelling reason to incur the societal expense of judicially shifting the windfall from the defendant to the plaintiff. Anglo-Australian law, in contrast, exercises a different choice.⁹ It tips the balance toward the plaintiff. The defendant's gain need merely be at the plaintiff's immediate expense. It is enough that the wholesaler received money from the retailer, even though the retailer in turn collected an identical sum from its customers.¹⁰

Although the second element in unjust enrichment is occasionally used to strike a balance between the parties' interests, most of that work is done at the first and third stages of analysis. Significantly, both of those stages focus on the same concept: freedom of choice. At its core, the law of unjust enrichment is concerned with the exercise of autonomy or lack thereof. Consequently, under the first element, the recognition of an enrichment requires proof that the defendant either chose to accept the risk of financial responsibility for the benefit that he received from the plaintiff or that, in the circumstances, there was no choice to be made. Unless that burden is met, liability is denied, even if the recipient consequently is left with a windfall. The notion of freedom of choice recurs, in two different manifestations, at the third stage of analysis. Despite being awkwardly phrased, the requirement of an "absence of any juristic reason for the enrichment" pertains to reasons for allowing the plaintiff to recover a benefit, rather than to reasons for allowing the defendant to retain a benefit.¹¹

⁸ *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1203, 59 D.L.R. (4th) 161 [*Air Canada* cited to S.C.R.]; *Allied Air Conditioning v. British Columbia* (1994), 109 D.L.R. (4th) 463, [1994] 5 W.W.R. 62 (B.C.C.A.); *Cherubini Metal Works Ltd. v. Nova Scotia (A.G.)* (1995), 137 N.S.R. (2d) 197, 35 C.P.C. (3d) 302 (C.A.); *Sobeys Inc. v. Nova Scotia (A.G.)* (1992), 112 N.S.R. (2d) 205, rev'd (1993), 120 N.S.R. (2d) 392 (C.A.); *Air Canada v. Ontario (Liquor Control Board)* (1995), 24 O.R. (3d) 403, 126 D.L.R. (4th) 301 (C.A.), rev'd in part on other grounds, [1997] 2 S.C.R. 581, 148 D.L.R. (4th) 193 [*LCBO* cited to S.C.R.]. American courts often apply the passing on defence as well. See e.g. *Decorative Carpets v. State Board of Equalization*, 373 P.2d 637 (Cal. Sup. Ct. 1962); *United States v. Jefferson Electric Manufacturing*, 291 U.S. 386 (1934), 54 S. Ct. 443 (1933).

⁹ *Roxborough*, *supra* note 5 at 342-43; *Victoria (Commissioner of State Revenue) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51, 126 A.L.J. 1 (H.C.A.); *Mason v. New South Wales (State of)* (1959), 102 C.L.R. 108 (H.C.A.); *Kleinwort Benson Ltd. v. Birmingham (City Council)*, [1997] Q.B. 380, [1996] 4 All E.R. 733 (C.A.); *Kleinwort Benson Ltd. v. South Tyneside (Metropolitan Borough Council)*, [1994] A.C. 429, [1994] 4 All E.R. 972 (Q.B.) [*Kleinwort*].

¹⁰ In other words, the requirement of the plaintiff's expense merely pertains to the title to sue and does not affect the quantum of recovery. See Andrew Tettenborn, *The Law of Restitution in England and Ireland*, 3d ed. (London: Cavendish, 2002) at 18-19.

¹¹ Mitchell McInnes, "Unjust Enrichment—Restitution—Absence of Juristic Reason" (2000) 79 Can. Bar Rev. 459 [McInnes, "Absence of Juristic Reason"]; Mitchell McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution" (1999) 37 Alta. L.

In most instances, this requirement is satisfied by proof that the plaintiff did not truly intend to confer an enrichment upon the defendant. For instance, she may have acted pursuant to a mistake or under duress. In any event, the law responds to her lack of free will. Sometimes, however, restitution is premised upon proof that the defendant voluntarily received a benefit to which he knew or ought to have known he was not entitled. In such circumstances, the law responds, at least in part, to the defendant's free will. This is true, for instance, when liability is predicated upon the defendant's free acceptance or knowing receipt, or when a court refuses to impose liability in the absence of a "special relationship".¹²

This paper presents two arguments. The first is that the legal concept of enrichment invariably reflects the defendant's freedom of choice. Canadian law has embraced several tests of enrichment, but it has seldom recognized their unifying theme. The second argument is that since the defendant's autonomy receives protection in connection with the element of enrichment, it need not be additionally protected in connection with the unjust factor (i.e., the reason for reversing the impugned transfer of wealth). To do so unfairly tips the balance toward the defendant and may unnecessarily deprive the plaintiff of relief.

I. The Nature of Enrichment

The concept of enrichment is surprisingly complex. This is true for a number of reasons, two of which must be mentioned at the outset. First, as suggested above, the real focus is not so much on enrichment *per se*, but rather on freedom of choice. The discussion that follows demonstrates that most of the difficulties in that regard can be overcome by applying a three stage analysis:

1. Did the defendant receive an objective benefit?
2. Can the defendant subjectively devalue that benefit?
3. Can the plaintiff overcome subjective devaluation?

The second source of difficulties arises from the fact that the concept of enrichment serves a dual purpose: It most obviously satisfies the first element of unjust enrichment (i.e., an enrichment to the defendant), but assuming that the other components of the action are similarly met, it also governs, along with the concept of a corresponding deprivation, the quantification of relief. These two purposes are inextricably linked. The plaintiff's claim consists of proof that she conferred upon the defendant a benefit that he cannot retain. The associated remedy is restitution. In one form or another, he must give

Rev. 1 at 9-13; Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12 Sup. Ct. L. Rev. 211; Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (London: Cavendish, 2001) at 257ff. See also *Garland v. Consumers' Gas* (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (C.A.).

¹² In a third category of cases the reason for restitution pertains to neither the defendant's free choice nor the plaintiff's lack of free choice, but rather to a discrete policy factor. See *infra* note 151, 152.

back what he received from her.¹³ The defendant is not responsible for more than he actually gained and the plaintiff cannot recover more than she actually lost. The appropriate order therefore is easily determined in a case of specific restitution. The defendant must simply return the very thing that he received from the plaintiff. The exercise is more complicated, however, whenever the applicable form of relief requires a valuation of the defendant's enrichment. This is true if the plaintiff seeks either personal relief, or proprietary relief with respect to an asset that she did not provide to the defendant.¹⁴ In either event, it is necessary to establish not only the existence, but also the measure, of the defendant's enrichment and the plaintiff's corresponding deprivation. This calculation begins with the objective value of the benefit at the time of its conferral.¹⁵ Frequently, however, the initial figure must be adjusted to reflect the extent to which the defendant either chose to assume the risk of financial responsibility for his benefit or had no choice to make. Unfortunately, Canadian courts often fail to carefully identify and quantify enrichments in this manner.

A. Objective Benefit

In one sense, the concept of enrichment is quite broad. It can encompass virtually any type of gain, including money, land, goods, or services. Its scope is immediately limited, however, by the fact that a gain generally¹⁶ is relevant only if it constitutes an *objective* benefit. The defendant normally cannot be considered enriched unless he received something of market value. As McLachlin J. explained, "[t]he word 'enrichment' ... connotes a tangible benefit."¹⁷ Tangible in this instance refers not to the capacity for physical touch but rather to the capacity for monetary valuation.¹⁸ Canadian law therefore "has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment."¹⁹

The insistence upon market value and a "straightforward economic approach" to the issue of enrichment is justified by the nature of restitutionary relief. The defendant is required to "give back" the benefit that he received from the plaintiff. Moreover, he

¹³ McInnes, "Measure", *supra* note 1 at 183.

¹⁴ The most common illustration of the latter occurs when a constructive trust is imposed over a cohabitational home on the basis of services rendered. See *e.g.* *Pettkus*, *supra* note 2 at 849. In *Peter v. Beblow* ([1993] 1 S.C.R. 980 at 998-99, 101 D.L.R. (4th) 621 [*Peter* cited to S.C.R.]), McLachlin J. explained that the extent of the plaintiff's proprietary interest is determined first by calculating the "value received" by the defendant, and then by assessing the proportion of this contribution to the "value surviv[ing]" in the asset.

¹⁵ *Peter*, *ibid.* at 999.

¹⁶ An exception is discussed in Part I.B, below, dealing with subjective overvaluation.

¹⁷ *Peel (Regional Municipality of) v. Canada*, [1992] 3 S.C.R. 762 at 790, 98 D.L.R. (4th) 140 [*Peel* cited to S.C.R.].

¹⁸ Were it otherwise, restitutionary relief would not, contrary to established precedent, be available with respect to services.

¹⁹ *Peter*, *supra* note 14 at 990.

generally is required to do so personally, rather than proprietarily. Liability usually takes the form of an obligation to pay a sum of money that represents the value of the enrichment. Consequently, as a practical matter, the courts must have some reliable means of measuring the gain for the purposes of quantifying relief. If the cause of action is to operate above the level of intuitive justice, the definition and calculation of an enrichment cannot be left to judicial discretion. And while market value admittedly entails a range of dollar figures in some situations, the basic concept does provide sufficiently clear guidance.

The focus on monetary value is further justified by the nature of the underlying cause of action. As discussed below, liability for unjust enrichment is generally strict. In most cases, the defendant is held responsible simply because he received an involuntary transfer from the plaintiff and not because he did anything wrong. As a result, unlike a person who has broken a contractual promise or committed a tort, the defendant does not warrant mistreatment. Unjust enrichment should, at worst,²⁰ be a zero-sum event. The defendant should never be required to give back more than he got.²¹ While perhaps redistributed, the totality of his wealth should be the same both before the event of unjust enrichment and after the response of restitution. Suppose that the defendant initially had five thousand dollars cash and a debt of two thousand dollars, for a net worth of three thousand dollars. If the plaintiff involuntarily discharged the defendant's debt, the plaintiff might be entitled to two thousand dollars in restitution. In satisfying that judgment, the defendant would be required to rearrange his assets, but his net worth would remain the same: three thousand dollars (all cash and no debt). It would be different, however, if relief was available with respect to intangible benefits, such as love and affection, that cannot be translated into monetary terms.²² In that case, since the defendant did not receive anything of economic value, liability necessarily would worsen his financial position. He would

²⁰ Restitution is measured by the highest amount common to the defendant's gain and the plaintiff's loss. Consequently, despite receiving an enrichment, the defendant is relieved of liability to the extent that the plaintiff did not suffer a deprivation. As explained above, this rule is particularly important in cases of passing on.

²¹ Aside from the fact that it generally does not involve wrongdoing, the action in unjust enrichment is limited to the response of restitution by the elements of enrichment and corresponding deprivation. See McInnes, "Measure", *supra* note 1 at 186.

²² The problem is not that love and affection do not create a physical residuum, but rather that the courts will not recognize such benefits as marketable commodities. Love and affection cannot, for instance, constitute consideration for the purposes of a contract. In this sense, they are distinguishable from other types of services (e.g., lectures and massages) that similarly do not provide the recipient with a physical residue but that are quantifiable in the marketplace. Consequently, as discussed in the next section, if the defendant either chose to assume the risk of financial responsibility for the second type of service, or did not have any choice to make, he may be considered enriched even if he has nothing to show for the plaintiff's efforts.

be required to give up money even though he did not receive money or money's worth.²³

1. Objective Benefits and Services

Although an objective benefit can take many forms, special problems can arise when the plaintiff confers services upon the defendant. This proposition recurs throughout this paper. For present purposes, it is necessary to discuss two particular issues: (1) pure services and (2) time of receipt.

a. Pure Services

The need for a restorable benefit has led some commentators to claim that restitutionary relief cannot be awarded on the basis of pure services, that is, services that neither create a marketable residuum nor leave the recipient with exchange value.²⁴ On this view, an enrichment can be recognized if the plaintiff's services provided the defendant with a new asset (e.g., if the plaintiff built a boat for the

²³ An excellent illustration appears in *Peel*, *supra* note 17. The *Juvenile Delinquents Act* (R.S.C. 1970, c. J-3) allowed judges to make a variety of orders with respect to wayward children. Some of these possibilities involved financial costs to the federal and provincial governments, but others did not. Over a number of years, courts in Ontario developed a practice of committing delinquents to group homes and ordering the relevant municipalities to pay the associated costs. The Regional Municipality of Peel challenged those orders and eventually succeeded in having them declared ultra vires. In an effort to recover its payments, Peel then argued that the other levels of government had been unjustly enriched by its expenditures. In the Supreme Court of Canada, McLachlin J. recognized that an enrichment can arise either "positively", through an accretion to pre-existing resources, or "negatively", through the discharge of an obligation (*Peel*, *ibid.* at 790). See also *Carleton (County of) v. Ottawa (City of)*, [1965] S.C.R. 663, 52 D.L.R. (2d) 220 [*Carleton* cited to S.C.R.]. But in either event, she insisted, the defendant must receive something of economic value. That requirement could not be satisfied on the facts. The provincial and federal governments did not enjoy a positive benefit for the simple reason that the municipality's money was not paid to them. Nor were they enriched in a negative sense. Even if the ultra vires orders had not been issued, it was neither certain nor probable that the Family Court judges would have adopted alternatives that cast a financial burden upon the defendants. The courts might have required the provincial and federal governments to care for the delinquent children, but that was purely speculative. Therefore, Peel was reduced to arguing that, as a result of its payments, Canada was enriched in a political sense insofar as the general goals of its legislation were furthered, while Ontario was enriched in a moral sense insofar as it was not required, as a matter of conscience, to help the children. McLachlin J. rejected that argument because it could not be translated into economic terms. The defendants may have been enriched, but not in a legally relevant sense (*Peel*, *ibid.* at 798-801).

²⁴ J. Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) at 22-44; Ross B. Grantham & Charles E.F. Rickett, *Enrichment & Restitution in New Zealand* (Oxford: Hart Publishing, 2000) at 60-61 [Grantham & Rickett, *Enrichment*]. While denying the possibility of a claim in unjust enrichment, Grantham and Rickett accept that pure services may have market value and may be capable of supporting some other form of liability.

defendant) or improved the market value of an existing asset (e.g., if the plaintiff painted the defendant's boat).²⁵ In such circumstances, the defendant can, if necessary, sell the new or improved item in order to obtain the money needed to satisfy judgment. In contrast, a benefit purportedly cannot be recognized if the plaintiff's services failed to leave behind something of market value. This would be true, for example, if the plaintiff performed a concert or gave a lecture.²⁶ In such circumstances, the defendant does not have anything from which he can generate the money needed to make restitution.²⁷

This thesis has intellectual appeal and it certainly could provide the basis for a coherent principle of unjust enrichment. It does not, however, represent Canadian law. The leading cases of *Degelman v. Guaranty Trust*²⁸ and *Petkus*²⁹ are illustrative. In each instance, the plaintiff performed a number of household services, including some that did not leave marketable residue.³⁰ The defendant nevertheless was liable for all of the work. These decisions reveal a significant feature of the Canadian concept of enrichment. While courts insist upon an objective benefit, they do not define that requirement in terms of the retention of exchange value. They presumptively proceed instead by reference to the receipt of market value. Consequently, relief may be awarded even if the defendant is unable to either effect restoration *in specie* or satisfy judgment on the basis of a financial gain that he could realize from the plaintiff's efforts. It may be enough that he received pure services, such as an increase in human capital (e.g., when a capable student receives a lesson) or even an ephemeral experience (e.g., when an

²⁵ An enrichment can also be recognized if the plaintiff's services save the defendant a necessary expense (e.g., by discharging a legal obligation on the defendant's behalf). In such circumstances, the defendant does not positively receive a marketable residuum from the plaintiff. He does, however, negatively receive such a benefit insofar as he is spared the need to expend existing resources in fulfilment of the underlying obligation. He can use these existing resources instead to make restitution. See Beatson, *ibid.* at 33.

²⁶ There may be a difference between a concert and a lesson. The former presumably does not raise the listener's human capital in the sense of providing him with the intellectual wherewithal to generate wealth. The latter may or may not raise the student's human capital, depending upon his abilities as a pupil. The attentive law student, for instance, can earn an income from what he was taught; his inattentive classmate cannot. Those who are opposed to recognizing pure services as enrichments are split on the issue. While Beatson contemplates a possibility of restitutionary relief where the defendant's human capital is increased (Beatson, *ibid.* at 30-31, 35-36), Grantham and Rickett appear to insist upon the receipt of a marketable residuum that is separate from the defendant himself (Grantham & Rickett, *Enrichment*, *supra* note 24 at 61).

²⁷ Logically extended, the same reasoning should apply to the provision of consumed goods, as when the plaintiff provides sustenance to a person suffering from an incapacity. By the time of trial, the digestive process has run its course and there is no marketable residuum. In fact, however, restitutionary relief is available in such circumstances. Grantham and Rickett explain many such cases on compensatory grounds. See Grantham & Rickett, *ibid.* at 227.

²⁸ [1954] S.C.R. 725, 3 D.L.R. 785 [*Degelman* cited to S.C.R.].

²⁹ *Supra* note 2.

³⁰ Nor did the plaintiff's services invariably save the defendant a necessary expense.

audience listens to a concert). And while the economist may not agree with that definition of enrichment, the legal view does comport with common practice. One startling consequence of accepting the objection to pure services is that many of the things for which people regularly pay do not constitute enrichments, or at least do not fall within the scope of the action in unjust enrichment. The masseuse, the hairdresser, the teacher, the taxi driver, the entertainer—indeed, in many cases, even the lawyer—would be incapable of demanding restitutionary relief.

b. Time of Receipt

Accepting that services, including pure services, can constitute objective benefits, it remains necessary to identify their moment of receipt. While it may be possible to award relief even in the absence of a marketable residuum, the defendant should not be held liable unless and until he actually has received something. When, however, are services received?³¹ The centrepiece of this debate is *Planché v. Colburn*.³² The defendant engaged the plaintiff to write a children's book about ancient armour. After the plaintiff researched and wrote a portion of the text, but before he delivered any pages, the defendant broke the contract by stating that it no longer intended to go forward with the publication. The author then successfully claimed the value of his services on a *quantum meruit*—or, as it would be phrased today, on the basis of restitution for unjust enrichment.³³ This decision is controversial insofar as it appears to hold the defendant liable even though he never actually received an objective benefit in the form of a manuscript. On this view, there simply was nothing to give back. Canadian courts nevertheless have relied upon *Planché* in awarding restitutionary relief,³⁴ which may indeed be defensible.³⁵

³¹ The issue is much simpler, of course, with respect to money, land, and goods. The defendant is enriched when he actually acquires the property.

³² (1831), 5 Car. & P. 58, 172 E.R. 876 (C.P. at *nisi prius*), aff'd (1831), 8 Bing. 14, 131 E.R. 305 (C.P.) [*Planché*].

³³ Many commentators prefer to analyze *Planché* as a case in which the plaintiff was awarded reliance damages under a cause of action in breach of contract. See Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 2002) at 22-23 [Goff & Jones, *Restitution*, 2002]; Andrew Burrows, *The Law of Restitution*, 2d ed. (London: Butterworths, 2002) at 343 [Burrows, *Law of Restitution*]; Grantham & Rickett, *Enrichment*, *supra* note 24 at 166. And indeed, that would seem the simpler solution. It does not, however, accurately reflect the reasons for judgment. The court employed a restitutionary approach. Furthermore, the contractual analysis would be inapplicable if the services were not rendered pursuant to an enforceable agreement. In this situation, the defendant could be held liable, if at all, only under the action in unjust enrichment.

³⁴ *Oberholtzer v. Exploits Oilskin Originals*, [2000] N.J. No. 173 (Nfld. P.C.) (QL) at para. 11; *Kuny v. Wigle*, [1994] A.J. No. 331 (Alta. P.C.) (QL). See also *Brenner v. First Artists' Management Pty. Ltd.* (1992), [1993] 2 V.R. 221 at 258 (S.C.) [*Brenner*]; *Independent Grocers Co-operative Ltd. v. Noble Lowndes Superannuation Consultants Ltd.* (1993), 60 S.A.S.R. 525 (S.C.); George E. Palmer, *The Law of Restitution*, vol. 1 (Boston: Little Brown, 1978) at 370-78.

The mere fact that the defendant in *Planché* did not receive anything that he could restore *in specie*, or from which he could realize a financial gain, was not necessarily fatal to the issue of enrichment. The cases on pure services are proof of this proposition. Assume a variation on the facts: Although he had not yet decided to publish a book on ancient armour, the defendant wanted to prepare for this contingency and therefore asked the plaintiff to research the topic. The parties agreed at the outset that the production of a manuscript or report would be addressed separately if and when the need arose. The plaintiff performed the services, but the defendant refused payment because the contract was, for some reason, unenforceable. Restitution might be available, notwithstanding the absence of any physical product, on the basis that the defendant had received the plaintiff's time and effort. And this enrichment, which consisted of the research itself, would have been received from time to time as the work was done. Returning to the actual facts of *Planché*, there is no reason why a different conclusion is required by the mere fact that the parties initially expected the plaintiff's research to culminate in a marketable residue. The anticipated manuscript would have constituted an enrichment, but so too did the underlying services.³⁶ On this view, the defendant arguably began to receive the latter form of enrichment as soon as the plaintiff commenced performance. At that point, even though he subsequently abandoned the project, the publisher had command of the author's labour.³⁷

The possibility that services may be received even before an anticipated end product is transferred admittedly entails certain complications. First, it requires a court to determine whether the defendant sought both the plaintiff's services and their end product (e.g., research and a printed manuscript) or merely the end product (e.g., a printed manuscript). If the latter, the defendant, presumably would be immune to a claim based on the services themselves. Second, even if the defendant sought both services and their end product, a court must determine whether the plaintiff's actions were merely preparatory and hence non-recoverable (e.g., walking to a library) or

³⁵ See Peter Birks, "In Defence of Free Acceptance" in Andrew Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 105 at 140-41 [Birks, "Free Acceptance"]; Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) at 39; Tettenborn, *supra* note 10 at 10.

³⁶ *BP Exploration (Libya) v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 801-802 (Q.B.), *aff'd* [1983] 2 A.C. 352 (H.L.) [*BP Exploration*] (prospecting services may constitute a benefit in themselves, even if they do not discover minerals).

³⁷ Palmer, *supra* note 34. Professor Burrows draws a distinction between services that are intended to create an end product and those that are not. The former, he says, are received only when part of the end product is transferred to the defendant, whereas the latter are received as soon as the plaintiff starts performance. Burrows, *Law of Restitution*, *supra* note 33 at 17-18. In either event, however, the plaintiff is working for the defendant once performance begins. Moreover, in some situations, the end product may be relatively unimportant to the parties. People pay for balloon animals, not so much because they want the end products, but rather because they enjoy the creative process.

whether they constituted part performance and hence were recoverable (e.g., conducting research).³⁸

B. Subjective Devaluation

The concept of an objective benefit is broadly defined. If unqualified, it would be practically intolerable. There would be too much restitution. A person would be at risk of liability any time that he received something of market value. Moreover, such an approach would be irreconcilable with a basic tenet of our legal system. As McLachlin J. explained in *Peel*, 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 placed [a] premium on the right to choose how to spend one’s money.”³⁹ And while it is true that the “[c]ommon law man has lost the rougher edges of his individualism,”⁴⁰ Canadian courts remain vigilant to protect freedom of choice. They do so through the concept of subjective devaluation.

That phrase is of modern vintage. It was coined by Birks⁴¹ and only recently began to appear in the case law.⁴² The underlying principle, however, is well rooted. Having received an objective benefit, the defendant has always been entitled to argue that, regardless of the market’s perception of his purported enrichment, he did not choose to place value on it and therefore should not be held responsible. It is important to stress the nature of this plea. The defendant need not deny the objectively beneficial nature of his receipt. Nor, more significantly, is he required to prove that he did not personally feel enriched.⁴³ He only has to show that he did not freely assume the risk of financial responsibility for his gain.⁴⁴ Consequently, as one Canadian judge

³⁸ Compare Goff & Jones, *Restitution*, 2002, *supra* note 33 at 514.

³⁹ *Peel*, *supra* note 17 at 785-86. See also Peter Birks, “Restitution for Services” (1974) 27 *Curr. Legal Probs.* 13.

⁴⁰ Peter Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989) at 121 [Birks, *Introduction*].

⁴¹ *Ibid.* at 109.

⁴² *Gidney v. Feuerstein* (1995), 101 Man. R. (2d) 197 at 210, (*sub. nom.* *Gidney v. Shank*) [1995] 5 W.W.R. 385 (Q.B.), rev’d on other grounds (1996), 107 Man. R. (2d) 208, [1996] 2 W.W.R. 383 (C.A.) [*Gidney* cited to Man. R.]; *Olchowy v. McKay*, [1996] 1 W.W.R. 36 at 46, 136 Sask. R. 241 (Q.B.) [*Olchowy* cited to W.W.R.]; *Club 7 Ltd. v. E.P.K. Holdings Ltd.* (1993), 115 Nfld. & P.E.I.R. 271 at 315, 360 A.P.R. 271 (Nfld. S.C.T.D.); *Ministry of Defence v. Ashman*, [1993] 2 *Estates Gazette Law Reports* 102 at 105 (C.A.U.K. (Civ. Div.)) [*Ashman*].

⁴³ For this reason, the label “subjective devaluation” is somewhat misleading. The important point is not the defendant’s personal valuation of a benefit, but rather his personal choice to accept financial responsibility for it.

⁴⁴ Some authorities suggest that the plea of subjective devaluation is overcome if the defendant personally felt enriched. See e.g. *Olchowy*, *supra* note 42 at 46. This approach is unacceptable insofar as it fails to properly respect the underlying principle of freedom of choice. There is a fundamental difference between recognizing the beneficial nature of a receipt and being willing to assume financial

observed, it may be possible to resist an action in unjust enrichment simply by turning to the claimant and saying, "[I]t is not your job to make my choices."⁴⁵ Suppose that the plaintiff mistakenly repaired the defendant's car while he was on vacation. Perhaps he left his car in her garage for an oil change, only to discover upon returning home that, due to an administrative error, she had repainted the car. He might agree that the car's market value has been enhanced and further concede that he is delighted by the improvement. Without more, however, the plaintiff's claim should fail. "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."⁴⁶

Unfortunately, Canadian courts occasionally lose sight of that basic principle. *Estok v. Heguy*⁴⁷ is illustrative. In this case, the parties attempted to create a contract for the sale of the defendant's land. In the honest belief that he had become the owner, the plaintiff deposited a "substantial amount of manure" on the property, thereby increasing its market value by changing "pasture to crop bearing soil."⁴⁸ The apparent agreement was later struck down, however, for lack of *consensus ad idem*. The plaintiff then successfully claimed restitution with respect to the improvements. The court imposed liability despite the fact that the defendant was "satisfied with the previous tilth"⁴⁹ and without regard to the fact that he had not chosen to receive the manure. He consequently was required to provide restitution with respect to an objective benefit for which he had not assumed responsibility and that he did not want.⁵⁰ In effect, the plaintiff was allowed to unilaterally determine the allocation of the defendant's resources.

responsibility for it. For instance, while most car owners would be quite happy to have a new paint job, few are willing to pay for this service.

⁴⁵ *Magical Waters Fountains Ltd. v. Sarnia (City of)* (1990), 74 O.R. (2d) 682 at 691, 73 D.L.R. (4th) 734 (Gen. Div.), Gauthreau J. [*Magical Waters*], rev'd on other grounds (1992), 8 O.R. (3d) 689, 91 D.L.R. (4th) 760 (C.A.). See also J.R.M. Gauthreau, "When Are Enrichments Unjust?" (1989) 10 *Advocates' Q.* 258 at 261, where it is stated: "The 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."

⁴⁶ *Falcke v. Scottish Imperial Insurance* (1886), 34 Ch.D. 234 at 248 (C.A.).

⁴⁷ (1963), 40 D.L.R. (2d) 88, 43 W.W.R. 167 (B.C.S.C.) [*Estok* cited to D.L.R.]. See also *T & E Development Ltd. v. Hoornaert* (1977), 78 D.L.R. (3d) 606 (B.C.S.C.).

⁴⁸ *Estok*, *ibid.* at 89.

⁴⁹ *Ibid.*

⁵⁰ Nor, to foreshadow the discussion that follows, could the defendant's plea of subjective devaluation be overcome on the basis of incontrovertible benefit, or request or free acceptance. As to the former, the defendant was not spared a necessary expense, and he did not realize a financial gain from the plaintiff's efforts. The facts indicate that he continued to use the land as pasture and not for crops. And as to the latter, the defendant had neither requested the services nor received them with knowledge that payment was expected.

C. Tests of Enrichment

To satisfy the requirement of an enrichment, the plaintiff must do more than establish the provision of an objective benefit. She must also overcome the defendant's plea of subjective devaluation. She must, in other words, satisfy the court that liability would not intolerably infringe upon the defendant's freedom of choice. The plaintiff can do so by proving that the defendant chose to assume responsibility for his benefit or, in the circumstances, had no choice to make.

Properly analyzed, the element of enrichment is generally satisfied on the basis of either an incontrovertible benefit, or a request or free acceptance. Both of these concepts are examined below. By way of preface, however, it must be conceded that Canadian judges very often adopt an intuitive and unreasoned approach to the issue. Sometimes they entirely fail to identify a specific ground of enrichment.⁵¹ Other times they invoke the name of, say, incontrovertible benefit, but fail to rigorously apply the underlying test.⁵² In either event, they determine restitutionary rights on the basis of a broad, if not unfettered, discretion. It was the fear of precisely this sort of "palm tree justice" that traditionally inhibited the development of unjust enrichment.⁵³ The historical concern remains very real today. To the extent that it turns upon unarticulated opinions, rather than defined rules, the principle of unjust enrichment constitutes an illegitimate exercise of personal power.

1. Incontrovertible Benefit

Subjective devaluation can be overcome if the defendant received an incontrovertible benefit⁵⁴ that is, "a benefit which is demonstrably apparent and not subject to debate and conjecture."⁵⁵ As McLachlin J. explained in *Peel*, "[w]here the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice."⁵⁶ An incontrovertible benefit, however, is "not the antithesis of freedom of choice" but

⁵¹ See e.g. *Peter*, *supra* note 14 per Cory J.

⁵² See e.g. cases cited *infra* at note 57.

⁵³ *Pettus*, *supra* note 2 at 859, Martland J. See also *Baylis v. Bishop of London* (1912), [1913] 1 Ch. 127 at 140 (C.A.); *Holt v. Markham* (1922), [1923] 1 K.B. 504 at 513-14, [1922] All E.R. 134 (C.A.).

⁵⁴ Once again, although the underlying principle is well established, Canadian courts only recently have begun to call it by name. See *Park Lane Ranch Ltd. v. Fleetwood Village Holdings (Phase II)* (1980), 17 R.P.R. 35 at 44 (B.C.S.C.) [*Park Lane Ranch*]; *Republic Resources Ltd. v. Ballem* (1981), 33 A.R. 385 at 399, [1982] 1 W.W.R. 692 (Q.B.) [*Republic*]; *Magical Waters*, *supra* note 45 at 691; *Gidney*, *supra* note 42 at 209; *Olchoway*, *supra* note 42 at 46; *Halifax (City of) v. Nova Scotia (A.G.)* (1997), 163 N.S.R. (2d) 360 at 369, 487 A.P.R. 360 (C.A.) [*Halifax* cited to N.S.R.]; *Sharwood & Co. v. Municipal Financial* (2001), 53 O.R. (3d) 470 at 480, 197 D.L.R. (4th) 477 (C.A.) [*Sharwood* cited to O.R.].

⁵⁵ *Peel*, *supra* note 17 at 795.

⁵⁶ *Ibid.*

rather "exists when freedom of choice as a problem is absent."⁵⁷ There are several species of incontrovertible benefits.

a. Money

The receipt of money is an incontrovertible benefit. Since it is the very means by which the law recognizes and expresses value, money cannot be subjectively devalued.⁵⁸ It is always valuable, and moreover, it is equally valuable regardless of who holds it. A five dollar bill is worth precisely as much in the defendant's hands as in the plaintiff's. Finally, because of its fungibility, money can be effectively restored even if the defendant no longer holds the same notes and coins that he received from the plaintiff. One five dollar bill is as good as the next.⁵⁹

b. Services

The analysis is more complicated when the defendant receives services, rather than money. Services are not invariably valuable, nor are they equally valued by everyone. Regardless of the fact that a shoeshine may have a market price of, say, five dollars, the defendant may place less value, or no value at all, on that type of service. Furthermore, unlike money, services are not fungible and cannot be restored *in specie*. As Baron Pollock famously said, "One cleans another's shoes; what can the other do but put them on?"⁶⁰ As a result, judges are reluctant to characterize services as

⁵⁷ *Ibid.* at 795-96 (quoting Gautreau, *supra* note 45 at 270-71). Because of persistent errors, it is important to stress the nature of the concept. Contrary to a common misperception, incontrovertible benefit is not an independent cause of action. See *Gill v. Grant* (1988), 30 E.T.R. 255 at 272 (B.C.S.C.) [*Gill*]; *Wettstein v. Wettstein*, [1992] B.C.J. No. 1026 (S.C.) (QL); *Alyea v. South Waterloo Edgar Insurance Brokers Ltd.* (1993), 50 C.C.E.L. 266 at 274, C.C.L.I. (2d) 81 (Ont. Ct. J. (Gen. Div.)) [*Alyea*]; *Lavigne v. Dak Enterprises Ltd.*, [1996] B.C.J. No. 196 at para. 30 (S.C.) (QL); *Sharwood*, *supra* note 54 at 480. To say that the defendant has received an incontrovertible benefit is merely to say that he undeniably was enriched. It does not reveal who provided that enrichment, nor does it indicate any reason for reversing the transfer. A gift of five hundred dollars is an incontrovertible benefit because it is not "subject to debate or conjecture" (*Peel*, *supra* note 17 at 795). But, of course, being a gift, it need not be returned. Furthermore, incontrovertible benefit is only one of several means by which the plaintiff can overcome subjective devaluation. It is not the exclusive test of enrichment, although some courts have acted as though it were. See *Toronto-Dominion Bank v. Bank of Montreal* (1995), 22 O.R. (3d) 362 at 375, 6 E.T.R. (2d) 202 (Gen. Div.); *G.J.V. Investments Ltd. v. Katz*, [1993] B.C.J. No. 466 (S.C.) (QL).

⁵⁸ "Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited ..." (*BP Exploration*, *supra* note 36 at 799, Goff J.). See also *Sharwood*, *ibid.* at 478; *Halifax*, *supra* note 54 at 370.

⁵⁹ Exceptions exist. For instance, even if it qualifies as currency, an old or unusual coin may be worth more than its face value.

⁶⁰ *Taylor v. Laird* (1856), 25 Law Journal Reports (New Series, Part 2) 329 at 332, 1 H. & N. 266, 156 E.R. 1203 (Ex. Ct.). The same observations apply, *mutatis mutandis*, with respect to goods that

incontrovertible benefits. There is a very real danger of imposing liability despite the fact that, if presented with a timely opportunity to do so, the recipient might have refused to assume the risk of financial responsibility for the work in question. Consequently, although the cases have yet to be expressly rationalized along such lines, it appears that the plaintiff must demonstrate that her services provided the defendant with the functional equivalent of a monetary benefit. Two possibilities have been recognized: (1) discharge of a necessary expense and (2) realization of a financial gain.⁶¹ In either situation, it is as if the defendant received money from the plaintiff.

i. Necessary Expense

Services constitute an incontrovertible benefit to the extent that they anticipate a necessary expense. The defendant cannot deny having been enriched if the plaintiff has discharged an obligation on his behalf. This is true if the plaintiff provided money and eliminated a monetary debt (e.g., a contractual duty to pay rent) or if she performed work and eliminated a non-monetary debt (e.g., a statutory duty to clear a blocked sewer). In either event, it is as if the plaintiff gave the defendant a monetary benefit. Being relieved of a five thousand dollar burden essentially is the same as receiving five thousand dollars.⁶² The resources that the defendant could have used to discharge the underlying debt can be used instead to satisfy the plaintiff's judgment. While it may be true that the defendant has no choice but to effect restitution, it is also true that he had no choice but to honour his original debt. Liability leaves the defendant none the worse for wear.

There is, however, need for caution. First, it is important to stress that the defendant is enriched only to the *extent* that a necessary expense was avoided. The focus at this stage of the inquiry therefore is not upon the expense that the plaintiff incurred but rather upon the expense that the defendant was spared. Suppose that while the plaintiff paid five thousand dollars to discharge the defendant's original obligation, the defendant could have achieved the same result himself at a cost of only three thousand dollars. Perhaps the underlying burden consisted of a monetary debt that he could have satisfied at less than face value (e.g., because he held a right of set-off against his landlord).⁶³ Or perhaps it pertained to a service that he could have personally performed at a cost below market value (e.g., because he was capable of unblocking a sewer himself and therefore had no need to hire someone for that job).

have been consumed. The retention of unconsumed goods generally is caught by the concept of free acceptance, as discussed below.

⁶¹ *Peel*, *supra* note 17 at 799.

⁶² *Carleton*, *supra* note 23; *Peter*, *supra* note 14 at 989; *Peel*, *ibid.*; *Davey v. Cornwallis (Rural Municipality of)* (1930), [1931] 2 D.L.R. 80, 39 Man. R. 259 (C.A.) [*Cornwallis* cited to D.L.R.]; *Halifax*, *supra* note 54; *J.B.C. Consulting v. Gray* (2000), 47 O.R. (3d) 212 (S.C.J.).

⁶³ Compare *Boulton v. Jones* (1857), 2 H. & N. 563, 157 E.R. 232 (Ex. Ct.).

In either event, notwithstanding the generally incontrovertible nature of his benefit, the defendant should be entitled to subjectively devalue the enrichment by two thousand dollars. The law must respect the fact that the defendant initially enjoyed an option as to whether he would spend five or three thousand dollars in discharge of the burden.

Even more fundamentally, the defendant should not be considered enriched at all, at least under this head of analysis, unless he was saved a *necessary* expense. Given the ultimate focus of the inquiry, the necessity of the expense must not be defined in a way that intolerably undermines freedom of choice. It certainly should not be enough that most reasonable people would consider a particular expenditure to be highly desirable or even inevitable. While the defendant cannot demand every indulgence, he must be allowed, to a substantial degree, to dissent from common perceptions. In that regard, a distinction must be drawn between legally necessary expenses and factually necessary expenses. The former are relatively simple. True, it occasionally is difficult to determine whether or not the defendant was indeed legally obliged to pay money or perform services.⁶⁴ But once that question has been answered in the affirmative an enrichment can be readily recognized.⁶⁵ A legal obligation usually is narrowly prescribed in terms of content and timing.⁶⁶ Taxes, for instance, must be paid in a specified amount by a specified date. Moreover, while it is true that some legal obligations are never fulfilled, it would be perverse for a court of law to countenance the possibility of non-compliance. The defendant should not be heard to say that he would have ignored his legal duty.⁶⁷

A factually necessary expense is much more difficult to establish. Strictly speaking, of course, nothing is absolutely necessary. A person is free to refuse the

⁶⁴ *Peel*, *supra* note 17; *Metropolitan Police District (Receiver for) v. Croydon Corp.*, [1957] 2 Q.B. 154, [1957] 1 All E.R. 78 (C.A.).

⁶⁵ *Carleton*, *supra* note 23 (plaintiff discharged defendant's statutory obligation to care for indigent person); *Cornwallis*, *supra* note 62 (plaintiff discharged defendant's statutory duty by burying unidentified body).

⁶⁶ Timing may be important. For instance, if the plaintiff discharged the defendant's debt before it was due, the defendant might be able to prove that it would have been financially advantageous for him to postpone payment. If so, judgment for the full amount of the plaintiff's payment would deprive the defendant of the opportunity that he would have enjoyed to profitably invest money pending payment of the original debt. Compare *R.B.C. Dominion Securities v. Dawson* (1994), 114 Nfld. & P.E.I.R. 187 at 195, 111 D.L.R. (4th) 230 (Nfld. C.A.) [*Dawson* cited to Nfld. & P.E.I.R.] (where the relevance of timing per se was rejected without investigating the financial implications of accelerating repayment).

⁶⁷ Suppose that the defendant was indebted to his mother for five thousand dollars. If the plaintiff discharged that obligation, the debtor should not be allowed to argue that he could have taken advantage of his mother's desire for harmonious relations by cynically refusing repayment. It would be different, of course, if the mother had actually forgiven the debt.

necessities of life.⁶⁸ The law generally excludes extreme choices, however, by disregarding “unrealistic or fanciful possibilities of ... doing without ...”⁶⁹ Consequently, a person who improperly occupies a house cannot subjectively devalue that benefit by pointing to the possibility of living on the street.⁷⁰ Likewise, a person suffering from an incapacity, due to infancy, mental disability, or intoxication, may be liable for restitution after being provided with food, clothing, or shelter.⁷¹ More controversially, a person who attempts suicide may be considered enriched by the receipt of emergency medical treatment, at least if he can be presumed to have acted with an impaired intention.⁷² The identification of factually necessary expenses therefore can begin by proceeding by analogy to the rules that govern the provision of “necessaries” to incapacitated persons.⁷³

⁶⁸ *Malette v. Shulman* (1990), 72 O.R. (2d) 417, 67 D.L.R. (4th) 321 (C.A.).

⁶⁹ Birks, *Introduction*, *supra* note 40 at 120.

⁷⁰ *Ashman*, *supra* note 42; *Ministry of Defence v. Thompson*, [1993] 2 Estates Gazette Law Reports 107 (C.A.U.K. (Civ. Div.)) (discussed in the context of a claim to disgorgement under the cause of action for trespass to land). The facts of both cases were substantially similar. The defendant was married to a man who, because he was in the military, was entitled to housing at a substantially reduced rate. After her husband moved out on his own, the defendant was legally obligated to vacate the premises. She nevertheless remained in possession on the ground that she could not afford alternative accommodation on the open market and therefore was waiting for the local government to provide her with subsidized council housing. The Ministry of Defence sought to recover the full market value of the military quarters. It succeeded in part. The defendant obviously could not entirely deny that she had been enriched. After all, she had been saved the necessary expense of paying for shelter. She was, however, entitled to partially subjectively devalue that enrichment by arguing that she merely had been saved the necessary expense of subsidized rent, rather than market rent. That conclusion is open to debate. It is true, on the one hand, that the defendant would not have paid full market value in the normal course of events. It was beyond her means. But it is also true, on the other hand, that if she had been physically removed from the military accommodation, she would have been required to find some alternative pending the availability of council housing. In such circumstances, it is difficult to calculate the saved expense because it is not clear how the defendant, if pressed by the exigency, would have resolved the problem created by a lack of subsidized accommodation.

⁷¹ *Re Rhodes* (1890), 44 Ch. 94 (C.A.) (recognizing an enrichment, but refusing liability on the basis that the services were provided as a gift).

⁷² The analysis is further complicated if the patient died despite receiving competent care. Even in that instance, however, an enrichment may be established by assessing the necessity at the time of emergency, rather than the time of trial. Immediately after sustaining a potentially fatal gunshot wound, for instance, no reasonable person would deny the need for treatment. Moreover, in cases of doubt, the law should, on policy grounds, favour a rule that encourages intervention. See *Matheson v. Smiley*, [1932] 2 D.L.R. 787, 40 Man. R. 247 (C.A.) [*Matheson* cited to D.L.R.].

⁷³ Birks, *Introduction*, *supra* note 40 at 121. On enforceability of contracts concerning the provision of “necessaries” to minors, see S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at 481.

Leaving aside the necessities of life, however, it is unclear how far the courts will go in the recognition of incontrovertible benefits.⁷⁴ There is no obvious answer, and in formulating an appropriate rule the courts will be required to weigh a number of considerations. Most significantly, they will have to balance the traditional desire to protect freedom of choice against the fact that, in practice, many expenditures, if not strictly necessary, are effectively compelled by circumstance.⁷⁵ Consequently, the plaintiff should not invariably be required to prove that the defendant certainly would have incurred a particular type of expense. A lower threshold may be acceptable in some situations. Without resolving the issue, McLachlin J. canvassed several possibilities in *Peel*. She referred at one extreme to an "inevitable expense"⁷⁶ and at the other to a cost that the defendant "would likely have paid ..."⁷⁷ The former is unacceptable insofar as it suggests a complete lack of flexibility. Given the competing values, the defendant should not be able to defeat the plaintiff's claim for unjust enrichment merely by pointing to a slight chance that he would not have incurred the expense in the normal course of events. The second proposal is even less palatable. It suggests that the defendant could be exposed to the risk of liability simply because he probably would have incurred an expense. A bare probability, however, admits of a forty-nine percent chance to the contrary—a chance that intolerably undermines the notion of freedom of choice. In the final analysis, it appears that the concept of a factual necessity unfortunately is not susceptible to precise definition. The courts will be required to proceed cautiously while bearing in mind the nature of the exercise.

ii. Realization of a Financial Gain

An incontrovertible benefit can also be recognized if the plaintiff provided the defendant with something from which the defendant realized a financial gain. Once again, freedom of choice is the touchstone. Suppose that the plaintiff repaired the defendant's chattel and thereby raised its value from five to seven thousand dollars. At that point, the defendant could plausibly argue that he should not be held liable because he did not voluntarily assume financial responsibility for the work. That argument certainly would be lost, however, if he subsequently sold the property in its improved state for seven thousand dollars. The sale proceeds would be attributable to

⁷⁴ The courts occasionally have taken a very relaxed approach. See e.g. *Cyvel International v. Janif* (1984), 18 C.L.R. 82 (B.C. Co. Ct.) [*Cyvel International*] (defendants said to be incontrovertibly benefited by the installation of house siding that they intended to acquire in the future if financing was available).

⁷⁵ The reality, for instance, is that some types of companies simply will not do without the services of a managing director. See *Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403, [1936] 2 All E.R. 1066 (C.A.).

⁷⁶ *Peel*, *supra* note 17 at 794, McLachlin J. citing Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) at 21-22.

⁷⁷ *Peel*, *ibid.* at 796 citing Mitchell McInnes, "Incontrovertible Benefits and the Canadian Law of Restitution" (1990) 12 *Advocates' Q.* 323 at 346.

both the original condition of the thing and the repairs. Consequently, having turned the plaintiff's services into money, it is as if the defendant received from her two thousand dollars in cash. And, as always, money is immune to subjective devaluation.

Although this analysis must be correct, it is surprisingly difficult to find conclusive authority. The effect of the leading English case, *Greenwood v. Bennett*,⁷⁸ is qualified. The notion of realization of a financial gain does, however, enjoy stronger support in Canada. It was favourably discussed, without being applied, by the Supreme Court of Canada in *Peel*.⁷⁹ The Ontario Court of Appeal expressly stated that it would have been prepared to impose liability in *Sharwood*⁸⁰ if, *inter alia*, the

⁷⁸ (1972), [1973] 1 Q.B. 195, [1972] 3 All E.R. 586 (C.A.) [*Greenwood*]. The facts can be simplified for present purposes. The defendant car dealer owned a Jaguar that was valued at between 400 and 500 pounds. In preparation for its sale, he agreed to pay Searle 85 pounds to make minor repairs. Instead of fixing the car, Searle drove it into the ground and then wrongfully sold it to a third party for 75 pounds. The third party then sold it at the same price to the plaintiff, who proceeded to spend 226 pounds on repairs. After Searle's misconduct was detected, the police seized the car and, since both the plaintiff and the defendant claimed ownership, commenced interpleader proceedings. The trial judge awarded the car to the defendant and rejected the plaintiff's claim for reimbursement of his expenses. While an appeal was pending, the defendant sold the vehicle, as originally intended, for 400 pounds. The Court of Appeal unanimously varied the trial decision. It confirmed that the Jaguar belonged to the defendant, but it also found that the plaintiff was entitled to 226 pounds as reimbursement for his expenses. Unfortunately, the judges split on the reasons for the latter conclusion. Cairns L.J. held, and Phillimore L.J. seemed to agree, that the plaintiff only enjoyed a passive claim. His right to relief was premised upon the fact that the defendant had recovered the vehicle through legal proceedings (see also *Peruvian Guano Co. Ltd. v. Dreyfus Brothers*, [1892] A.C. 166 (H.L.); compare *Mayne v. Kidd*, [1951] 2 D.L.R. 652, 1 W.W.R. 833 (Sask. C.A.)). Cairns L.J. expressly stated that the dealer would have avoided liability altogether if he had reacquired the Jaguar through his own efforts. On this view, reimbursement effectively was the price the defendant had to pay for the court's help. In contrast, Lord Denning M.R. expressly recognized that the plaintiff could, if necessary, actively claim restitution. The defendant would not be allowed unjustly to enrich himself, even if he did not invoke the court's jurisdiction on his own behalf. While it does not form the *ratio* of *Greenwood*, Lord Denning's analysis is more compelling. The defendant was undeniably enriched, either because he realized a financial gain from the plaintiff's services, or because those services saved him an expense that was, given his intention to sell the car, factually necessary. Finally, although the defendant's benefit was 325 pounds (insofar as the value of his car was increased from 75 pounds to 400 pounds), the plaintiff's corresponding deprivation was only 226 pounds. Restitution was properly limited to the lesser amount. The plaintiff could not get back more than he actually lost.

⁷⁹ *Supra* note 17.

⁸⁰ *Sharwood*, *supra* note 54 at 476-77. The defendant contractually agreed to pay a success fee if the plaintiff was able to arrange "debt or equity financing" on its behalf (*ibid.* at 472). To that end, the plaintiff introduced the defendant to several banks, but financing never occurred as anticipated and the parties' agreement was terminated. The defendant then sold its assets to one of the institutions to whom it had been introduced. The plaintiff insisted that it was entitled to be paid for its services. The court rejected that claim on the ground that the sale, which was a different type of transaction than "debt or equity financing" and hence not within the scope of the contract, would have occurred in any

defendant had derived a profit from the plaintiff's services. Likewise, in *Olchowy*,⁸¹ while relief ultimately was denied on other grounds,⁸² an enrichment was recognized after the defendant profitably harvested a crop that the plaintiff had planted. And in *Park Lane Ranch*,⁸³ the court found that the services of a realtor provided an incontrovertible benefit to a mortgagee insofar as they resulted in the building's sale price being increased by two hundred thousand dollars.

Accepting that the realization of a financial gain can overcome the plea of subjective devaluation, the exact scope of that principle remains to be defined. Most significantly, it has yet to be determined whether the defendant is enriched only if he has realized a financial gain, or whether it is sufficient that he received services from which he could realize a financial gain. The latter issue arose in *Gidney v. Feuerstein*.⁸⁴ The plaintiff bought a dilapidated canoe for one hundred dollars. After spending considerable time and over eight hundred dollars on repairs, he raised its value to nineteen hundred dollars. The canoe was then seized by the Royal Canadian Mounted Police and returned to the defendant, from whom it had been stolen years earlier. The plaintiff, who had been unaware of the theft, brought an action in unjust enrichment for the value of his efforts and expenses. Justice Beard of the Queen's Bench allowed the claim.⁸⁵ She said that where "a canoe is unusable as a watercraft before the repairs and becomes useable as a result of the repairs ... [the] improvement qualifies as an 'incontrovertible benefit' as earlier defined."⁸⁶ The meaning of this statement unfortunately is obscured by the fact that the judge's earlier definition of "incontrovertible benefit" referred to both necessary expenses and realizable financial gains. It is difficult to accept, however, that the repairs fell within the former category.

event and therefore was not causally related to the plaintiff's efforts. In other words, while the defendant had realized a financial gain, it did not do so on the basis of the plaintiff's services.

⁸¹ *Olchowy*, *supra* note 42 at 46-47. See also *Kraft v. Kraft*, [1999] B.C.J. No. 288 (Prov. Ct.) (Q.L.) (land made saleable through creation of driveway and culvert); *Hill Estate v. Chevron Standard Ltd.* (1992), [1993] 2 W.W.R. 545 at 560, 83 Man. R. (2d) 58 (C.A.) [*Hill Estate* cited to W.W.R.] (enrichment resulting from services that created a profitable oil well). See also *Republic*, *supra* note 54 (oil well was not, and was not likely to be, placed into production).

⁸² As discussed below, McLellan J. improperly denied relief on the basis that the parties did not share a special relationship.

⁸³ *Supra* note 54 (the court also found an enrichment on the basis of the defendant's free acceptance).

⁸⁴ *Supra* note 42.

⁸⁵ With respect to the second and third elements of the cause of action, Beard J. held that the defendant suffered a corresponding deprivation through the provision of services and the payment of money, and that the defendant's enrichment was unjust because the plaintiff had acted in the mistaken belief that he owned the canoe. While accepting the trial judge's findings on the issues of enrichment and deprivation, the Manitoba Court of Appeal relieved the defendant of responsibility on the ground that he did not share a relationship with the plaintiff under which he had requested or accepted the improvements. See *Gidney v. Shank*, [1996] 2 W.W.R. 383, 107 Man. R. (2d) 208 (C.A.) [*Gidney* (C.A.) cited to W.W.R.]. The purported requirement of a special relationship is discussed below.

⁸⁶ *Gidney*, *supra* note 42 at 209.

The owner of a badly damaged boat is not required, legally or factually, to fix it. Beard J. therefore presumably relied on the fact that the defendant could realize a financial gain by selling the canoe in its improved condition, even though he had not actually done so.

Was Beard J.'s decision in *Gidney* correct? As always, the issue turns on freedom of choice and the extent to which the defendant should enjoy control over his own resources. The defendant began the episode with a value of one hundred dollars in the form of a decrepit canoe. Even if he was held responsible for the full amount of the financial gain that he could realize from the plaintiff's repairs,⁸⁷ he would still have one hundred dollars in value at the end of the story. The totality of his wealth would not be diminished, but it would be forcibly reallocated. Instead of a canoe worth one hundred dollars, he would have a canoe worth nineteen hundred dollars and a debt worth eighteen hundred dollars. Moreover, in order to satisfy judgment, he would be forced to expend resources in a way that he had not anticipated. If he wished to keep the canoe, he would have to forgo other assets (e.g., personal savings). Alternatively, if he was unable or unwilling to deploy other assets, he would be required to sell the canoe in its improved state. With the sale proceeds, he could discharge his eighteen hundred dollar debt to the plaintiff and, if he wished, attempt to replace the original item with the remaining one hundred dollars. Of course, in the circumstances, this last transaction seems implausible. There is no market for decrepit boats. Consequently, the defendant might be left with something that he never chose: one hundred dollars in cash, rather than a canoe worth one hundred dollars. Admittedly, this may not seem a hardship on the facts of *Gidney*, precisely because the property was so undesirable at the outset. Significantly, however, the same line of reasoning might require the defendant in another situation to liquidate an irreplaceable asset to which he was profoundly attached. And in any event, freedom of choice is generally defined by the right to choose—sensibly or perversely as the individual sees fit.

Canadian courts have yet to conclusively decide whether or not the defendant's freedom of choice can be overridden upon proof of a realizable financial gain. There is no logically compelling answer. A resolution of the issue requires an assessment of practical considerations and, ultimately, a political choice. The possibilities, as found in the academic literature, run a wide range.⁸⁸ At one extreme, Professor Birks insists that the defendant should not be considered enriched unless he already has realized a

⁸⁷ The trial judge actually limited recovery to 806 dollars, as reimbursement of the plaintiff's out-of-pocket expenses. She denied remuneration for his services because the evidence was incomplete.

⁸⁸ Canvassed in Mitchell McInnes, "Incontrovertible Benefits in the Supreme Court of Canada: *Peel (Regional Municipality) v. Canada*; *Peel (Regional Municipality) v. Ontario*" (1994) 23 Can. Bus. L.J. 122. Time has passed by several earlier proposals. Professor Klippert, for instance, rejected the concept of realization of a financial gain on the ground that the defendant generally cannot be enriched unless he chose to receive a benefit. George B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 56-61. Canadian courts have now moved well beyond that position.

financial gain from the plaintiff's services.⁸⁹ While defensible, that rule does put the plaintiff at the defendant's mercy. The defendant can defeat the plaintiff's claim merely by retaining the improved item until the trial has ended or the limitation period has expired. For that reason, Professor Burrows suggests that an enrichment should also be recognized if it is reasonably certain that the defendant will realize a financial gain.⁹⁰ Lord Goff and Professor Jones endorse a test that is both more lenient and more complicated. They begin with the proposition that the defendant is enriched if he received a readily realizable financial gain. In their opinion, it usually is "not unreasonable" to compel the defendant to sell the improved property in order to satisfy judgment.⁹¹ It may be otherwise, however, if the property in question is unique,⁹² for the defendant should not be forced to sacrifice something that is irreplaceable. Finally, Professors Maddaugh and McCamus generally agree with Goff and Jones. In their view, a realizable financial gain generally should suffice, unless liability would create a hardship for the defendant.⁹³ In this situation, they favour the imposition of an equitable lien that would be enforceable only if the defendant actually realized a profit from the plaintiff's services.⁹⁴

⁸⁹ Birks, *Introduction*, *supra* note 40 at 121-24.

⁹⁰ Burrows, *Law of Restitution*, *supra* note 33 at 19.

⁹¹ Goff & Jones, *Restitution*, 2002, *supra* note 33 at 24, 238.

⁹² *Ibid.* at 249. Compare Gareth Jones, "Restitutionary Claims for Services Rendered" (1977) 93 Law Q. Rev. 273 at 293 (arguing that an enrichment should be recognized if the defendant has disposable funds with which to satisfy judgment—the defendant's freedom of choice can be infringed, so long as he is not required to sacrifice unique property).

Goff and Jones similarly reject the second branch of incontrovertible benefit where services improve real property, on the basis that every parcel of land is unique. Goff & Jones, *Restitution*, 2002, *ibid.* at 25, 29. This position is difficult to sustain in absolute terms. First, Canadian law no longer views every parcel of land as unique. See *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1. Second, if an enrichment can be recognized with respect to unique chattels when disposable funds are available, it is not clear why the same exception should not apply in the case of land. Third, the argument from freedom of choice is attenuated if the defendant intended to sell his property in any event. And finally, there is no reason to refuse relief if the defendant not only could, but actually has, realized a financial gain from the plaintiff's services. See *Olchoway*, *supra* note 42; *Hill Estate*, *supra* note 81.

⁹³ Maddaugh & McCamus, *supra* note 35 at 43-44.

⁹⁴ *Ibid.* at 101-102. This view finds support in *Re Gareau Estate* (1995), 9 E.T.R. (2d) 25 (Ont. Ct. J. (Gen. Div.)). The amount secured by the lien presumably would depend upon the gain that the defendant actually realized rather than the gain he could have realized by selling the property either at the time of receipt or at the time of trial. Consequently, the value of the plaintiff's remedy would normally depreciate over time, along with the value of the property. See also Andrew G. Spence, "In Defence of Subjective Devaluation" (1998) 43 McGill L.J. 889 at 918.

c. *Specific Restitution*

While seldom recognized as such, the receipt of property should qualify as an incontrovertible benefit if the plaintiff seeks specific restitution.⁹⁵ The plaintiff's burden, as always, is to overcome the plea of subjective devaluation. She must prove that liability would not intolerably dictate the defendant's allocation of resources. Services are problematic precisely because they cannot be restored *in specie*. Restitution can be effected only substitutionally through the payment of money, with the result that the defendant must give up something to which he *prima facie* is entitled (i.e., resources that were not directly acquired from the plaintiff). The situation is much different, however, if the plaintiff provided the defendant with property that he still (traceably) retains and that she wants returned. Since she is not claiming monetary relief, there is no need to assess the value of that property.⁹⁶ More significantly, since she is asking to recover the very thing that he should not hold, there is no danger of improperly overriding the defendant's autonomy. He should not enjoy any freedom of choice with respect to the disposition of that very item that he must give back.

The preceding analysis is, however, subject to several qualifications. First, it presumes that the plaintiff is entitled to proprietary relief. In fact, restitution normally is available only in personal form. The defendant is required to give back the monetary value of his enrichment, rather than the enrichment itself. The exceptional circumstances in which a court will order restoration *in specie* cannot be explored in this paper.⁹⁷ For present purposes, it is enough to say that the defendant's retention of the property (or its traceable proceeds) is a necessary, but not independently sufficient,

⁹⁵ Birks, *Introduction*, *supra* note 40 at 130; Burrows, *Law of Restitution*, *supra* note 33 at 16; Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) at 95.

⁹⁶ This point occasionally is overlooked. *Soulos v. Korkontzilas* ([1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214) is illustrative. The defendant, a real estate agent, breached a fiduciary duty by buying a property that he should have made available to the plaintiff, his principal. The plaintiff sought the imposition of a constructive trust and offered, in return, to indemnify the defendant for any losses or expenses that he incurred in connection with the property. In a dissenting opinion, Sopinka J. believed that such relief was premised upon an unjust enrichment, and therefore required proof that the defendant had received pecuniary or nonpecuniary advantages. This burden could not be discharged because the value of the land had depreciated after its purchase and the defendant did not gain any meaningful nonpecuniary advantages associated with the property (*ibid.* at 256-58; see also *ibid.* at 232, McLachlin J.). Given the nature of the plaintiff's claim, however, the actual value of the property should have been irrelevant. Any concern for the defendant's freedom of choice was sufficiently met by the plaintiff's willingness to accept relief on terms. The question therefore was whether the defendant was enriched by the possession of property with which he could satisfy judgment *in specie*. The answer should have been in the affirmative.

⁹⁷ See Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alta. L. Rev. 173; Robert Chambers, "Resulting Trusts in Canada" (2000) 38 Alta. L. Rev. 378.

condition. Consequently, the plaintiff cannot invariably avoid the hurdle of subjective devaluation by simply claiming proprietary relief.

Second, it is important to distinguish the situation currently under discussion from the situation in which the plaintiff acquires rights over a particular piece of property as a result of conferring a different form of enrichment upon the defendant. In *Pettkus*,⁹⁸ for instance, the court imposed a constructive trust over a farm because its legal owner had received beneficial services. Lothar Pettkus received one thing (i.e., labour), but was required to give up another (i.e., land). Consequently, since she was not seeking specific restitution, Rosa Becker was required to overcome the plea of subjective devaluation by other means.⁹⁹

Third, there is a debate as to whether or not the defendant can be enriched by the possession of property to which the plaintiff retains title. The operative question, as phrased by Professors Grantham and Rickett, is "whether the requirement of enrichment is ... factual or ... legal ..."¹⁰⁰ Suppose that the defendant steals the plaintiff's car.¹⁰¹ From a factual perspective, he clearly is enriched and she clearly is deprived: he has use of the vehicle and she does not. From a legal perspective, however, the theft is irrelevant, at least in one sense. The plaintiff continues to enjoy ownership even though the defendant has possession. It therefore has been suggested that the first element of the action in unjust enrichment cannot be satisfied because, unless property has passed, the defendant gains nothing and the plaintiff loses nothing.¹⁰² This proposition is debatable. As a practical matter, the plaintiff certainly is interested in title, but her more immediate concern, as she walks to work, pertains to the enjoyment of the vehicle. The value of a car consists largely in its use. Moreover, as a matter of precedent, the existence of an enrichment does not invariably depend upon proof that the defendant received title to something. This proposition is demonstrated by every case in which restitution is awarded for services. There is no reason why a different rule is required merely because property is involved. The better

⁹⁸ *Supra* note 2.

⁹⁹ As explained in the next section, she did so on the basis of free acceptance.

¹⁰⁰ Grantham & Rickett, *Enrichment*, *supra* note 24 at 61.

¹⁰¹ Likewise, for instance, if the plaintiff paid money pursuant to a fundamental mistake that prevented property from passing to the defendant.

¹⁰² William Swadling, "A Claim in Restitution?" [1996] L.M.C.L.Q. 63; Grantham & Rickett, *Enrichment*, *supra* note 24 at 61-63. Compare R.B. Grantham & C.E.F. Rickett, "Restitution, Property and Ignorance—A Reply to Mr. Swadling" [1996] L.M.C.L.Q. 463 (accepting that the defendant is enriched but arguing that the claim in unjust enrichment is subverted to a claim in property).

view, therefore, may be that the plaintiff's retention of title does not preclude the defendant's enrichment.¹⁰³

2. Request and Free Acceptance

Subjective devaluation can be overcome on the basis of an incontrovertible benefit where, given the nature of the enrichment itself, freedom of choice is a non-issue. Subjective devaluation also can be overcome, regardless of the precise nature of the enrichment, by virtue of the defendant's conduct. This is true if the defendant chose to assume the risk of financial responsibility for the benefit. Broadly speaking, there are two possibilities: (1) request and (2) free acceptance.

a. Request

The defendant may be enriched if he received something that he requested. Having actually exercised a choice, he cannot complain that liability would intolerably infringe upon his autonomy. This basic proposition is incontestable. Nevertheless, it is subject to certain qualifications.

i. Contract

First, the fulfillment of a request often occurs within a contractual context. The parties' agreement may be express or it may be genuinely implied. In either event, the plaintiff generally is required to pursue her remedies in contract. The action in unjust enrichment cannot be used to override a contractual allocation of risk.¹⁰⁴ Restitution is possible, however, if the agreement somehow can be overcome or set aside.¹⁰⁵ The parties may have tried, but failed, to create a valid contract; they may have created a contract that is valid, but unenforceable; or they may have created an enforceable contract that was subsequently discharged for breach. In such cases, the plaintiff can seek restitutionary relief.

¹⁰³ Peter Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z.L. Rev. 623 at 654; Andrew Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 Law Q. Rev. 412 at 419; McInnes, "Quadrant Thesis", *supra* note 1 at 123-27.

¹⁰⁴ *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 455, 83 D.L.R. (3d) 289 [*Rathwell* cited to S.C.R.].

¹⁰⁵ See e.g. *Clarke v. Moir* (1987), 82 N.S.R. (2d) 183 (S.C.(T.D.)) (contract void); *Degelman*, *supra* note 28 (contract unenforceable); *McElheran v. Great Northwest Insulation Ltd.*, [1995] N.W.T.R. 120 (C.A.) [*McElheran*] (contract discharged for breach). So too, possibly, if restitution is sought with respect to a risk that was not addressed by the contract. See *Roxborough*, *supra* note 5. Compare Stephen A. Smith, "Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement" (1999) 115 Law Q. Rev. 245.

ii. Acceptance of Financial Responsibility

Even within the context of a claim in unjust enrichment, a mere request should not invariably preclude a plea of subjective devaluation. A request is relevant only insofar as it demonstrates that the defendant chose to accept financial responsibility for his benefit. Granted, this usually is the case. A request normally indicates not only a desire to receive something, but also a willingness to pay for it.¹⁰⁶ Sometimes, however, the second conclusion cannot be drawn. A person at a festival might ask an on-site tattoo artist for a temporary image in the reasonable belief that the service was being provided for free. If so, he should not be considered enriched by the artist's work. As might be expected, it is difficult to find cases directly on point. The proposition nevertheless is supported by the general structure of the action and, more pointedly, by the defence of change of position.¹⁰⁷ A recurring theme throughout unjust enrichment is that a person cannot be held responsible for an act that was the product of an impaired intention. As explained below, it is for this reason that the plaintiff can recover a mistaken payment and that, notwithstanding proof of a prima facie claim, the defendant is relieved of liability to the extent that he incurred an exceptional expenditure in the honest, but erroneous, belief that he was entitled to retain his enrichment. A request that was unaccompanied by the anticipation of payment should be ineffective in the same way.

It further follows that even if the defendant's conduct imports both a desire to receive a benefit and a willingness to pay for it, he should be considered enriched only to the extent indicated by his request.¹⁰⁸ Suppose that the defendant asks the plaintiff to repair the defendant's house at a price of ten thousand dollars. The plaintiff performs the service but then discovers that the apparent contract is unenforceable for want of some formality. The plaintiff also discovers that she entered into a bad bargain, in that the market value of her work was actually fifteen thousand dollars. If the plaintiff brings a claim for restitution, she undoubtedly can establish the defendant's enrichment on the basis of his request. Nevertheless, the defendant should be allowed partial recourse to subjective devaluation. The defendant assumed financial responsibility for the repairs, but only at the lower price. He did not exercise his

¹⁰⁶ Strictly applied, this test would not capture a case in which the defendant requested a benefit, knowing that payment normally was expected, but improperly intending to take the benefit for free. He might, for instance, demand medical services at gun point. In such circumstances, the recipient nevertheless can be considered enriched. He cannot rely on his own reprehensible conduct to disregard the usual incidents of the marketplace. See Burrows, *Law of Restitution*, *supra* note 33 at 24-25.

¹⁰⁷ See Part I.D, below.

¹⁰⁸ If the parties did not agree on a price, the defendant can, in the absence of evidence to the contrary, be assumed to have agreed to pay market value. Likewise if the parties agreed to a "reasonable" price. See *Pavey & Matthews Proprietary Ltd. v. Paul* (1987), 162 C.L.R. 221 (H.C.A.).

freedom of choice with respect to the additional five thousand dollars.¹⁰⁹ Unfortunately, courts frequently overlook this fact. They often disregard the terms of an ineffective agreement and, without full analysis, measure relief by reference to market value alone.¹¹⁰

iii. Part Performance

Difficulties may also arise if the defendant merely receives part of a requested benefit. The defendant is apt to argue that he accepted the risk of financial responsibility only on the assumption that he would get everything that he wanted. That may be true in the case of an entire contract. The parties may have agreed that payment would be due only *when* and *if* the project was completed. The former stipulation is relatively innocuous insofar as it merely postpones payment. The latter stipulation, however, has the capacity to create injustice insofar as it may allow a party to retain a substantial benefit without liability in either contract or unjust enrichment. And while it is certainly within a person's power to contract out of the right to restitution,¹¹¹ the courts should be slow to reach that conclusion.¹¹² This issue is discussed elsewhere.¹¹³ For present purposes, the relevant question is somewhat narrower. It pertains not to the ultimate right to relief, but rather to the existence of an enrichment. Can a person subjectively devalue a benefit received in partial fulfilment of a request?

The answer to this question sometimes is said to depend upon the circumstances. If a person pays part of a requested sum of money, restitution may be available if the reason for the payment later fails. Subjective devaluation is easily overcome because the receipt of any money invariably constitutes an incontrovertible benefit. This is true whether the ultimate failure of the transaction is attributable to the payor or the payee.¹¹⁴

¹⁰⁹ It should be different, however, if the plaintiff alternatively established an enrichment on the basis of an incontrovertible benefit. In that situation, the defendant would be precluded, by the very nature of the enrichment, from pleading subjective devaluation.

¹¹⁰ *Lindsay v. Sutton*, [1947] O.W.N. 951 (H.C.J.); *McElheran*, *supra* note 105; *Slowey v. Lodder* (1901), 20 N.Z.L.R. 321 (C.A.), *aff'd* [1904] A.C. 442 (P.C.); *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.); *Rover International Ltd. v. Cannon Film Sales Ltd. (No. 3)*, [1989] 3 All E.R. 423, [1989] 1 W.L.R. 912 (C.A.). See McInnes, "Measure", *supra* note 1 at 210-18.

¹¹¹ *Cutter v. Powell* (1795), 6 T.R. 319, 101 E.R. 573 (K.B.); Martin Dockray, "Cutter v. Powell: A Trip Outside the Text" (2001) 117 Law Q. Rev. 664.

¹¹² *Campbell, Albo, Low Ltd. v. Black* (1995), 26 O.R. (3d) 111 (Gen. Div.).

¹¹³ *Maddaugh & McCamus*, *supra* note 35 at 443-46; Burrows, *Law of Restitution*, *supra* note 33 at 356; *Kemp v. McWilliams* (1978), 87 D.L.R. (3d) 544 (Sask. C.A.).

¹¹⁴ In other words, even a party who breaks a contract by refusing to pay the full price normally is entitled to restitution of money paid. See *Dies v. British and International Mining & Finance Corp. Ltd.*, [1939] 1 K.B. 724; *Stephenson v. Bromley*, [1928] 3 W.W.R. 370, 37 Man. R. 487; *Rowland v. Divall*, [1923] 2 K.B. 500, [1923] W.N. 188; *Gibbons v. Trapp Motors Ltd.* (1970), 9 D.L.R. (3d) 742 (B.C.S.C.). Of course, he may also be subject to a counterclaim for breach of contract.

More interestingly, restitution may be available if the defendant, having requested a non-monetary benefit, prevents the plaintiff from completing the project after she has partially performed.¹¹⁵ The defendant cannot avoid liability by insisting that he chose to accept financial responsibility only if he received full performance. Were it otherwise, he would be able to retain a non-contractual benefit, without any payment, simply by stopping the plaintiff before she finished. According to the prevailing view, however, the result is different if the roles are reversed such that performance is interrupted by the person who was providing the services.¹¹⁶ In that situation, restitution is normally denied. Although the reasons vary, it is sometimes suggested that part performance does not provide an enrichment.¹¹⁷ This proposition is untenable as a general rule. As previously explained, an objective benefit often is received from the time that performance commences. Moreover, while part performance occasionally leaves the recipient with nothing of practical value, this is not always true. Suppose that the defendant asked the plaintiff to build a house. The plaintiff laid the foundation but was unable to complete the project. The defendant can legitimately assert that none of his request has been effectively fulfilled if, because of the circumstances, he must hire someone else to both re-lay the foundations and finish the structure.¹¹⁸ He cannot, however, legitimately deny that part of his request has been fulfilled if, because the initial work need not be repeated, he only has to hire someone else to build on top of the existing foundations.¹¹⁹

¹¹⁵ Indeed, restitution may be available even if the defendant was not left with anything of value. *Planché*, *supra* note 32, is authority for that proposition. On one view, the defendant enjoyed the benefit of the plaintiff's labour, even though his subsequent actions rendered those services fruitless. Moreover, it may be that the defendant is estopped from pleading subjective devaluation in such circumstances. Having represented that he would pay for performance, and having thereby induced the plaintiff into action, he may not have the right to falsify his representation by denying the enriching nature of the plaintiff's efforts. See Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Clarendon Press, 1999) at 88-91, 94.

¹¹⁶ *Sumpter v. Hedges*, [1898] 1 Q.B. 673 (C.A.) [*Sumpter*].

¹¹⁷ Michael Garner, "The Role of Subjective Benefit in Unjust Enrichment" (1990) 10 Oxford J. Legal Stud. 42.

¹¹⁸ *Bradley v. Horner* (1957), 10 D.L.R. (2d) 446 (Ont. C.A.).

¹¹⁹ The enrichment presumably should be measured by the difference between the cost of the complete job and the cost of completing the job. Suppose that the defendant asked the plaintiff to build the house for a total price of fifty thousand dollars. After laying the foundation, the plaintiff was unable to do any more. The defendant then paid another contractor forty thousand dollars to finish the structure. The enrichment that the defendant received from the plaintiff should be valued at ten thousand dollars. This is true even if, in the normal course of events, the foundation and the top-structure would count equally toward the total price. The defendant should not be penalized by the fact that additional transaction costs were necessitated by the need to deal with two parties rather than one. Vis-à-vis the plaintiff, the defendant chose to assume financial responsibility to a maximum of fifty thousand dollars.

Unless he is considered enriched to that extent, he ultimately will receive full performance at a reduced price.¹²⁰

iv. Subjective Overvaluation

The final difficulty associated with request concerns what can be called subjective overvaluation. The element of enrichment usually requires the plaintiff to override the defendant's attempt to subjectively devalue an objective benefit. An interesting question will arise, however, if the requested services were not objectively beneficial or, going further, if they were objectively detrimental. Take an extreme example. Simply for the spectacle, the defendant arranges for his house to be razed by the plaintiff, a demolition expert. Can the defendant be considered enriched despite losing something of great value? As always, the essential issue is whether or not liability would intolerably curtail freedom of choice. And in this regard, there is no danger in recognizing an enrichment if the defendant received the very thing that he requested, even if no reasonable person would have agreed with his choice.¹²¹ Autonomy includes the right to be perverse. Not surprisingly, there are few cases directly on point. In an illuminating comment from Australia, however, Byrne J. explained that the concept of a benefit

must be seen from the perspective of the recipient who is, after all, the person to be charged. It may be that for some idiosyncratic reason a defendant seeks the performance of work which another would see as without benefit or, indeed, as a positive dis-benefit. ... But where a person requests another to do something, it is not unreasonable for the law to conclude that the former sees some benefit in its performance, however wrong this view may be on an objective basis and for the law to act upon the perception of the recipient.¹²²

It might be objected that the defendant cannot be enriched because, in the absence of an objective benefit, he has nothing that he can give back. This argument is sufficiently overcome, however, by pointing to the cases in which restitution is awarded with respect to pure services. As previously explained, Canadian law has rejected the proposition that an enrichment is premised upon the retention of a marketable residuum.

Finally, it admittedly may be difficult to assess the value of the enrichment in a case of subjective overvaluation. This problem will not arise if the defendant's request was accompanied by the quotation of a price. Even in the absence of a stated amount, a court may be able to resolve the issue by reference to prevailing values. This will be true if, despite creating an objective detriment in the circumstances, the plaintiff

¹²⁰ Once again, even if the party in breach successfully claims restitution, the innocent party is entitled to claim contractual relief if the benefit was conferred pursuant to an enforceable agreement.

¹²¹ Michael Garner, "Benefits—For Services Rendered: Commentary" in Mitchell McInnes, ed., *Restitution: Developments in Unjust Enrichment* (Sydney: LBC Information Services, 1996) 109 [McInnes, *Developments*]; Burrows, *Law of Restitution*, *supra* note 33 at 24.

¹²² *Brenner*, *supra* note 34 at 258.

provided a type of service that is readily available in the market. For instance, the plaintiff may have lowered the value of the defendant's house, not by razing it, but rather by painting it a garish colour. The court will be without such guidance, however, if there is neither a stated price nor a market for the plaintiff's services. In that situation, a court might simply assume that the defendant's enrichment coincides with the plaintiff's expenses.

b. Free Acceptance

For the purposes of establishing an enrichment, freedom of choice can be exercised either actively through a request or passively through "free acceptance".¹²³ This phrase originally was coined by Goff and Jones,¹²⁴ who today state that the defendant "will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services."¹²⁵ This test was adopted, with slight modifications, by Dickson J. in *Pettkus*.¹²⁶ Since then, it has been used by Canadian courts in both family¹²⁷ and commercial matters.¹²⁸

¹²³ Principles governing request apply *mutatis mutandis* to free acceptance. For instance, the defendant should be considered enriched only to the extent of his free acceptance. Consequently, if the defendant acquiesced in the receipt of a benefit that carried market value of five thousand dollars, but only because he reasonably believed that the plaintiff expected to receive payment of four thousand dollars, he should not be held liable for the greater amount.

¹²⁴ Robert Goff & Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) at 30-31 [Goff & Jones, *Restitution*, 1966].

¹²⁵ Goff & Jones, *Restitution*, 2002, *supra* note 33 at 20.

¹²⁶ *Supra* note 2 at 849.

¹²⁷ In fact, in family cases, the courts often simply assume that the defendant was enriched and then apply the test of free acceptance to satisfy the third element of the action in unjust enrichment. Free acceptance nevertheless is often the best explanation for the defendant's enrichment. See *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1 [*Sorochan* cited to S.C.R.]; *Clarkson v. McCrossen Estate* (1995), 122 D.L.R. (4th) 239, [1995] 6 W.W.R. 28 (B.C.C.A.) [*Clarkson* cited to D.L.R.]; *Davidson v. Kuzonski Estate* (1990), 37 E.T.R. 297 (B.C.S.C.); *Forrest v. Price* (1992), 48 E.T.R. 72 (B.C.S.C.); *King v. Andrews* (1992), 48 E.T.R. 125, 6 C.L.R. (2d) 268 (Ont. Ct. J. (Gen. Div.)); *McDougall v. Gesell Estate*, [1999] 11 W.W.R. 535, 140 Man. R. (2d) 161 (Q.B.), rev'd in part [2001] 3 W.W.R. 391, 2001 MBCA 3; *Wilgosh v. Puchalski* (1999), 132 Man. R. (2d) 299 (Q.B.).

¹²⁸ *Brisebois v. Modern Music* (1993), 50 E.T.R. 305 (Ont. Ct. J. (Gen. Div.)); *Gill*, *supra* note 57. Once again, the courts often intuitively find enrichments that are best explained on the ground of free acceptance. See *Hiscock v. Nolan* (1993), 109 Nfld. & P.E.I.R. 302, 12 C.L.R. (2d) 58 (S.C.(T.D.)); *Hesjedal v. Granville Estate* (1993), 109 D.L.R. (4th) 353, 117 Sask. R. 111 (Q.B.); *Sharwood & Co. v. Municipal Financial*, [1998] O.J. No. 4907 (Gen. Div.), rev'd *Sharwood*, *supra* note 54. A number of older cases more understandably employ the theory, but not the name, of free acceptance. See e.g. *Tanenbaum and Downsview Meadows Ltd. v. Wright-Winston Ltd.*, [1965] 2 O.R. 1, 49 D.L.R. (2d) 386 (C.A.).

It is important to understand the role of free acceptance. Take a simple example. The defendant delivers his computer to the plaintiff's shop for cleaning. He notices that the plaintiff mistakenly has begun to perform a much more valuable service. He knows that she expects payment, but he remains silent until the job is done. His acquiescence indicates little about his perception of the objective benefit. He might have accepted the service because he felt that it was personally enriching. But so too he might have remained silent because he was entirely indifferent to the work. In the circumstances, however, that distinction is irrelevant. The significance of free acceptance lies not in its ability to identify subjective benefits, but rather in its ability to overcome the defendant's freedom of choice. It demonstrates that the defendant passively assumed the risk of financial responsibility for his receipt. In effect, he had an obligation to reject a benefit for which he was unwilling to pay. Having failed to do so, he is taken to have voluntarily accepted the risk of liability.¹²⁹

Canadian courts habitually apply the test of free acceptance, seemingly without full appreciation of its controversial (though not necessarily indefensible) nature. The focus of the enrichment analysis, as always, is on autonomy. But in this regard, it is one thing to find that a choice was made through request, and quite another to conclude that the defendant exercised his volition by doing nothing at all. It presumably is for that reason that English courts have refrained from adopting the concept.¹³⁰ Given its fundamentally individualistic orientation, the common law generally refuses to impose liability on the basis of mere passivity.¹³¹

The controversial nature of the Canadian position in fact runs even deeper. The plaintiff can establish the existence of an enrichment by proving either that the defendant knew that the plaintiff expected payment or that a reasonable person would have known that the plaintiff expected payment. The former branch, which turns upon the question of subjective knowledge, is relatively less troublesome. Although it requires a policy decision to impose liability on the basis of mere passivity, it is not

¹²⁹ Acquiescence in the receipt of a benefit does not invariably result in restitution. Liability may be denied if the plaintiff acted officiously by foisting upon the defendant a benefit that the plaintiff knew had not been requested. So too if the plaintiff did not expect payment. Free acceptance cannot create liability with respect to a benefit that was provided with a gratuitous intention. (The situation will be different, however, if, to the defendant's knowledge, the plaintiff's apparently gratuitous intention was impaired by error such that, but for her mistake, she would have expected payment.) Finally, even if the defendant knew of the plaintiff's non-gratuitous intention, he will not be caught by the principle of free acceptance unless he failed to use a reasonable opportunity to reject the benefit. Although this requirement is seldom contentious, it serves an important function. The concept of free acceptance imposes a burden upon the defendant to positively reject something for which he does not wish to pay. Given the importance of choice, this obligation of affirmative action is tolerable only because it is subject to an overriding limitation of reasonableness. See *Cyvel International*, *supra* note 74.

¹³⁰ Burrows, *Law of Restitution*, *supra* note 33 at 20-23. But see Birks, "Free Acceptance", *supra* note 35 at 128-32; Tettenborn, *supra* note 10 at 118.

¹³¹ *Felthouse v. Bindley* (1862), 11 C.B. (N.S.) 869, 142 E.R. 1037 (C.P.).

entirely inconsistent with the underlying value of freedom of choice. It is plausible to say that the defendant actually exercised a choice if he failed to reject a benefit for which he knew payment was expected. The analysis becomes much more difficult, however, if the defendant merely had constructive knowledge of the plaintiff's expectation.¹³² Regardless of what he should have known, the defendant could not truly have chosen to assume financial responsibility if, in fact, he was unaware of that possibility. A choice presumes an appreciation of the consequences and since autonomy is the paramount consideration under the first element of the action in unjust enrichment, free acceptance should be limited, in principle, to cases of actual knowledge (including recklessness and wilful blindness).¹³³ Constructive knowledge should be irrelevant. An accurate account of Canadian law nevertheless must recognize that courts occasionally do rely upon the broader test. These cases are perhaps best explained on policy grounds.¹³⁴ The defendant anomalously may be

¹³² In *Peter* (*supra* note 14 at 1017), Cory J. discussed free acceptance in the context of the third element of unjust enrichment, having assumed, without analysis, that the defendant had been enriched. He affirmed that the test for absence of juristic reason is objective and further held that, at least in a cohabitational context, it should be presumed proven in the absence of evidence to the contrary.

¹³³ The timing of such knowledge can vary with the nature of the enrichment. Since they cannot be restored *in specie*, the defendant should be held to have freely accepted services only if he had knowledge of the plaintiff's expectation of payment before the benefit was conferred. Subsequent knowledge should not suffice because, having received services, the recipient no longer has the option of rejecting them. In contrast, goods may subsist for an extended period. And so long as they have not deteriorated or been consumed, the recipient may enjoy the capacity for restoration. Accordingly, despite being initially unaware of the plaintiff's expectation of payment, the defendant can properly be put to a choice after he acquires knowledge of the plaintiff's non-gratuitous intention. See *Sumpter*, *supra* note 116 (liability for construction materials provided by the plaintiff and subsequently used by the defendant). Unfortunately, Canadian courts have not been attentive to these distinctions and occasionally have awarded relief with respect to services that the defendant received without knowledge of the plaintiff's expectation of payment. See *e.g. Pettkus*, *supra* note 2.

¹³⁴ Unfortunately, even if the threshold issue of liability can be explained on policy grounds, the measure of relief awarded in free acceptance cases remains controversial. Perhaps because the test of free acceptance is based on the defendant's awareness of the plaintiff's reasonable expectation of payment, there is a tendency, especially in cohabitational cases, for courts to calculate relief in a manner that fulfills the plaintiff's expectation. See *Peter*, *supra* note 14. The fulfillment of expectations is, however, properly the function of the law of contract. Since contractual undertakings pertain to the future, it makes sense to remedy a breach by providing the plaintiff with the monetary proxy of the defendant's performance. The inherent logic of the cause of action in unjust enrichment, in contrast, speaks to the past. The gist of the claim is that the defendant received a benefit from the plaintiff that he cannot, in justice, retain. The only coherent response is restitution. The defendant should invariably be ordered to give back (the value of) the enrichment and no more. The response must look backward and not forward (McInnes, "Measure", *supra* note 1 at 204-10).

denied recourse to subjective devaluation, not because he actually exercised a choice, but rather because he was unreasonably imperceptive.¹³⁵

D. Freedom of Choice Revisited: The Defence of Change of Position

To reiterate, the first element of the cause of action in unjust enrichment is concerned with the defendant's receipt of an enrichment. More precisely, it requires proof that the defendant either chose to assume the risk of financial responsibility for a benefit, or that he did not have any choice to make. Assuming that the other elements of the action are met, the defendant *prima facie* is liable for restitution. Nevertheless, the defendant ultimately may avoid liability, in whole or in part, by establishing a defence. Most restitutionary defences operate by directly undermining one of the elements of the plaintiff's *prima facie* claim. The introduction to this paper provided an illustration.¹³⁶ The defence of passing on demonstrates that, notwithstanding initial appearances, the plaintiff did not truly suffer a corresponding deprivation. Following the same pattern, several other defences are best conceived as being enrichment-denying.¹³⁷ This is true of the most important restitutionary defence: change of position.

¹³⁵ The plaintiff is protected from the defendant's unreasonable lack of perception in other areas of private law. See e.g. *Hadley v. Baxendale* (1854), 9 Welsb. H. & G. 341, 156 E.R. 145; *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. (The Wagon Mound, No. 2)* (1966), [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.).

¹³⁶ See text accompanying notes 5-10.

¹³⁷ This probably is true of the defence of ministerial receipt (or payment-over), which applies if the defendant received a benefit from the plaintiff, but before learning of the plaintiff's claim in unjust enrichment, turned it over to a third party as anticipated. The classification of other defences is more controversial. For instance, it is unclear whether the restitutionary defence of bona fide purchase is enrichment-related or unjust-related. This defence arises if the defendant in good faith paid a third party for the receipt of a benefit from the plaintiff. Take a simple example. A thief stole five hundred dollars from the plaintiff. He then paid that money to the defendant, who had no reason to be suspicious, in exchange for a meal at the defendant's five-star restaurant. If the plaintiff sues for unjust enrichment, the defendant will have a complete defence, even if the meal provided to the thief would be considered, by normal standards, to have been overpriced. There are two possibilities. First, it may be that the defendant was not truly enriched in the final analysis. Respect for contractual principles precludes the court from comparing the value exchanged between the defendant and the thief. The law treats both parties as having given equal consideration. Consequently, although the defendant received five hundred dollars cash, he is taken to have given up five hundred dollars in goods and services. In other words, he necessarily changed his position to the full extent of the enrichment. Alternatively, a bona fide purchase may preclude relief, regardless of its effect on the defendant's enrichment, simply because the law wishes, as a matter of fairness and commercial reality, to occasionally create exceptions to the general rule of *nemo dat quod non habet*. Given the desire to ensure that money flows freely through the market, a bona fide purchase clears title to stolen funds and protects the recipient from either proprietary or personal liability. See, however, Peter Birks & Charles Mitchell, "Unjust Enrichment" in Peter Birks, ed., *English Private Law*, vol. 2 (Oxford: Oxford University Press, 2000) 525 at 617-19, 626-27; Grantham & Rickett, *Enrichment*, *supra* note

The defence of change of position denies liability to the extent that the defendant incurred an exceptional expenditure in the honest belief that he was entitled to retain a benefit. This plea is most easily explained through an example. Suppose that the defendant owns shares in a company. Due to a clerical error, the company mistakenly pays a dividend of ten thousand dollars. At that moment, the company prima facie enjoys a right to restitution in the same amount. The defendant received an incontrovertible benefit in the form of money, the company suffered the corresponding deprivation, and the payor's mistake provides a reason to reverse the transfer. In the honest belief that he is entitled to that dividend, however, the defendant makes two purchases that otherwise would not have occurred: six thousand dollars for a dream vacation to Fiji and three thousand dollars for a computer. Upon returning from his holiday and learning of the plaintiff's error, he spends the remaining one thousand dollars on a party. Notwithstanding the liability that initially arose, the plaintiff is not entitled to receive restitution of the full ten thousand dollars. Despite some equivocation by Canadian courts,¹³⁸ the best explanation is that the defendant was not truly enriched to that extent. While perhaps counterintuitive, this conclusion is a function of the legal concept of enrichment. It is, in other words, a reflection of the law's respect for the defendant's freedom of choice.

However much he enjoyed the holiday, the defendant's liability will be reduced with respect to its cost of six thousand dollars. His apparent decision to assume financial responsibility for that trip was vitiated by his mistaken belief that he was

24 at 320-29; Kit Barker, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Peter Birks, ed., *Laundering and Tracing* (Oxford: Clarendon Press, 1995) 191 [Birks, *Laundering*]; Peter Birks, "Overview: Tracing, Claiming and Defences" in Birks, *Laundering*, *ibid.* 289 at 332-36. As discussed below, the defence of bona fide purchase, whatever its precise explanation, plays a crucial role in cases of knowing receipt.

¹³⁸ It is commonly said that the defence applies only if it is "inequitable" to require the defendant to pay. See *Storthoaks (Rural Municipality of) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 at 165, 55 D.L.R. (3d) 1. See also *Dawson*, *supra* note 66; *A.J. Seversen Inc. v. Qualicum Beach (Village of)* (1982), 135 D.L.R. (3d) 122, [1982] 4 W.W.R. 374 (B.C.C.A.). On that basis, it might be thought that the defence operates by demonstrating that the defendant's enrichment was not unjust rather than by showing that there ultimately was no enrichment. Significantly, however, the Privy Council recently rejected the suggestion that change of position involves a judicial discretion to "balance the equities". Lord Goff regarded such an approach as "hopelessly unstable" (*Dextra Bank & Trust Co. v. Bank of Jamaica*, [2002] 1 All E.R. (Comm.) 193). See also McInnes, "Enrichments", *supra* note 5. This certainly has been the experience in New Zealand, where courts have struggled to apply an unjust-related defence. See *Thomas v. Houston Corbett & Co.*, [1969] N.Z.L.R. 151 (C.A.); *National Bank of New Zealand Ltd. v. Waitaki International Processing (NI) Ltd.*, [1999] 2 N.Z.L.R. 211 (C.A.); R.B. Grantham & C.E.F. Rickett, "Change of Position and Balancing the Equities" [1999] R.L.R. 158. Similar problems have arisen in Canada. See *Durand v. Highwood Golf & Country Club* (1998), 240 A.R. 320, 1998 ABPC 83. Consequently, the "inequity" with which change of position is concerned should be confined to the unfairness of imposing liability on a defendant who, having incurred an exceptional expenditure in reliance upon a benefit, was not truly enriched. See McInnes, "Measure", *supra* note 1 at 168-72.

entitled to the windfall that he received from the plaintiff. If he had known that he would have to repay the dividend *and* pay for the Fijian junket from his other resources, he never would have gone. As a matter of integrity, the plaintiff must accede to that argument. As discussed below, its claim in unjust enrichment is based on the assertion that it should not be held liable for the consequences of its own mistake. The prima facie right to restitution arose because the original payment was not truly a function of free choice. But by the same token, the plaintiff must be prepared to relieve the defendant of responsibility for the consequences of his mistake. Notice, however, that the conclusion would be different if the defendant would have taken the same trip in any event. In this situation, the receipt of the mistaken payment would not have vitiated his intention to assume financial responsibility for the vacation. And consequently, the imposition of liability would not intolerably infringe his freedom of choice.¹³⁹ If he paid for the vacation with his own pre-existing resources, he could provide restitution by returning the same funds that he received from the plaintiff. And if he paid for the vacation with funds received from the plaintiff, he could provide restitution by re-directing six thousand dollars of his own pre-existing resources to the company. In either event, liability would simply place the defendant in the position that he initially chose to occupy.

The analysis is more complicated with respect to the computer that the defendant bought before learning of the plaintiff's claim. As with the trip to Fiji, he will argue that he did not truly assume financial responsibility for the purchase. His apparent intention was vitiated by his mistaken belief that he was entitled to the dividend. The two expenditures nevertheless are distinguishable. The vacation did not leave behind a marketable residuum. It no longer can be turned into money. The computer, in contrast, continues to represent something of value. It falls under the second branch of incontrovertible benefit.

If the defendant actually realized a financial gain by reselling the computer, he certainly should be held liable. He once again is in possession of money, which, as always, is immune to subjective devaluation.¹⁴⁰ The answer is less clear, however, if the computer merely represents a realizable financial gain that has not yet been turned to account. Is the defendant's freedom of choice sufficiently respected merely by the fact that he could, through resale, generate a pot of money with which to satisfy

¹³⁹ The analysis requires a slight modification if the defendant would have taken a less expensive holiday if he had not received the mistaken payment. If, for instance, he otherwise would have spent two thousand dollars on a trip to Edmonton, the defence of change of position would apply with respect to four thousand dollars of the six thousand dollars that he spent going to Fiji. As always, liability is limited to the extent that it is consistent with the defendant's freedom of choice.

¹⁴⁰ Of course, the defendant generally should be held liable only for the price realized upon resale (e.g., 2,500 dollars) even though the computer initially cost more (i.e., 3,000 dollars). The analysis might be different, however, if after learning of the plaintiff's claim, the defendant intentionally sold it for less than market value (e.g., 2,000 dollars instead of 2,500 dollars). In that case, he could be held responsible for his own decision to sell at a discount.

judgment? Just as that question has split the courts when raised in connection with the recognition of a prima facie enrichment, so too it has divided opinion when asked in connection with change of position. Although the issue has never been properly analyzed, defendants sometimes are,¹⁴¹ and sometimes are not,¹⁴² held responsible for the retention of realizable financial benefits. The latter position is difficult to defend. It may be appropriate to deny liability if the plaintiff provides services that enhance the value of an asset already in the defendant's possession. The defendant can forcefully argue that he should not be required to sell pre-existing property. The situation is much different, however, if the defendant, having received money from the plaintiff, incurred an exceptional expense by purchasing a new asset. The notion of freedom of choice is then much attenuated. At worst, the defendant will be required to satisfy judgment by selling an asset that he never would have acquired but for his unjust enrichment.

Finally, even though the remaining one thousand dollars was spent on a party that left behind no marketable residuum, it does not fall within the scope of change of position even if it was incurred in reliance upon the dividend's receipt. Since the expenditure occurred after the plaintiff explained its mistake and claimed restitution, a court would hold that it did not arise in good faith. More to the point, the defendant would be liable because, in the circumstances, he freely chose to assume financial responsibility for the expense. At the operative moment, he knew, or should have known, that the cost of the party would come from his own pocket.

II. The Reason for Restitution

Taken together, enrichment and enrichment-related defences like change of position ensure that the defendant's freedom of choice is protected not only with respect to the initial receipt of an enrichment, but also subsequently. The essential point can be stated succinctly: liability is possible only if the defendant remains enriched at the time of trial. While the defendant need not necessarily continue to hold the original enrichment or its traceable proceed *in specie*, relief is possible only if his assets remain at least "abstractly swollen"¹⁴³ on the date of the hearing. A successful restitutionary claim requires both that the defendant received a benefit with respect to which he either chose to assume a risk of financial responsibility or had no choice to

¹⁴¹ *Sullivan v. Lee* (1994), 95 B.C.L.R. (2d) 195 (S.C.); *Empire Life Insurance v. Neufeld Estate* (1998), 4 C.C.L.I. (3d) 278, 22 E.T.R. (2d) 207 (B.C.S.C.); *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 at 560, [1992] 4 All E.R. 512 (H.L.).

¹⁴² *Dawson*, *supra* note 66 (the defendants were allowed to retain some of the gains).

¹⁴³ Peter Birks, "Change of Position: The Nature of the Defence and Its Relationship to Other Restitutionary Defences" in McInnes, *Developments*, *supra* note 121, 49 at 70-71.

make, and that he was not later “disenriched” in a way that was inconsistent with his autonomy.¹⁴⁴

Given the effect of the element of enrichment and its related defences, there is no danger that the imposition of liability will intolerably infringe the defendant’s freedom of choice. That is not to say that relief invariably should follow. The plaintiff must still prove a corresponding deprivation and an unjust factor (i.e., a reason for restitution). It does, however, indicate that in deciding whether or not to reverse a transfer of wealth, a court need not be concerned about protecting the defendant’s autonomy. Unfortunately, that fact is often overlooked. Upon reaching the third stage of analysis, Canadian judges frequently require additional proof that the defendant voluntarily assumed responsibility for his enrichment.

The remainder of this paper explores this problem in four stages. First, it briefly outlines the generally strict nature of restitutionary relief. Second, it revisits the concept of free acceptance and considers it as a reason for restitution, rather than as a test of enrichment. Third, it considers the purported requirement that a special relationship must exist between the parties before relief can be imposed. Finally, it critiques the Supreme Court of Canada’s recent finding that restitutionary relief will lie against a recipient of misdirected trust property only if that party had at least constructive knowledge of the underlying breach of trust.

A. Strict Liability

Liability in unjust enrichment is *prima facie* strict.¹⁴⁵ Narrowly construed, this means that the reason for reversing a transfer of wealth does not involve the defendant’s breach of obligation.¹⁴⁶ For present purposes, however, the position can be

¹⁴⁴ The most difficult cases occur, as in *Planché* (*supra* note 32), when the plaintiff renders requested services (e.g., academic research) that leave no marketable residuum and that the defendant later decides to abandon. Even in this situation, however, the defendant cannot avoid liability on the basis of freedom of choice. Having exercised his choice to incur the expense of potentially unprofitable labour, he cannot later shift that cost to the plaintiff. He is, of course, entitled to change his plans with respect to the services rendered, but he must accept responsibility for doing so.

The same conclusion flows more easily in other situations. Assuming that the defendant has not experienced a claim-defeating disenrichment (e.g., a change of position), he either still retains the precise benefit that he received from the plaintiff (in which case he can simply provide restitution *in specie*) or his assets remain otherwise swollen (e.g., because he was able to preserve other assets by spending the impugned enrichment on expenses that he would have incurred in any event). In either case, liability leaves him none the worse for wear.

¹⁴⁵ Peter Birks, “The Role of Fault in the Law of Unjust Enrichment” in William Swadling & Gareth Jones, eds., *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford: Oxford University Press, 1999) 235 at 237ff; M. McInnes, “Unjust Enrichment: A Reply to Professor Weinrib” [2001] R.L.R. 29.

¹⁴⁶ “Strict liability” is an ambiguous phrase. In tort, for instance, it refers to a situation in which the defendant is held responsible for unintentionally and non-carelessly committing a wrong. In such

stated more broadly. Assuming proof of an enrichment and a corresponding deprivation, the grounds for relief normally proceed without reference to the recipient's participation, acquiescence, or knowledge. Most significantly, there is generally no attempt at the third stage of analysis to safeguard the defendant's freedom of choice. As always, the law must strike a balance that reflects the parties' interests as autonomous agents. But as explained above, this concern is met on the defendant's side by the element of enrichment and its related defences. Accordingly, while volition usually lies at the heart of the unjust factor, it generally is examined only from the plaintiff's perspective. The reason for restitution consists of the fact that, regardless of the nature of the defendant's conduct, the plaintiff acted with an impaired intention. Because it takes the notion of choice seriously, the law respects and defends the claimant's right to determine the allocation of her own resources. Accordingly, if she disposes of an asset with an intention to do so (e.g., through a contract or gift), she will be held to that choice and cannot claim restitution. By the same token, she is entitled to resile from a transfer that was not truly a function of her volition.

The strict nature of restitutionary liability is well established in the paradigm case of a mistaken payment. Notwithstanding older authorities¹⁴⁷ and occasional lapses to the contrary,¹⁴⁸ it is clear that the cause of action in unjust enrichment arises as soon as the defendant receives the money from the plaintiff.¹⁴⁹ It is irrelevant that the defendant

circumstances, the defendant's breach of a primary obligation (e.g., to refrain from converting the plaintiff's property) gives rise to a secondary obligation (e.g., to pay compensatory damages to the plaintiff). In the law of unjust enrichment, however, "strict liability" refers to a situation in which the defendant is held responsible even though he did not commit a wrong. There is only a primary obligation (i.e., to provide restitution), which the plaintiff enforces directly against the defendant. There is no question of a breach or a secondary obligation.

¹⁴⁷ *Royal Bank v. The King*, [1931] 2 D.L.R. 685, [1931] 1 W.W.R 709 (Man. Q.B.) (the defendant is liable for the return of a mistaken payment only if he was "in some way party to the mistake, either as inducing it, or as responsible for it, or connected with it" at 713). Some older authorities suggested that the plaintiff was required to demand payment before bringing an action in unjust enrichment. See *Freeman v. Jeffries* (1869), L.R. 4 Ex. 189. Compare *Baker v. Courage & Co.*, [1910] 1 K.B. 56. This purported requirement has been doubted academically. See Goff & Jones, *Restitution*, 2002, *supra* note 33 at 197-198. Compare *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* §63 (1937). It has been expressly rejected by English courts. See *Fuller v. Happy Shopper Markets Ltd.*, [2001] 1 W.L.R. 1681 at 1686-89, [2001] 2 Lloyd's Rep. 49 (Q.B.). See also *Kleinwort*, *supra* note 9 at 978. It has not played any role in modern Canadian law.

¹⁴⁸ *Pinnacle Bank N.A. v. 1317414 Ontario Inc.*, [2000] A.C.W.S.J. LEXIS 123 (Ont. C.A.) (Lexis); *David E. Funston Merchandising Ltd. v. J.E. Gidney Enterprises Ltd.* (1997), 120 Man. R. (2d) 133 (Q.B.); *Evergreen Spray Service Ltd. v. Ingram-Cotton* (1995), 17 C.C.E.L. (2d) 228 (Alta. P.C.); *Howe v. Laurentian Life of Canada* (1995), 161 N.B.R. (2d) 368 (Q.B. (T.D.)). As discussed below, there is an anomalous requirement of fault in the context of the knowing receipt of trust property.

¹⁴⁹ Consequently, limitation periods run (*Michelin Tires (Canada) Ltd. v. Canada* (2001), 271 N.R. 183, 205 F.T.R. 305 (F.C.A.)), and interest accrues (*LCBO*, *supra* note 8 at 612) from the time of the defendant's receipt and not from the time that he learns of the plaintiff's claim. It occasionally is

is unaware of his own gain or the plaintiff's error.¹⁵⁰ This conclusion is easily reached in a case of mistaken payment because of the nature of the enrichment. Since money is an incontrovertible benefit, the recipient's freedom of choice obviously is never in issue except insofar as it concerns a defence like change of position. Nevertheless, while more controversial, the same regime should apply whenever the plaintiff demonstrates that she did not truly intend to confer a benefit upon the defendant,¹⁵¹

suggested that liability arises only once the defendant is aware of his unjust enrichment and refuses to provide restitution. See *Roxborough*, *supra* note 5; Stephen A. Smith, "Justifying the Law of Unjust Enrichment" (2001) *Tex. L. Rev.* 2177; Nicholas J. McBride & Paul McGrath, "The Nature of Restitution" (1995) 15 *Oxford J. Legal Stud.* 33 at 38; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 134, 141. This position is, however, contrary to both precedent and principle. See McInnes, "Measure", *supra* note 1 at 188-93; Ross Grantham, "Restitutionary Recovery *Ex Aequo et Bono*" [2002] *S.J.L.S.* 388 at 398-99.

A slight variation in the analysis occurs if the plaintiff's intention was qualified, rather than vitiated, as explained below (*infra* note 151). In this case, the cause of action crystallizes not when the defendant receives the enrichment but rather when the condition underlying the plaintiff's transfer fails.

¹⁵⁰ The leading case is *LCBO* (*supra* note 8). The plaintiff mistakenly paid fees to the defendant with respect to in-flight alcoholic drinks. After several years, the defendant realized that payments were not actually due. It nevertheless continued to collect money from the plaintiff for another five years. The lower courts granted restitutionary relief, but only with respect to the fees that the defendant received after it had become aware of the plaintiff's error. In the Supreme Court of Canada, Iacobucci J. extended the scope of recovery to all of the mistaken payments on the basis that "Canadian law has never required a showing of bad faith as a precondition to the recovery of monies collected by a governmental agency under an inapplicable law" (*ibid.* at 612). Although this decision technically is limited to the recovery of mistaken payments made pursuant to inapplicable legislation, the reasoning applies equally in purely private matters. The Supreme Court of Canada has indicated that the same rules should apply uniformly to all defendants. Compare *Re Eurig Estate*, [1998] 2 *S.C.R.* 565 at 582, 165 *D.L.R.* (4th) 1 [*Re Eurig*]. See also *Central Guaranty Trust v. Dixdale Mortgage Investment* (1994), 24 *O.R.* (3d) 506, 121 *D.L.R.* (4th) 53 (C.A.).

¹⁵¹ A case of mistaken payment is the simplest not only because the defendant's enrichment is incontrovertible, but also because the impairment of the plaintiff's intention usually arises unilaterally. For instance, in an attempt to discharge a debt to a third party, the plaintiff may mistakenly send money to the defendant, with whom she has no pre-existing relationship. Relief is available because the plaintiff's act was not truly voluntary. The essence of the analysis is generally the same, however, even if the defendant somehow induced the plaintiff's error. This would be true, for instance, if the defendant extracted the payment from her through deception or force. While the defendant's misconduct explains why the plaintiff's intention was vitiated, the precise reason for restitution remains her lack of volition rather than his wrongdoing. See Grantham & Rickett, *Enrichment*, *supra* note 24 at 185-88.

In all of these situations, the plaintiff's intention is impaired in the sense that it is vitiated. The gist of the plaintiff's complaint is that she did not truly intend to confer a benefit upon the defendant. The analysis is modified slightly if the plaintiff's intention was qualified, rather than vitiated. A qualification occurs if, despite fully intending to initially confer a benefit upon the defendant, the plaintiff ultimately intended for him to retain it only if some condition (usually, but not always, contractual) was satisfied. Restitution is available (under the traditional, but misleading, label of "failure of consideration") if the condition was not met and if the defendant was aware of the

even if that benefit consisted of services.¹⁵² Regardless of the precise form of the enrichment, the plaintiff's claim will never reach the third stage analysis unless she has already shown that the defendant received something for which he either chose to assume the risk of financial responsibility, or had no choice to make. Consequently, in considering the specific reason for restitution, a court can safely focus on the plaintiff's volition, without regard to the defendant's.¹⁵³

B. Free Acceptance

The third element of unjust enrichment usually pertains to the plaintiff's impaired intention, but it need not do so. Restitution sometimes is justified on other grounds. While the courts have yet to expressly endorse such a scheme, the various unjust factors can be usefully arranged into three groups: (1) impaired intention, (2) unconscientiousness, and (3) policy.¹⁵⁴ The first category has already been considered. And since they generally are not formulated to protect the defendant's freedom of choice, the miscellaneous tests contained in the third category do not cause any

conditional nature of his enrichment. See Birks, *Introduction*, *supra* note 40 at 219; Grantham & Rickett, *Enrichment*, *supra* note 24 at 148. While perhaps debatable, the latter requirement is consistent with the law's respect for the parties' autonomy. There is no need for the plaintiff to put the defendant on notice in a case of mistaken payment. Such a requirement would be self-defeating because, by its very nature, the plaintiff's error prevents her from recognizing the need for such notice. Since a mistake pertains to an existing state of affairs, the plaintiff has no way of knowing that she may wish to seek recovery in the future. Consequently, she does not assume a risk of error. The situation is different, however, if the plaintiff acted with a qualified, rather than a vitiated, intention. A qualification does not involve a mistake but rather a misprediction. It is an error as to a future state of affairs. And, as the plaintiff must appreciate, the future is inherently uncertain. Consequently, in conferring an enrichment conditionally, the plaintiff assumes a risk of error. The plaintiff is entitled to shift that risk onto the defendant only if the latter was made aware of the condition at the outset.

¹⁵² *Carleton*, *supra* note 23 (restitution available with respect to both money that the plaintiff mistakenly paid and services that the plaintiff mistakenly rendered in discharge of the defendant's statutory obligation to care for an indigent person).

¹⁵³ Exceptions exist. The law sometimes defensibly requires more than mere proof of the plaintiff's impaired intention. For instance, while lack of mental capacity due to infancy is sufficient to trigger relief, the same is not true if incapacity is attributable to old age. In this case, restitution will lie only if the defendant had notice of the plaintiff's impairment. See *Hart v. O'Connor*, [1985] A.C. 1000, [1985] 2 All E.R. 880 (P.C.); *Permaform Plastics Ltd. v. London & Midland General Insurance*, [1996] 7 W.W.R. 457, 37 C.C.L.I. (2d) 161 (Man. C.A.). This requirement is intended not so much to introduce fault-based liability as to avoid the infantilization of seniors. In such circumstances, a rule of pure strict liability would inhibit people from dealing with the very old, just as they hesitate to deal with the very young.

¹⁵⁴ Peter Birks & Robert Chambers, *Restitution Research Resource*, 2d ed. (Oxford: Mansfield Press, 1997) at 2-3. Compare Birks & Mitchell, *supra* note 137 at 543 (unjust enrichment invariably turning on involuntary transfer or policy).

particular problems in the current context and will not be examined further.¹⁵⁵ The second category, in contrast, demands some attention.

In Canada, the category of unconscientiousness is focussed largely, if not exclusively, on free acceptance. As previously explained, that concept provides a means by which the plaintiff can overcome a plea of subjective devaluation. The defendant is said to have exercised a choice to assume a risk of financial responsibility for a non-monetary benefit if, despite knowledge that payment was expected, he failed to reject the plaintiff's services. Significantly, however, free acceptance can establish not only an *enrichment*, but also an *unjust enrichment*.¹⁵⁶ The reason for restitution may consist of the defendant's bad conduct (i.e., his unconscientious decision to retain the benefit without payment and thereby frustrate the plaintiff's expectation). Consequently, whether it pertains to the element of enrichment or to the element of injustice, free acceptance is very much a function of the defendant's autonomy.

The thesis of this paper, to reiterate, is that the law of unjust enrichment must strike a fair balance between competing interests. Each party is entitled to freedom of choice, but not unduly so. Having overcome the defendant's autonomy at the first stage of analysis, the plaintiff should not be required to do so again, by a different means, at the third stage. For instance, as discussed below, if the plaintiff establishes the defendant's enrichment by proving that the defendant received an incontrovertible benefit, the plaintiff should not be required, in connection with the unjust factor, to prove that the defendant somehow was complicit in the plaintiff's decision to confer the benefit. Such a requirement would unjustifiably tip the scales too far in the defendant's favour. The primary danger against which the courts must guard lies in the imposition of liability on a person who does not continue to be enriched at the time of trial. Restitution should never hurt the recipient. At most, it should involve the restoration of the recipient's *status quo ante*. This concern is sufficiently addressed, however, through the element of enrichment. Consequently, the role of the unjust factors is not necessarily to respect the defendant's freedom of choice, but rather more broadly, to identify some good reason for reversing a transfer of wealth.

¹⁵⁵ The content of the third category is open to debate. See Birks & Mitchell, *ibid.* at 576-91. Compare Grantham & Rickett, *Enrichment*, *supra* note 24 at 221-41. It may include, for instance, cases in which restitution is ordered with respect to services rendered during an emergency (*Matheson*, *supra* note 72) and payments made pursuant to an unauthorized tax (*Air Canada*, *supra* note 8, Wilson J.; *Re Eurig*, *supra* note 150, Major J.; *Woolwich Building Society v. Inland Revenue Commission* (No. 2) (1992), [1993] A.C. 70, [1992] 3 All E.R. 820 (H.L.)).

¹⁵⁶ The dual nature of free acceptance was noted by Goff and Jones, who first formulated the concept (Goff & Jones, *Restitution*, 1966, *supra* note 124 at 30-31). Recently, they have said that the defendant "will be held to have benefited from the services rendered ..." and that "[m]oreover, in such a case, he cannot deny that he has been *unjustly* enriched" (Goff & Jones, *Restitution*, 2002, *supra* note 33 at 20 [emphasis in original]). In *Pettkus* (*supra* note 2 at 849), Dickson J.'s formulation of free acceptance closely mirrors that of Goff and Jones.

Viewed from this perspective, the concept of free acceptance, while troubling in other respects,¹⁵⁷ is uncontroversial in the present context. While the reason for restitution usually consists of the plaintiff's impaired intention, there is nothing inherently wrong with an unjust factor that alternatively triggers relief by reference to the defendant's bad conduct.¹⁵⁸ Moreover, although free acceptance serves a dual purpose, the plaintiff is required to satisfy the defendant's freedom of choice only once. In doing so, the plaintiff simultaneously establishes both an *enrichment* and an *unjust enrichment*.¹⁵⁹ Consequently, there is no danger that she will be improperly denied relief despite overcoming the defendant's plea of subjective devaluation at the first stage of analysis.¹⁶⁰

¹⁵⁷ See Part I.C.2.b, above.

¹⁵⁸ It is sometimes suggested that any cause of action premised upon the defendant's breach is capable of supporting responses other than restitution. Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 Oxford J. Legal Stud. 1 at 33; Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 U.W.A.L. Rev. 1 at 40. Logically extended, this would suggest that free acceptance should entitle the plaintiff to compensation, as an alternative to restitution. The better view, however, is that whether or not its third stage of analysis involves an element of fault, the action in unjust enrichment can trigger only restitution. Any other response is incoherent given the requirement of an enrichment and a corresponding deprivation (McInnes, "Measure", *supra* note 1 at 181-83).

¹⁵⁹ In theory, there is no reason why free acceptance must be used, if at all, both as a test of enrichment and as an unjust factor. It should be possible, for instance, to overcome subjective devaluation by proving an incontrovertible benefit and to rely upon free acceptance only for the purpose of establishing a reason for restitution. In practice, however, claimants naturally prefer to use the same proof twice. Unfortunately, free acceptance sometimes is used for a single purpose because courts resolve the issue of enrichment intuitively and discuss free acceptance only in the context of the unjust factor. See *Sorochan*, *supra* note 127 at 44-45; *Peter*, *supra* note 14 at 1011.

¹⁶⁰ While the concept of free acceptance is not itself problematic, it has given rise to a subsidiary line of cases that does run contrary to the thesis of this paper. Free acceptance, which is one species of unjust factor, occurs when the defendant accepts the plaintiff's services despite knowledge that the plaintiff reasonably expected payment. On a number of occasions, however, the element of "reasonable" or "legitimate" expectation has been extracted from the notion of free acceptance and given life of its own. In *Peter*, McLachlin J. addressed the question of which enrichments are "unjust" and hence reversible. She said that the "test is flexible" and that "the factors to be considered may vary with the situations before the court," such that "different factors may be more relevant in a ... claim for unjust enrichment between different levels of government, than in a family case" (*Peter*, *ibid.* at 990). In reference to *Pettus*, however, she then stated that "[i]n every case, the fundamental concern is the legitimate expectation of the parties" (*ibid.*). See also *Peel*, *supra* note 17 at 786, 802-803. This statement has been interpreted to mean that restitution is never available unless it accords with the parties' reasonable expectations. In other words, a shared belief that a benefit would be the subject of repayment is not merely one factor among many that may be capable of triggering restitution. Rather, it is an invariable prerequisite to relief. See *Canada (A.G.) v. Confederation Life Insurance* (1995), 24 O.R. (3d) 717 at 771-73, 33 C.B.R. (3d) 161 (Gen. Div.); *Smithson v. Bock Estate*, [1999] 1 W.W.R. 243 at 259, 62 Alta. L.R. (3d) 137 (Q.B.); *Baltman v. Coopers and Lybrand Ltd.* (1996), 43 C.B.R. (3d) 33 at 42 (Ont. Ct. J. (Gen. Div.)); *Brown & Collett, Limited* (1996), 11

C. Special Relationship

The concept of a “special relationship” was imported into the Canadian law of unjust enrichment by the Ontario Court of Appeal’s decision in *Nicholson v. St. Denis*.¹⁶¹ St. Denis agreed to sell a building to Labelle. Title was not to be transferred until the price was paid in full, but Labelle was allowed to take immediate possession. Upon doing so, he contractually requested Nicholson, the plaintiff, to apply aluminum and rock siding to the premises. Although that work was done, Labelle paid only 150 dollars against the total price of 1,978 dollars. He also defaulted on his payments under his contract with St. Denis. Nicholson successfully sued Labelle for breach of contract, but because of the defendant’s financial problems, judgment could not be satisfied. Anticipating that possibility, Nicholson also sued St. Denis in unjust enrichment on the basis that, as the owner of the improved property, he had received the benefit of the work. The trial judge invoked a seemingly unfettered discretion to act “in accordance with good conscience”¹⁶² and allowed the claim despite the fact that St. Denis had no knowledge of the plaintiff’s services until after the project was finished.

MacKinnon J.A. (Gale C.J.O. and Arnup J.A. concurring) allowed St. Denis’ appeal. This undoubtedly was the correct decision. There probably was no *enrichment* and there certainly was no *unjust* enrichment. As to the former, St. Denis had not, by means of request or free acceptance, exercised a choice to assume financial responsibility for Nicholson’s services. Indeed, he was entirely unaware of the work until it was too late to reject. Nor, it seems, could the issue of freedom of choice be overcome on the basis of an incontrovertible benefit. While objectively beneficial, the application of aluminum and rock siding did not constitute a necessary expense. Furthermore, St. Denis did not actually realize a financial gain from the work by selling the property in its improved state for an enhanced price. At most, he might have received a potentially realizable financial gain. Even if an enrichment can be

E.T.R. 164 at 179 (Ont. Ct. J. (Gen. Div.)); *Regnier v. O’Reilly* (1997), 39 B.C.L.R. (3d) 178 at 184, 31 R.F.L. (4th) 122 (S.C.); *Greater Toronto Airports Authority v. Air Canada*, (2000), O.J. No. 2532 at § 112 (Sup. Ct. J.) (Q.L.); *Clarkson*, *supra* note 127 at 251; *Campbell v. Campbell* (1999), 173 D.L.R. (3d) 270 at 281, 43 O.R. (3d) 783 (C.A.) [*Campbell*].

This proposition must be rejected as a matter of both principle and precedent. See McInnes, “Absence of Juristic Reason”, *supra* note 11 at 467-68. The simplest proof is found in the rules governing the recovery of mistaken payments. As previously explained, liability is triggered by the mere fact that the plaintiff did not truly intend to confer a benefit upon the defendant. The cause of action is complete at the moment of enrichment, even if the defendant is unaware of the transfer and even if, given the plaintiff’s mistake, the latter has no immediate expectation of repayment. Moreover, while the parties’ shared expectations will often be necessary for the proof of an enrichment in the context of a non-monetary benefit, there are exceptional cases in which unjust enrichment can be established by other means. See *Greenwood*, *supra* note 78; *Carleton*, *supra* note 23; *Matheson*, *supra* note 72.

¹⁶¹ (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.) [*Nicholson* cited to O.R.].

¹⁶² *Nicholson v. St. Denis* (1974), 4 O.R. (2d) 480 at 486, 48 D.L.R. (3d) 344 (Dist. Ct.).

found on that basis, however, (which is debatable, especially with respect to services rendered to land)¹⁶³ it does not appear that the court was provided with any evidence as to the value added by the plaintiff's services.

More significantly for present purposes, even if there had been an enrichment and a corresponding deprivation, there was no unjust factor. The defendant, unaware that the services were being performed, could not have freely accepted them. Moreover, the plaintiff's intention was not impaired in a relevant way. He did not, for instance, act in the mistaken belief that the property was his. To the contrary, he voluntarily agreed to exchange his services for Labelle's bare promise of future payment. And, as generally recognized, restitution should not be permitted to cut across contractual boundaries.¹⁶⁴ Among the reasons for this rule is the fact that a contract is the creation of autonomous agents. The parties are free to allocate risks between themselves as they choose. Nicholson could have demanded prepayment in full, just as he could have taken steps to secure his right to payment by means of a mechanic's lien. He chose instead to rely on Labelle's credit. That obviously was a bad decision, but not one that could be remedied by restitution. Nicholson was properly required to bear responsibility for his own choice.

The substance of the preceding analysis can be found in the Court of Appeal's decision. The real significance of *Nicholson*, however, appears in dicta. In discussing the general scope of the claim in unjust enrichment, MacKinnon J.A. said the following:

[I]n almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff ... This relationship in turn is usually, but not

¹⁶³ See *supra* note 92 concerning property.

¹⁶⁴ In *Rathwell* (*supra* note 104 at 455), Dickson J. explained that restitution was available only if there is "an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment." See also *Pettkus*, *supra* note 2 at 844. Restitution may be available in a contractual context, but only if the agreement has been avoided, is unenforceable, or has been discharged for breach. See *supra* note 105.

In a number of cases with facts analogous to those in *Nicholson*, the courts cited the "special relationship" doctrine but ultimately denied relief on the basis that the plaintiff conferred a benefit upon the defendant as a result of performing a contract with a third party. See *Norda Woodwork & Interiors Ltd. v. Scotia Centre Ltd.* (1980), 109 D.L.R. (3d) 736, [1980] 3 W.W.R. 748 (Alta. Q.B.); *Ledoux v. Inkman*, [1976] 3 W.W.R. 430 (B.C. Co. Ct.); *Nu-Way Kitchens Ltd. v. Smallwood* (2000), 187 Nfld. & P.E.I.R. 251 (Nfld. S.C. (T.D.)) [*Nu-Way Kitchens*]; *Carabin v. Offman* (1988), 55 D.L.R. (4th) 135 (N.S.S.C. (A.D.)); *Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.* (1995), 143 N.S.R. (2d) 275, 42 C.P.C. (3d) 74 (C.A.) [*Turf Masters*]; *Hussey Seating (Canada) v. Ottawa (City of)* (1997), 32 O.R. (3d) 633, 145 D.L.R. (4th) 493 (Gen. Div.); *Ken Lawler Holdings Ltd. v. Steen Panduro Holdings Ltd.* (1991), 55 B.C.L.R. (2d) 317, 45 C.L.R. 111 (C.A.); *McLaren v. The Queen*, [1984] 2 F.C. 899 (T.D.) [*McLaren*].

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.¹⁶⁵

Strictly interpreted, this statement is true, at least if it is confined to cases involving the provision of services, rather than money. Its truth, however, is attributable to the element of enrichment, rather than to the element of injustice. Given their nature, non-monetary benefits are seldom incontrovertible. Consequently, the plea of subjective devaluation normally can be overcome only if the recipient exercised his freedom of choice through request or free acceptance. Interestingly, MacKinnon J.A. acknowledged the existence of exceptional cases in which restitution may lie with respect to services even in the absence of such a pre-existing connection between the parties. His comments regarding “special relationships” were qualified.¹⁶⁶ He referred to “almost all of the cases” and said that the operative relationship “is usually, but not always” marked by the defendant’s knowledge and request or acquiescence.¹⁶⁷ He also discussed, seemingly with approval, *Greenwood*,¹⁶⁸ in which the defendant received an incontrovertible benefit—in the form of a realized financial gain—after selling a vehicle that the plaintiff had repaired. *Greenwood* was distinguished on the basis that that plaintiff had acted in the mistaken belief that he was improving his own property, while Nicholson “did not work under any mistaken belief that he held title to the property ...”¹⁶⁹ Unlike the claimant in *Nicholson*, he had not chosen to incur the risk of non-payment.

Many courts, however, have viewed *Nicholson* in a much different light. A misplaced desire to protect the defendant’s freedom of choice has elevated the concept of a “special relationship” to the status of an “essential nexus”, the “*sine qua non* of success,”¹⁷⁰ without which a restitutionary claim for services rendered must fail.¹⁷¹

¹⁶⁵ *Nicholson*, *supra* note 161 at 317-18.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Supra* note 78.

¹⁶⁹ *Nicholson*, *supra* note 161 at 320.

¹⁷⁰ *McLaren*, *supra* note 164 at 905.

¹⁷¹ *Agrium v. Chubb Insurance Co. of Canada*, [2002] 9 W.W.R. 689 (Alta. Q.B.); *Elmford Construction v. South Winston Properties* (1999), 45 O.R. (3d) 588, 49 C.L.R. (2d) 67 (Sup. Ct.); *Alyea*, *supra* note 57. A number of other decisions appear to be to the same effect, albeit ambiguously so. See *Nu-Way Kitchens*, *supra* note 164; *Turf Masters*, *supra* note 164; *Robert D. Sutherland Architects Ltd. v. Montykola Investments* (1995), 142 N.S.R. (2d) 137, 61 C.P.R. (3d) 447 (S.C.).

In some instances, the courts require proof of a “special relationship” by a different name. The Ontario Court of Appeal’s decision in *Campbell* is illustrative. Drawing upon an article by Professor Abraham Drassinower (“Unrequested Benefits in the Law of Unjust Enrichment” (1998) 48 U.T.L.J. 459), which in turn drew upon the work of Professor Ernest J. Weinrib (*The Idea of Private Law*, *supra* note 149; “The Gains and Losses of Corrective Justice” (1994) 44 Duke L.J. 277), Borins J.A. held that restitutionary relief is invariably premised upon “bilaterality”, in the sense that the defendant must have requested a benefit from the plaintiff. To allow relief otherwise, he held, “would effect the result of enabling the plaintiff to unilaterally constitute [the defendant’s] obligation. In my view,

Such a requirement is problematic in a number of respects. It is, to begin, hopelessly vague. Justice MacKinnon's original observation was understandably broad, given that it merely was offered in dicta as a general description of a broad range of cases. Much greater specificity is required if, in contrast, the notion of special relationship is to serve as an actual test of liability. Nevertheless, few judges have attempted to define the concept, and the leading statement is far too wide to provide useful guidance.¹⁷²

Even if it could be given sufficient specificity, the requirement of a special relationship can lead to injustice. This proposition can be illustrated by returning to two cases mentioned earlier. In *Gidney*, the plaintiff paid one hundred dollars for a dilapidated canoe which, unbeknownst to him, was stolen. Through the provision of labour and eight hundred dollars in expenses, he raised its value to nineteen hundred dollars. The canoe was then seized by the police and returned to the defendant, its true owner. The plaintiff claimed restitution. In a well-reasoned judgment, Beard J. allowed relief on the basis of the defendant's incontrovertible benefit and the plaintiff's mistake.¹⁷³ This conclusion was reversed on appeal. Huband J.A. agreed that there was an enrichment but held that there was no reason for restitution. While he did not explicitly refer to *Nicholson*, his comments closely echoed those of MacKinnon J.A.:

In my view there was a juristic reason for the enrichment, namely, that there was no relationship between [the parties] and consequently [the defendant] had no knowledge that [the plaintiff] was investing time and money in the canoe. [The defendant] neither consented nor acquiesced to that investment. ...

In the cases where unjust enrichment is found to exist, and where a remedy is provided, it would be inequitable for the defendant to retain the benefit. But that is because the defendant knew, or should have known of, the plaintiff's efforts and either consented or acquiesced to what the [plaintiff] was doing. ... But in the present case there is nothing to bind the conscience of [the defendant].¹⁷⁴

This decision appears to be wrong. Although he did not explain himself in detail, Huband J.A. was clearly motivated by the perceived need to safeguard the defendant's freedom of choice. There was, however, no need to provide such protection at the third stage of analysis. This concern had already been overcome at the first stage of analysis when the plaintiff established the incontrovertible nature of the benefit. In the circumstances, the defendant could not subjectively devalue the enrichment. As

liabilities are not to be forced upon people without their consent, and without their knowledge" (*Campbell*, *supra* note 160 at 283). Once again, while the concern for freedom of choice is legitimate, it is better addressed at the first stage of analysis. See McInnes, "Absence of Juristic Reason", *supra* note 11.

¹⁷² *McLaren*, *supra* note 164 ("What is that special relationship? It may be contractual, fiduciary or matrimonial. It may be a very casual arrangement, or an unenforceable contract" at 905).

¹⁷³ *Gidney*, *supra* note 42.

¹⁷⁴ *Gidney* (C.A.), *supra* note 85 at 386.

suggested in *Peel*, “freedom of choice as a problem [was] absent.”¹⁷⁵ The only remaining question was whether or not there was a reason to reverse the transfer of wealth that occurred between the parties. And in this regard, it should have been sufficient that, given his mistaken belief in ownership, the plaintiff’s intention in repairing the canoe was vitiated.

The result in the Court of Appeal can be justified, if at all, only by reopening the issue of enrichment. Beard J. found, and Huband J.A. agreed, that the defendant had received an incontrovertible benefit.¹⁷⁶ This finding, in fact, is debatable. The repairs did not represent a necessary expense and the defendant had not actually sold the canoe in its improved state. The enrichment consisted solely of the fact that, if he chose to do so, the defendant could realize a financial gain by selling the boat in its improved state. As previously discussed,¹⁷⁷ however, it is not clear that the mere possibility of such a gain is enough to displace freedom of choice. Indeed, it may be that the appellate court intuitively felt that there is no enrichment in such circumstances, but improperly expressed its concern at the third, rather than the first, stage of analysis.

No such doubts can be entertained with respect to the second case, which is *Olchowy*.¹⁷⁸ In the mistaken belief that he had purchased a piece of land, the plaintiff cleared the property of rocks and planted canola seed at a cost of 3,889 dollars plus labour. The defendants, who knew of the operative mistake, silently watched the services being rendered and then bought the land for themselves. At the end of the growing season, they harvested the crop and sold it for 4,386 dollars. As McLellan J. found, the defendants undeniably received an incontrovertible benefit. Their financial gain was not merely potentially realizable, but actually realized. The plaintiff’s goods and labour had been turned to account. In effect, it was as if he had provided the defendants with money, rather than services. Relief nevertheless was denied on the basis of *Nicholson*.¹⁷⁹ The judge stressed that the parties did not share a “special

¹⁷⁵ *Supra* note 17 at 796, quoting Gautreau, *supra* note 45 at 270-71.

¹⁷⁶ See *Gidney* (C.A.), *supra* note 85 at 385.

¹⁷⁷ See Part I.C.1.b.ii, above.

¹⁷⁸ *Supra* note 42.

¹⁷⁹ McLellan J. also held that there was a juristic reason for the defendants’ enrichment insofar as the Torrens system provided them with indefeasible title to the property that they had purchased. The plaintiff, however, was not claiming an interest in the land but rather a personal judgment for the value of his services.

In a small concession, McLellan J. awarded the plaintiff 428 dollars under *The Improvements under Mistake of Title Act*, R.S.S. 1978, c. 1-1. That statute provides relief for “lasting improvements” to land that are induced by an error of title. The judge held that while the cultivation of a crop did not qualify, the clearing of rocks did (*Olchowy*, *ibid.* at 59).

relationship” because the defendants “neither requested the services nor did they persuade the [plaintiff] to continue cultivation, fertilizing and seeding.”¹⁸⁰

The result in *Olchowy* is indefensible. Indeed, it epitomizes the notion of unjust enrichment: the defendants literally were allowed to reap what the plaintiff had sown. Admittedly, since they had not yet acquired ownership at the operative time, they had no choice but to accept the creation of the crop. It may even be true, as a matter of sound agricultural practice, that they were practically compelled to harvest the canola. The critical fact, however, is that having done so, and having deducted reasonable remuneration for their own efforts, the defendants held money that was directly attributable to the plaintiff’s mistaken services. The notion of freedom of choice cannot justify their retention of the money.

D. Knowing Receipt

The final issue for consideration arises in the context of a trust. Prima facie, in the event of breach, the beneficiary’s action lies against the trustee. Exceptionally, however, she may seek relief from a stranger (i.e., someone outside of the trust relationship). There are three possibilities.¹⁸¹ First, a stranger may be held liable as a trustee *de son tort* if he purported to administer trust property as a trustee. Such cases are rare. Second, even if he did not thereby receive a personal benefit, a stranger may be held liable for knowing assistance if he dishonestly participated in a fraudulent breach of trust. The threshold for liability is high. The stranger must have actually known (or at least been reckless or wilfully blind to the existence) of the underlying breach.¹⁸² Finally, the defendant may be held liable for knowing receipt if he beneficially received an improper disposition of trust property.

The nature of the action in knowing receipt is the subject of considerable debate. It traditionally was seen, along with knowing assistance, as a type of accessory wrongdoing. Liability was triggered by the defendant’s participation in the trustee’s breach. It continues to be viewed that way in England.¹⁸³ Consequently, the plaintiff

¹⁸⁰ *Olchowy*, *ibid.* at 57.

¹⁸¹ *Barnes v. Addy* (1874), 9 Ch. App. 244 at 251-52.

¹⁸² *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592. Compare *Royal Brunei Airlines v. Tan*, [1995] 2 A.C. 378, [1995] 3 All E.R. 97 (P.C.); *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (H.L.) [*Twinsectra*]. If the claim is established, the defendant typically incurs a personal obligation to provide compensation for the plaintiff’s losses. Exceptionally, however, he may be compelled to disgorge a gain that he did, incidentally, receive from either the plaintiff or a third party as a result of his wrong. See *Warman International Ltd. v. Dwyer* (1995), 128 A.L.R. 201, 182 C.L.R. 544 (H.C.A.); *Fyffes Group Ltd. v. Templeman*, [2000] 2 Lloyd’s L.R. 643 (Q.B.).

¹⁸³ Considered as a species of wrongdoing, knowing receipt seems to be the equitable equivalent of the common law action of conversion. An important distinction nevertheless must be drawn with respect to their elements of proof. Liability for civil wrongdoing generally presumes that the

typically has been required to prove that the defendant knew or ought to have known that he was receiving a benefit in breach of trust.¹⁸⁴ In recent years, however, there has been a growing belief that the plaintiff should also enjoy a second type of receipt-based claim that arises in unjust enrichment.¹⁸⁵ Moreover, while accepting that the wrong of knowing assistance should be premised upon the defendant's actual knowledge, and that the wrong of knowing receipt should be premised upon his constructive knowledge,¹⁸⁶ it has been forcefully argued that the restitutionary action should be strict. It should, in other words, be triggered by the beneficiary's lack of intention to part with the trust property, rather than by the stranger's state of mind.

The Canadian position, unfortunately, sits uncomfortably astride the two models of receipt-based liability. While knowing receipt is said to be an equitable species of unjust enrichment, it is also said to require proof of the defendant's wrongdoing. The

defendant breached an obligation either intentionally or carelessly. The tort of conversion nevertheless is strict, in the sense that while the defendant must have infringed the plaintiff's property rights, he may have done so "innocently", without any reason to suspect anything untoward (see *supra* note 146). The explanation for conversion's anomalously strict nature stems from the fact that the common law does not offer a general *vindicatio* (i.e., a means by which the plaintiff can directly vindicate her rights in personal property). And since the plaintiff does not have a right to recover misappropriated property *in specie*, the courts came to perceive a need to protect her position through an unusually strong claim for substitutionary relief. The situation is different, however, in equity, which unlike law, does recognize a *vindicatio*. Consequently, since an equitable property owner *prima facie* is permitted to claw back *in specie* things that wrongfully come into the defendant's possession, there is no need in that jurisdiction to denude the claim for wrongful receipt of its element of mental culpability. The *vindicatio* is strict; the equitable wrong need not be. See Peter Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 King's College Law Journal 1.

¹⁸⁴ *Belmont Finance v. Williams Furniture Ltd. (No. 2)*, [1980] 1 All E.R. 393, [1978] 3 W.L.R. 712 (C.A.). More recently, the Court of Appeal introduced the novel, and possibly unworkable, proposition that "unconscionability" is the touchstone of liability. See *Bank of Credit & Commerce Intl. (Overseas) Ltd. v. Akindele*, [2000] 4 All E.R. 221, [2000] 3 W.L.R. 1423 (C.A.) [*Bank of Credit*].

¹⁸⁵ Professor Birks initially argued that the action for knowing receipt should be stripped of its fault component and reconceived entirely as a claim of strict liability in unjust enrichment. Peter Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296. More recently, however, he has conceded the continued existence of the equitable wrong and has argued for the additional recognition of the restitutionary claim. Peter Birks, "Receipt" in Peter Birks & Arianna Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002) 213 [Birks, "Receipt"]. See also Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in W.R. Cornish *et al.*, eds., *Restitution: Past, Present and Future—Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 231. Compare *Twinsectra*, *supra* note 182 at 194, Lord Millett.

¹⁸⁶ If a strict liability claim in unjust enrichment is recognized, it may be necessary to reassess the existence and elements of the wrong of knowing receipt so as to avoid undesirable inconsistencies between the two actions. Birks, "Receipt", *ibid.* at 227-28; Mitchell McInnes, "Knowing Receipt and the Protection of Trust Property: *Banton v. CIBC*", Case Comment (2002) 81 Can. Bar Rev. 171 at 186-88 [McInnes, "Knowing Receipt"].

leading case is *Citadel General Assurance v. Lloyds Bank Canada*.¹⁸⁷ Citadel General Assurance hired a company called Drive On to collect insurance premiums on its behalf. Under the terms of that arrangement, the agent was to hold the money in trust pending payment over to the insurer. Drive On and its parent company, International Warranty Company Limited ("IWC"), both held habitually overdrawn accounts at Lloyds Bank Canada. On instructions from IWC, the bank made nightly transfers from the subsidiary's account (which held the insurer's trust funds) to the parent's account. This scheme constituted a breach of trust: Drive On, as trustee, allowed funds beneficially belonging to Citadel, as beneficiary, to be dissipated. Financial problems continued to mount for IWC and Drive On, and both were eventually forced out of business. Because it was still owed more than six hundred thousand dollars, Citadel sued Drive On for breach of trust. This claim was successful, but given the defendant's insolvency, judgment could not be satisfied. The insurer then turned its attention to the bank.

The bank had not purported to administer the trust property and therefore could not be liable as a trustee *de son tort*. Furthermore, there was a finding at trial that while the bank should have known that it was participating in a breach of trust, it did not have actual knowledge of that impropriety, and therefore could not be liable for knowing assistance. Relief consequently was possible, if at all, only on the basis of the bank's receipt of the insurer's trust funds.

At the Supreme Court of Canada, Justice LaForest held that a claim for knowing receipt requires proof of two elements: (1) a beneficial receipt of trust funds, and (2) a reason to reverse the impugned transfer. The first requirement was satisfied even though the trust funds initially were transferred from Drive On's account to IWC's. Since IWC's account was overdrawn, every deposit effectively provided the bank with the benefit of repayment on an outstanding loan. The second element of the claim was more contentious. LaForest J. recognized two lines of authority. One required proof of the defendant's actual knowledge of the trustee's breach; the other could be satisfied by proof of constructive knowledge. In resolving that debate, LaForest J. drew a distinction between knowing assistance, which is "concerned with the furtherance of fraud,"¹⁸⁸ and knowing receipt, which he saw as a claim in unjust enrichment.

More is expected of the recipient who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge ... will suffice as a basis for liability. ... This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment.¹⁸⁹

¹⁸⁷ [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411 [*Citadel* cited to S.C.R.]. See also *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 35 O.R. (3d) 736.

¹⁸⁸ *Citadel*, *ibid.* at 835.

¹⁸⁹ *Ibid.* at 837.

Significantly, however, he was unwilling to lower the standard even further by adopting a test of strict liability.

[Strict liability] may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly *deprived* but, rather, because the defendant has been unjustly *enriched*, at the plaintiff's expense. To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind, not the plaintiff's knowledge or lack thereof.¹⁹⁰

This reasoning is unpersuasive. It simply is not true, as a matter of precedent, that "one must necessarily focus on the defendant's state of mind" when establishing the injustice of an enrichment. Three months before rendering judgment in *Citadel*, the Court held in *LCBO* that liability for a mistaken payment is strict. In doing so, it expressly rejected the proposition that the availability of relief is dependent upon the recipient's knowledge.¹⁹¹ Admittedly, the two cases are technically distinguishable insofar as *Citadel* involved an equitable claim whereas *LCBO* involved a legal claim. This, however, is a distinction without a difference. LaForest J. certainly did not purport to discriminate on jurisdictional grounds. Moreover, there is no compelling policy reason for affording less protection to those who hold equitable title in property than to those who hold legal title.¹⁹² Given that the trust beneficiary's property is held administratively by a trustee (who may or may not be trustworthy and competent), the

¹⁹⁰ *Ibid.* at 838.

¹⁹¹ *LCBO*, *supra* note 8 at 612. See also *supra* note 150 and accompanying text.

¹⁹² To the contrary, however, some courts and commentators have argued that equitable title holders should enjoy less protection and should be required to satisfy a more demanding cause of action. Nourse L.J. suggested that it would be "commercially unworkable" to allow beneficiaries to recover the value of misappropriated property without establishing, at a minimum, that the recipient should have known that the disputed funds were held in trust (*Bank of Credit*, *supra* note 184 at 236). Likewise, Professors Barker and Smith have expressed concern that "[b]ankers, stockbrokers, lawyers and others will routinely be required to go to trial to establish their defences, no matter how honest and careful are their procedures" (Kit Barker & Lionel Smith, "Unjust Enrichment" in David Hayton, ed., *Law's Future(s): British Legal Developments in the 21st Century* (Oxford: Hart Publishing, 2000) 411 at 426). Going further, Bradley Crawford has argued in favour of a test of actual knowledge, on the basis that the test of constructive knowledge exposes banks to an unreasonable burden of inquiry. Bradley Crawford, "Constructive Thinking? The Supreme Court's Extension of Constructive Trusts to Banks on the Basis of Constructive Notice of a Breach of Trust by a Customer" (1998) 31 Can. Bus. L.J. 1.

These arguments appear to be overstated. There is no evidence that recipients of misdirected assets have been exposed to an unreasonable burden in law, even though liability in that jurisdiction has always been strict in both unjust enrichment and conversion. Moreover, even though the introduction of a regime of strict liability presumably would produce a relative increase in the incidence of litigation in equity, the desire to reverse unjust enrichments surely outweighs the desire to protect bankers, stockbrokers, and lawyers from the occasional need to defend themselves against unwarranted claims. For a debate regarding other possible reasons for rejecting strict liability in equity, see Lionel Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 Law Q. Rev. 412; Birks, "Receipt", *supra* note 185 at 235-39.

trust beneficiary is uniquely vulnerable to harm and consequently in need of full protection. Most significantly for present purposes, however, the decision in *Citadel* misconstrues the nature of the claim in unjust enrichment and consequently fails to strike an appropriate balance between the parties' interests.

Strict liability was rejected in *Citadel* because of the desire to safeguard the defendant's ability to control assets that come into his possession. The animating concern, in other words, was freedom of choice. LaForest J. noted that "without any constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property," and suggested that "[i]t would be unfair to require a recipient to disgorge a benefit that has been lawfully received."¹⁹³ Indeed, in some circumstances,¹⁹⁴ this statement is quite true. It does not, however, justify a rule that requires the plaintiff to prove fault. The defendant can be sufficiently, and more appropriately, protected by a regime in which liability is strict, but subject to defences.

This proposition can be demonstrated by considering four situations. In the first, represented by *Citadel* itself, the defendant receives misappropriated trust property with knowledge of the underlying breach. Restitution would be available under either model of unjust enrichment. The fault-based test preferred by LaForest J. would be satisfied by proof of the defendant's knowing receipt. Under the strict liability regime, relief would be triggered *prima facie* by the fact that the plaintiff did not consent to the transfer. Furthermore, given the defendant's state of mind, he could not avail himself of any defence.¹⁹⁵

In the second situation, the defendant buys misappropriated trust property from a third party without notice of the underlying breach of trust. The defendant would not be held liable under either model of unjust enrichment. Since the defendant did not

¹⁹³ *Citadel*, *supra* note 187 at 838-39.

¹⁹⁴ For example, as discussed below, when the recipient is a bona fide purchaser for value without notice.

¹⁹⁵ If the defendant received trust property with actual knowledge of the underlying breach, the defendant would be caught by the fault-based model and would have no defence to the *prima facie* right of recovery generated by the plaintiff's lack of consent under the strict liability model. The answer would not be so clear, however, if the defendant received the property with only constructive knowledge of the underlying breach. The defendant once again would be caught by the fault-based model. And once again, relief *prima facie* would arise under the strict liability model on the basis of the plaintiff's impaired intention. While the defendant's constructive knowledge would, however, preclude the defence of bona fide purchase (which can be displaced by constructive notice), it might not preclude the defence of change of position. Although the issue has yet to be settled, change of position arguably should be available to an honest, but careless, recipient and denied only if the defendant actually knew of (or was reckless or wilfully blind to) the defect in the transfer. Change of position pertains to the element of enrichment, which in turn pertains to freedom of choice. The law of unjust enrichment generally does not enforce a choice that was impaired by error, even if that error was attributable to the party's own carelessness. See *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24 (Ex. Ct.).

receive the property with knowledge of the breach, and therefore was not at fault, he could not be held responsible under *Citadel's* conception of knowing receipt.¹⁹⁶ Under the strict liability model, the defendant *prima facie* would incur a restitutionary obligation. Nevertheless, as a bona fide purchaser for value of a legal interest, he could ultimately defeat the plaintiff's claim.¹⁹⁷ To ensure the efficient flow of commerce, the plaintiff's ability to reverse an unintended transfer is, in such circumstances, subverted to the defendant's freedom to retain a benefit that he honestly acquired.¹⁹⁸

In the third situation, the defendant receives misappropriated trust property without paying for it and, before acquiring knowledge of the plaintiff's interest, incurs an exceptional expenditure in reliance upon the receipt. For the reason cited in the last paragraph, the defendant would not be liable under a fault-based scheme. Nor would he have to restore the enrichment if liability was strict. Although the defendant *prima facie* would incur a restitutionary obligation, he ultimately could defeat the plaintiff's claim by pleading the defence of change of position.¹⁹⁹

Similar results therefore would be obtained in the vast majority of cases whether liability was fault-based or strict but subject to defences. Occasionally, however, there would be a difference. In the final situation for consideration, the defendant receives misappropriated trust property without paying for it and, before being fixed with notice of the plaintiff's rights, spends it in a way that he normally would have spent other resources. Take a simplified example. The defendant arranged a vacation worth two thousand dollars. He had two thousand dollars in his mattress with which he intended to pay. He innocently received two thousand dollars that a trustee had stolen

¹⁹⁶ The analysis may be complicated by the fact that liability *prima facie* is possible as long as the defendant acquired the requisite knowledge while still in possession of the property, even if he did not have such knowledge at the time of receipt (*Citadel*, *supra* note 187 at 838, citing *Agip (Africa) Ltd. v. Jackson* (1989), [1990] Ch. 265 at 291, [1992] 4 All E.R. 385). Even in that situation, however, given his status as a bona fide purchaser, he ultimately has a complete defence to the plaintiff's claim.

¹⁹⁷ That would have been the situation in *Citadel* itself if the bank had not been fixed with constructive knowledge of Drive On's impropriety. Since it effectively bought the trust funds in exchange for its discharge of a debt (i.e., the reduction of IWC's overdraft), it was a purchaser, albeit with notice and not bona fide.

¹⁹⁸ The bona fide purchase of a legal interest extinguishes all pre-existing equitable interests in that same property. (A bona fide purchase of an equitable interest does not have the same effect; equitable interests generally take priority in their order of creation.) Moreover, this doctrine applies regardless of the nature of the property in which the pre-existing equitable interest inhered. In contrast, a bona fide purchase generally affects a pre-existing legal interest only if that interest was held in money. While law normally prefers the interests of the dispossessed owner to those of the honest purchaser, the commercial need to ensure the currency of money requires an exception. See David Fox, "Bona Fide Purchase and the Currency of Money" (1996) 55 Cambridge L.J. 547.

¹⁹⁹ Whereas bona fide purchase is a complete defence, change of position operates only to the extent that the defendant incurred an exceptional expenditure in reliance upon his enrichment. See discussion, *supra* note 137.

from the plaintiff's trust fund. The defendant used that money to pay for his holiday and therefore still has two thousand dollars in his mattress. According to *Citadel*, the defendant is not liable under the equitable species of unjust enrichment because, once again, he did not receive the trust funds with knowledge of the misappropriation.²⁰⁰ This result would, however, be unjustifiable. The rule in *Citadel* allows the defendant far too much, and the plaintiff far too little,²⁰¹ leeway in determining the allocation of their respective resources. The plaintiff is unable to recover the value of a benefit that was taken from her without her consent. At the same time, the defendant enjoys a windfall. He began the episode with two thousand dollars and the expectation that he would return from his vacation penniless. Nevertheless, because the defendant cannot be ascribed with fault, he is permitted to have both his holiday at the plaintiff's expense and the continued use of the money in his mattress.²⁰²

A much better balance would be struck between the parties' interests under the strict liability model. The defendant was unjustly enriched at the plaintiff's expense. He received two thousand dollars in cash, she suffered a corresponding deprivation, and her lack of consent constitutes a sufficient reason to reverse that transfer of wealth. The defendant *prima facie* is liable for restitution. Moreover, he has no defence to the claim. Although he used the misappropriated funds to pay for his holiday, he did not thereby sustain a relevant change of position. He intended to take the same vacation in any event. Consequently, the imposition of liability would properly respect each parties' freedom of choice. Since the plaintiff did not choose to dispose of two thousand dollars, she should get that amount back. And since the defendant did choose to spend two thousand dollars on a trip and return home penniless, restitution leaves him none the worse for wear. Indeed, it effectuates his chosen state of affairs.

²⁰⁰ Moreover, although the victim of misappropriated trust property theoretically enjoys several avenues of relief (McInnes, "Knowing Receipt", *supra* note 186), the plaintiff may find that they are all ineffective. The facts do not disclose an action in trustee *de son tort* or knowing assistance. Nor could the plaintiff assert a proprietary claim to recover the stolen trust funds *in specie*. The defendant no longer holds the money or its traceable proceeds. Moreover, even if the plaintiff could trace the funds into the hands of someone else, such as the travel agent with whom the defendant dealt, she almost certainly would be met by a defence of bona fide purchase or change of position. Finally, although the trustee would be liable for breach of trust, he may, for instance, be judgment-proof or impossible to locate.

²⁰¹ Admittedly, the plaintiff did not have the right to direct the disposition of property held in trust for her benefit. She should, however, have the right to demand recovery of misappropriated funds by means of a strict liability claim in unjust enrichment.

²⁰² The last clause in this sentence does not suggest that the plaintiff should have a proprietary right to the money in the defendant's mattress, but rather, more loosely, that in the absence of other resources, the defendant should use that money to discharge his personal obligation to provide the plaintiff with restitution.

Conclusion

A tension lies at the heart of unjust enrichment. The law is deeply committed to a principle of freedom of choice that frequently appears to pull in opposite directions. The plaintiff asserts a right to recover a benefit with which she involuntarily parted; the defendant asserts a right to retain assets in his possession. To a very large extent, this tension can be resolved at the first stage of analysis. At its core, the element of enrichment is designed to protect the defendant's autonomy. Even if he received an objective benefit, he cannot be held liable unless he either chose to assume the risk of financial responsibility, or in the circumstances, had no choice to make. This proposition is critically important in itself. Moreover, it reveals that there generally is no need to additionally protect the defendant's freedom of choice when considering reasons for restitution at the third stage of analysis. By ignoring that fact, Canadian courts often strike an unfair balance between the parties. The defendant is left with an unjust enrichment and the plaintiff is denied restitution.
