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# *In Defence of Subjective Devaluation*

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Andrew G. Spence\*

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The author examines the situation where a benefit mistakenly provided by the plaintiff has been conferred on a defendant without free acceptance of the latter. The plaintiff's claim is based on the unjust enrichment of the defendant and the damage claimed is the objective or market value of the said benefit. The author argues that recovery should be denied where it can be shown that the benefit was subjectively devalued by the defendant. For example, where the plaintiff has mistakenly improved the property of the defendant so as to increase its objective market value but the particular defendant preferred the property as it was, the author submits that the plaintiff should not be able to recover. When a defendant subjectively devalues a benefit conferred without free acceptance, there is no enrichment and so the principles of unjust enrichment, properly understood, do not support recovery for the plaintiff. Since the defendant has committed no wrong in receiving the objective benefit, it is unjust to alter the defendant's priorities by forcing the defendant to pay for something he or she does not value.

Subjective devaluation can thus leave apparently innocent plaintiffs without recovery while the defendant enjoys the value of an objective benefit mistakenly conferred. A misplaced sympathy for such plaintiffs has led authors and courts alike to advocate imposing liability on such defendants under the doctrine of incontrovertible benefit. This doctrine would allow such plaintiffs to recover their losses where the benefit is realisable in money by the defendant. In the case of a mistaken improvement to the defendant's property, the doctrine of incontrovertible benefit would impose liability on the defendant because the improved property could be sold, the value of the improvement realised in money and that value returned to the plaintiff. With the remainder, the defendant could purchase a substitute piece of property with the preferred characteristics. The author argues that the doctrine of incontrovertible benefit interferes with the freedom and priorities of the defendant when no wrong has in fact been committed, and is thus fundamentally inconsistent with the principles of unjust enrichment and of private law in general.

L'auteur examine la situation où un bénéfice, conféré par erreur par le demandeur, échoit au défendeur sans que ce dernier y ait librement consenti. La réclamation du demandeur est fondée sur l'enrichissement injustifié du défendeur et le dommage réclamé correspond à la valeur objective ou marchande dudit bénéfice. L'auteur soutient que le recours devrait être débouté lorsque le défendeur établit que, subjectivement, le bénéfice n'a pas de valeur. Par exemple, lorsque le demandeur a, par erreur, amélioré le bien du défendeur de manière à augmenter sa valeur marchande objective, mais que le défendeur préfère le bien dans son état original, l'auteur suggère que le demandeur ne devrait pas se voir dédommagé. Lorsqu'un défendeur n'attribue pas de valeur à un bénéfice qu'il n'a pas souhaité, il n'y a pas d'enrichissement et les principes de l'enrichissement injustifié, lorsque correctement compris, ne peuvent s'appliquer. Puisque le défendeur n'est nullement fautif dans la réception du bénéfice, il serait injuste de permettre un recours contrecarrant sa liberté d'établir ses préférences en l'obligeant à déboursier pour une amélioration qui n'a pas de valeur à ses yeux.

La dévaluation subjective peut alors laisser un demandeur innocent sans recours alors que le défendeur jouit du bénéfice objectif qui lui a été donné par inadvertance. Une sympathie déplacée pour de tels demandeurs a mené les auteurs et les cours à responsabiliser les défendeurs sous le couvert de la doctrine du bénéfice incontestable. Cette doctrine permet aux demandeurs de recouvrer leurs pertes si le bénéfice est monnayable. Dans le cas d'une amélioration apportée par erreur au bien du défendeur, la doctrine du bénéfice incontestable imposerait la responsabilité au défendeur parce qu'il pourrait vendre le bien amélioré, empocher le prix de vente, restituer au demandeur la valeur de sa contribution, et avec le reste du montant, acheter un substitut au bien initial qui renferme les caractéristiques voulues. L'auteur est d'avis que la doctrine du bénéfice incontestable entre en conflit avec la liberté et les préférences légitimes du défendeur alors qu'il n'est pas fautif ; elle est alors incohérente eu égard aux principes de l'enrichissement injustifié et au droit privé en général.

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\* Hons B.A. (Western Ontario), M.A. (Chicago), LL.B. (Toronto), Articling student at Tory Tory DesLauriers & Binnington, Toronto.

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## Introduction

You return from a vacation to find that your driveway has been paved over mistakenly by a paving company, making it smooth and increasing the resale value of your property. However, you personally preferred the look and feel of loose gravel and have better things to do with your money than spend it on your driveway.<sup>1</sup> The company sues you, claiming restitution. The law's traditional answer to this situation is to deny recovery to the paving company based on what is called "subjective devaluation." Today, the doctrine of "incontrovertible benefit" is gathering steam, both among scholars and courts, threatening to impose liability in the aforementioned situation because the improvement to the driveway is realisable in money if you were to go through the trouble of selling your house.

This article is an effort to defend subjective devaluation and refute the doctrine of incontrovertible benefit as being inconsistent with the underlying principles of restitution. Virtually every instance where a court has found an incontrovertible benefit is in actuality a case where the facts were such that it was impossible for the defendant to argue subjective devaluation. In the next two sections, the principle of subjective devaluation and the challenge posed by the doctrine of incontrovertible benefit will be outlined. In the subsequent section, the treatment of incontrovertible benefit in the courts will be explored. The article will then examine the principles behind private law in general and restitution in particular, and show how incontrovertible benefit is wholly inconsistent with them. In the final section, a new remedy, consistent with subjective devaluation, will be proposed to deal with situations such as the mistakenly paved driveway.

## I. Subjective Devaluation

Goff and Jones write: "[I]n restitution it is not material that the plaintiff has suffered a loss if the defendant has gained no benefit."<sup>2</sup> In many cases where the plaintiff has rendered a service to the defendant, such as improving the defendant's property, a "benefit" in the ordinary sense is said to be conferred on the defendant since the objective result is a positive economic value which is reflected in the market price for the good or service. These benefits, however, may not be valued as highly, or at all, by the particular defendant.<sup>3</sup> Subjective devaluation, as coined by Peter Birks, enables a de-

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<sup>1</sup> Example drawn from *Finelli v. Dee*, [1968] 1 O.R. 676, 67 D.L.R. (2d) 393 (C.A.), Laskin J.A.

<sup>2</sup> L. Goff & G. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) at 16 [hereinafter Goff & Jones, 3d ed.].

<sup>3</sup> The reference to services is designed, of course, to exclude benefits in the form of money received by the defendant. Generally, it is impossible to deny enrichment if one has received money, for "[m]oney has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited" (*B.P. Exploration Co. (Libya) v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 799 (Q.B.), Goff J., aff'd (1982), [1983] 2 A.C. 352, [1982] 1 All E.R. 925 (H.L.)). Goods may be akin to either money or services in this respect. Like money, goods which are still returnable (even if they

defendant to respond to a claim for unjust enrichment by arguing that, while others might generally value the goods consumed or services conferred, the defendant does not. If the law of restitution is not to force liabilities on people "behind their backs,"<sup>4</sup> then it must respect each particular defendant's preferences and deny recovery. As Birks writes, "[o]ne man's meat is another man's poison."<sup>5</sup>

Subjective devaluation is only possible, however, where the defendant does not freely accept the benefit. A defendant who knows that a benefit is being offered non-gratuitously and, having the opportunity to reject, still chooses to accept the goods or services in question, is considered to have indicated that it is a benefit to receive those goods or services. Thus "ordering him to pay for them does not undermine respect for the individuality of values."<sup>6</sup> Free acceptance precludes a defendant from arguing subjective devaluation because subjective devaluation is based on the freedom of choice of the defendant, and to freely accept a benefit is to exercise that freedom and make that choice.

The introduction gave the example of a gravel driveway which was mistakenly paved over by a paving company. Yet other examples can also serve to illustrate subjective devaluation. Suppose while X is away on vacation, builder Y mistakenly builds a new deck, solarium, or other addition to X's home which increases its resale value, but X is shocked upon returning to find this "improvement" to the property — X liked the house just as it was and views the addition as useless and unsightly.<sup>7</sup> Or suppose Y mistakenly repairs the muffler of X's sportscar and gives it a fresh coat of paint. X actually liked the roar of the old muffler because it added character to the car and has no use for a bright red exterior — X preferred the faded ochre colour it had before. For centuries, the law's response to these situations was clear, simple and unmistakable: "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."<sup>8</sup>

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have depreciated or deteriorated) pose little difficulty — if the defendant truly does not value the painting, or television, or book, the goods can simply be returned without prejudice. In contrast, goods which are consumed by the defendant (e.g. an opulent dinner) labouring under the impression they are free are better classified in the same category as transitory services — a lesson from a teacher, a concert by a performer — which leave warm memories but no marketable residuum. See J. Beatson, "Benefit, Reliance, and the Structure of Unjust Enrichment" (1987) 40 *Curr. Leg. Probs.* 71 at 72.

<sup>4</sup> *Falcke v. Scottish Imperial Assurance Co.* (1886), 34 Ch. 234 (C.A.) at 248 [hereinafter *Falcke* cited to Ch.].

<sup>5</sup> P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 131.

<sup>6</sup> A.S. Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 *L.Q. Rev.* 576 at 579. See also Birks, *ibid.* at 265; Goff & Jones, 3d ed., *supra* note 2 at 18; M. Garner, "The Role of Subjective Devaluation in the Law of Unjust Enrichment" (1990) 10 *Oxf. J.L.S.* 42 at 42-43.

<sup>7</sup> This example is drawn from Birks, *ibid.* at 110.

<sup>8</sup> *Falcke*, *supra* note 4 at 248, Bowen L.J. See also *Taylor v. Laird* (1856), 1 H. & N. 266, 156 E.R. 1203 (Ex. Ct.) [hereinafter *Taylor*]; *Owen v. Tate* (1974), [1975] 2 All E.R. 129 (C.A.) [hereinafter *Owen*]; *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.) at 64, Brett M.R.

Subjective devaluation is not the only way in which a defendant can argue that recovery should be denied. A defendant could appreciate the new driveway or repainted car, but maintain that, at the time, there were more important things to do with her money. That way the defendant should only have to pay for the services if sufficient funds are left over after meeting other higher-priority needs. This is the “priority of payments” argument. Alternatively, the defendant may agree to the objective value of the services rendered, but argue that she would have preferred to have done the job herself, perhaps on a weekend or vacation when time was available, or that a friend or relative was prepared to do the work for a reduced rate, on barter for the defendant’s goods or services, or on the basis of a set-off.<sup>9</sup>

A good example of this second type of defence is found in *Upton-on-Severn Rural District Council v. Powell*.<sup>10</sup> In this case, the defendant lived within the jurisdiction of the Upton police department but not the Upton fire department — instead, he was within the Pershore fire department’s area. Having paid his taxes and the Pershore fire department having been allotted its budget, he was entitled to free fire brigade service when in need thereof. The defendant’s house caught fire and he called the Upton police. The Upton police naturally called the Upton fire brigade which arrived and put out the fire. Soon it found out that the defendant was in the Pershore brigade’s area and so the Upton brigade sued the defendant for the cost of the fire service and recovered damages in contract. In their treatise on restitution, Goff and Jones criticise this decision on the basis that the Upton fire brigade would be unlikely to have succeeded in restitution, since “the defendant had not freely accepted [the fire brigade services] knowing that he would have to pay for them.”<sup>11</sup> Indeed, this is not a free acceptance case, rather, it is a case of mistaken delivery of services valued by the defendant but who should and could have received the same services for free.

For the sake of brevity, all these concerns will be collectively referred to as subjective devaluation, distinguishing their rationales and implications only where necessary.

## II. Incontrovertible Benefit

The doctrine of incontrovertible benefit, as put forth by the most authoritative texts, encompasses two ideas. Goff and Jones write that restitutionary relief should be granted where “it can be shown that the defendant has gained a financial benefit *readily realisable*, without detriment to himself, or has been *saved an inevitable expense*.”<sup>12</sup> Birks would find that the defendant has received an incontrovertible benefit and

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<sup>9</sup> See Garner, *supra* note 6 at 44.

<sup>10</sup> [1942] 1 All E.R. 220 (C.A.) [hereinafter *Upton*].

<sup>11</sup> L. Goff & G. Jones, *The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993) at 178 [hereinafter Goff & Jones, 4th ed.].

<sup>12</sup> Goff & Jones, 3d ed., *supra* note 2 at 144 [emphasis added and footnotes omitted]. See also P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) at 42-44; Burrows, *supra* note 6 at 584.

would grant recovery in two types of situations: first, where the plaintiff has conferred a benefit on the defendant which was necessary to the defendant in the sense that he would have had to seek it out himself;<sup>13</sup> (anticipation of a necessary expenditure), and second, where “the recipient of a benefit which can be turned into money does turn it into money [such that] he can no longer resort to subjective devaluation,”<sup>14</sup> (realisation in money). As this article will demonstrate, there is really little difference in these respective formulations between “saved inevitable expense” and “anticipation of a necessary expenditure.” Readily *realisable* and *realised* in money are, however, different in a very crucial respect, both in principle and in practice. Both of these instances of so-called incontrovertible benefit will now be examined in turn.

### A. Saved Inevitable Expense

Mitchell McInnes states that “the doctrine of inevitable expense finds ample support on both sides of the Atlantic, both judicially and academically.”<sup>15</sup> This aspect of the incontrovertible benefit doctrine has two dimensions: legal obligation and factual necessity. While McInnes’s statement is undeniably true, the case law in fact amounts to little more than a collection of categories and instances where the facts were such that no plea of subjective devaluation would have succeeded in persuading a judge.<sup>16</sup> David Stevens concludes that the extension of the concept of benefit to saved inevitable expenses is an “innocuous development”, provided that the courts insist on genuine inevitability and do not slide into imposing liability for expenses the defendant would “likely” or “probably” have incurred.<sup>17</sup>

#### 1. Legal Obligation

The foundational case for this dimension of the incontrovertible benefit doctrine in Canada is *Carleton (County) v. Ottawa (City of)*.<sup>18</sup> In 1950, the City of Ottawa an-

<sup>13</sup> Birks, *supra* note 5 at 117.

<sup>14</sup> *Ibid.* at 121.

<sup>15</sup> M. McInnes, “Incontrovertible Benefits and the Canadian Law of Restitution” (1991) 12 *Advocates’ Q.* 323 at 329 [footnotes omitted, hereinafter “Incontrovertible”].

<sup>16</sup> For example, at Common Law, the personal representatives of a deceased are legally responsible for burial of the deceased, and the officious undertaker who buries the dead at his own expense is entitled to be reimbursed out of the estate for reasonable expenses. The usual pattern of these cases is that it is impossible to identify or contact the personal representatives of the deceased in time for burial and prompt action by an undertaker is required. See Goff & Jones, 4th ed., *supra* note 11 at 382; *Jenkins v. Tucker* (1788), 1 Black. H. 90, 126 E.R. 55 (C.P.); *Ambrose v. Kerrison* (1851), 138 E.R. 307, 10 C.B. 776 (C.P.); *Davey v. Cornwallis (Rural Municipality)* (1930), 39 Man. R. 259, [1931] 2 D.L.R. 80 (C.A.); *Pearce v. Diensthuber* (1977), 17 O.R. (2d) 401, 81 D.L.R. (3d) 286 (C.A.); *Patterson v. Patterson*, 17 A.R. 384 at 392 (N.Y. 1875); *Croskery v. Gee*, [1957] N.Z.L.R. 586 (S.C.).

<sup>17</sup> D. Stevens, Comment (1994) 73 *Can. Bar Rev.* 84 at 97.

<sup>18</sup> [1965] S.C.R. 663, 52 D.L.R. (2d) 220 [hereinafter *Carleton* cited to S.C.R.]. For British precedent, see *Brooks Wharf & Bull Wharf Ltd. v. Goodman Brothers* (1936), [1937] 1 K.B. 534, [1936] 3 All E.R. 696 (C.A.); *Exall v. Partridge* (1799), 8 T.R. 308, 101 E.R. 1405 (K.B.).

nexed parts of the Townships of Gloucester and Nepean from the County of Carleton. Prior to the annexation, Carleton was under a statutory obligation to take care of indigent residents within its territory, including one Norah Baker who lived in that part of Gloucester which was later annexed by the City of Ottawa. Having no institution of its own for indigents such as Ms. Baker, Carleton had entered into an agreement with the County of Lanark under which Lanark agreed to accept all persons sent by Carleton into its institutions and in return Carleton paid Lanark for fulfilling its obligation under the statute. Upon annexation, Ottawa became responsible for those indigents from Carleton who resided in the annexed areas of Gloucester and Nepean, including Ms. Baker. Through sheer inadvertence, Ms. Baker's name was not on the list prepared by Carleton for the city, and for ten years Carleton continued to pay Lanark for the care of Ms. Baker though she had become Ottawa's responsibility.

The Supreme Court allowed the county's appeal and granted restitution, holding simply that "[t]he respondent ... assumed responsibility ... and the fact that one welfare case was inadvertently omitted from the list cannot permit the respondent to escape the responsibility for that case."<sup>19</sup> Though the case involves payment of money on the part of Carleton, the statutory duty was to provide board, lodging and medical assistance to the indigent residents. Fridman and McLeod interpret it as a case "involving the provision of services which constitute the performance of another's legal obligation ... an exception to the general rule that a person will not be required to pay for services which he has not requested and for the receipt of which he is not at fault."<sup>20</sup>

## 2. Factual Necessity

A more direct challenge to the doctrine of subjective devaluation is posed by those cases where restitution is granted for services mistakenly rendered without free acceptance by the defendant on the grounds that the defendant had no real choice but to contract for those services, although there was no legal obligation to do so.<sup>21</sup> All of these cases ultimately rest on their particular facts, however, and their results merely reflect findings by the courts that the defendant's claim of subjective devaluation, if

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<sup>19</sup> *Carleton, ibid.* at 669.

<sup>20</sup> G.L. Fridman & J.G. McLeod, *Restitution* (Scarborough, Ont.: Carswell, 1982) at 425. This is certainly also the analysis of McInnes in "Incontrovertible", *supra* note 15 at 345.

<sup>21</sup> Most cases of factual necessity fall into three categories: i) the cases of necessitous intervention or emergency rescue (see *e.g. Hastings v. Semans Village*, [1946] 4 D.L.R. 695, [1946] 3 W.W.R. 449 (Sask. C.A.) [hereinafter *Hastings* cited to D.L.R.]; *Matheson v. Smiley*, [1932] 2 D.L.R. 787, [1932] 1 W.W.R. 758 (Man. C.A.) [hereinafter *Matheson* cited to D.L.R.]; *Re Agnew's Will*, 230 N.Y.S. 519 (Supr. Ct. 1928); M. McInnes, "Restitution and the Rescue of Life" (1993) 32 Alta. L. Rev. 37 [hereinafter "Restitution"]; G. Jones, "Restitutionary Claims for Services Rendered" (1977) 93 L.Q. Rev. 273 at 284; ii) salvage; and iii) the business management cases (see *e.g. Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403, [1936] 2 All E.R. 1066 (C.A.); *Monks v. Poynice Pty Ltd.* (1987), 8 N.S.W.L.R. 662 (Eq. Div.); Note (1988) 62 Aust. L.J. 239; *Re Berkeley Applegate (Investment Consultants) Ltd.*, [1989] 1 Ch. 32).

there was one, simply was not persuasive. Subjective devaluation is always a question of fact for the judge or jury, and these cases are merely illustrative examples where the trier of fact was unpersuaded.<sup>22</sup> Birks writes that a court is entitled to find the defendant has been benefited notwithstanding lack of request or free acceptance where:

[O]n the facts any recourse to subjective devaluation would be so absolutely unreasonable that *no reasonable man* would try it. ... There is a great difference between this 'no reasonable man' test and the adoption of a straightforward objective standard of value [however]. The 'no reasonable man' test does no more than moderate the greater absurdities of a subjective approach.<sup>23</sup>

Goff and Jones's main example of factual necessity leading to recovery based on incontrovertible benefit is the home heating oil case.<sup>24</sup> One oil company, say Esso, mistakenly delivers oil to the defendant when it should have delivered it to a third party with whom Esso has a standing contract. The defendant consumes the oil, believing it to have been delivered by Texaco, with whom it has a similar standing contract and not knowing of Esso's mistake. If the defendant had no choice but to buy oil from someone, so the argument goes, the defendant should reimburse Esso for the market value of the oil (including a profit element), the price that the defendant regularly pays his supplier, or possibly the price Esso usually receives from the third party, whichever is lower.

*LAC Minerals Ltd. v. International Corona Resources Ltd.*<sup>25</sup> is a real life example of this sort of factual necessity. The plaintiff, Corona, was engaged in exploratory

<sup>22</sup> See Stevens, *supra* note 17 at 96.

<sup>23</sup> Birks, *supra* note 5 at 116. See also Stevens, *supra* note 17 at 98. Birks himself says that the "no reasonable man" test has only three manifestations: money, "anticipation of necessary expenditure" and when services or improvements to land or chattels have been realised in money (both discussed in detail below). It is submitted that these categories may capture most but not necessarily all such cases and the test need not be so limited.

<sup>24</sup> Goff & Jones, 4th ed., *supra* note 11 at 30, as adapted by McInnes in "Incontrovertible", *supra* note 15 at 330-31.

<sup>25</sup> (1987), 62 O.R. (2d) 1, 44 D.L.R. (4th) 592 (C.A.) [hereinafter *LAC Minerals* (C.A.) cited to O.R.], aff'd [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *LAC Minerals* (S.C.C.) cited to S.C.R.]. At the Supreme Court, only two of five justices granted a constructive trust on the basis of a breach of fiduciary duty by LAC, the other three found only a breach of confidence. However, Lamer C.J.C. ruled that a constructive trust was the appropriate remedy for the breach of confidence and so the Court of Appeal result stood. In the course of his judgement finding a breach of fiduciary duty, LaForest J. agreed that Corona "would of necessity have had to expend funds to develop the mine" (*LAC Minerals* (S.C.C.) at 680) and thus LAC was entitled to a lien on the land in the amount of the value of the mill and mine. (But see *Republic Resources v. Ballem* (1981), 33 A.R. 385 (Q.B.), [1982] 11 W.W.R. 692 [hereinafter *Republic Resources* cited to A.R.] where the court reached a different conclusion on the facts.) Note that both the Court of Appeal and LaForest J. granted LAC this lien based on restitutionary principles and not on s. 37(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, which reads:

37(1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled

drilling for minerals on certain land which it sought to develop with LAC's help, and so it showed LAC confidential information. LAC turned around and bought the land from the owner and subsequently constructed a mill and a mine on the site. The trial and Court of Appeal found LAC had breached a fiduciary duty to Corona and granted Corona a constructive trust over the entire property as a remedy. However, the Court of Appeal required Corona to pay LAC some \$154 million for the mine and mill which LAC had constructed "in the light of the reality that the expenditures made by LAC to make the property productive inevitably would have been required on the part of Corona."<sup>26</sup>

The oil example is used to powerful effect by McInnes, but two further cases should serve to illustrate indeed how fact-specific the Goff and Jones scenario is, and how it discloses no general principle beyond the generic rule that specific facts can often defeat a claim of subjective devaluation.

In *Boulton v. Jones*,<sup>27</sup> Jones had been accustomed to dealing with one Brocklehurst, against whom he had a set-off. One day he sent an order to Brocklehurst for some hose-pipe but, unknown to him, Brocklehurst had that very day sold the business to his foreman, Boulton. Boulton filled the order and delivered the goods to Jones, who was not informed of the change in ownership and resultant loss of set-off until after he had consumed the goods. The Court refused to grant Boulton restitution, finding "the all-important factor was the existence of the set-off."<sup>28</sup> In terms of the home heating oil example, it is as if the homeowner had "expected to receive his oil from Texaco without handing over any cash because he had a right of set-off against

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or may be required to retain the land if the Ontario Court (General Division) is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

A majority of jurisdictions in North America have similar "betterment statutes" which provide for statutory relief for improvements to land under certain limited circumstances. This provision constitutes a very narrow legislative exception to the principle of subjective devaluation. To fall within s. 37(1), the improvement must be made to land, must be lasting, and must be made by the person under the belief the land is his or her own. The mistaken paving company which paves the driveway at the wrong address but was never under a belief that it owned the property it was paving cannot claim a lien under s. 37(1). See A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger Law of Real Property*, vol. 2, 2d ed. (Aurora: Canada Law Book, 1985) at 1477-79; *Gay v. Wierzbicki*, [1967] 2 O.R. 211. For a recent example of the limited availability of s. 37(1), see *Olson v. Olson* (1996), 6 R.P.R. (3d) 107 (Ont. Gen. Div.).

<sup>26</sup> *LAC Minerals (C.A.)*, *ibid.* at 70.

<sup>27</sup> (1857), 62 H. & N. 564, 157 E.R. 232 (Ex. Ct.), discussed in Goff & Jones, 4th ed., *supra* note 11 at 488-89.

<sup>28</sup> In Goff & Jones, 4th ed., *supra* note 11 at 488-89, the authors also note that the foreman/plaintiff can be inferred to have known of the set-off between the defendant and Brocklehurst and realised the order was intended for Brocklehurst personally and not simply whoever owned the business.

Texaco”<sup>29</sup> and, suddenly, the enrichment disappears and recovery is no longer justified. In this sense, *Upton*, the fire brigade case discussed earlier,<sup>30</sup> is similar.

In *Boston Ice Co. v. Potter*,<sup>31</sup> Potter had in the past ordered ice from the Boston Ice Co. but had become dissatisfied with their service and terminated his contract with them. Instead, he ordered from the C. Ice Co. Unbeknownst to Potter, C. Ice Co. was then sold to the Boston Ice Co., and for a year thereafter Boston Ice Co. delivered ice to Potter and he received the ice under the assumption it was from the C. Ice Co. By the time Boston Ice Co. sought to recover for a year’s supply of ice, it had been consumed or melted. Goff and Jones consider the case to be one of officiousness on the part of Boston Ice Co. who knew full well that Potter wanted to have no business with them.<sup>32</sup> In terms of the home heating example, the change of one key fact — delivery of the oil in circumstances where Esso knew or ought to have known the homeowner did not want oil from it<sup>33</sup> — again suddenly removes the case from the comfortable category of saved inevitable expense and reveals the highly fact-specific character of all of the cases therein.

### ***B. Realisable vs. Realised in Money***

This issue is the crux of the challenge to subjective devaluation and the fundamental principles underlying restitution posed by the doctrine of incontrovertible benefit. In their fourth edition, Goff and Jones reiterate that “it is sufficient, in our view, that the benefit is *realisable*, it should not be necessary to demonstrate that it has been *realised*.”<sup>34</sup> Birks is their prime opponent in academia; he would limit recovery for services mistakenly conferred without request or free acceptance to cases where the defendant has *in fact* realised the improvement to the land or chattel and turned it into money, typically by selling it.<sup>35</sup> Realisation in money precludes the argument that the defendant subjectively devalues the services or resulting improvements (or preferred the land or chattel as it was before) since money is by definition immune from subjective devaluation. In such a case, though, there is no need for a new doctrine or innovation called “incontrovertible benefit”; the natural, common sense limit on the

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<sup>29</sup> “Incontrovertible”, *supra* note 15 at 331. See also *McKeown v. Cavalier Yachts Pty Ltd.* (1988), 13 N.S.W.L.R. 303 (Eq. Div.) at 313, Young J. (owner requests improvements to his chattel but mistakenly believes they are already paid for).

<sup>30</sup> *Supra* note 10.

<sup>31</sup> 123 Mass. 28 (1877).

<sup>32</sup> Goff & Jones, 4th ed., *supra* note 11 at 490.

<sup>33</sup> “Incontrovertible”, *supra* note 15 at 331.

<sup>34</sup> Goff & Jones, 4th ed., *supra* note 11 at 23.

<sup>35</sup> Birks, *supra* note 6 at 121. Burrows cannot seem to decide where he stands on this issue: in A.S. Burrows, *The Law of Restitution* (London: Butterworths, 1993) at 10, he prefers Birks’s formulation, but in “Free Acceptance”, *supra* note 6 at 584 he says a defendant may be incontrovertibly benefited where “the improvement is readily realisable in money.” Maddaugh & McCamus, *supra* note 12 at 42 write that incontrovertible benefit can perhaps be established where the asset serviced or improved has a value realisable by the defendant.

principle of subjective devaluation posed by receipt of money is sufficient. The realisable in money argument, in contrast, marks a fundamental break from the principles of restitution as traditionally understood, and henceforth the term “incontrovertible benefit” will be used to refer to this dimension of the concept alone.

### III. Incontrovertible Benefit in the Courts

#### A. *Greenwood v. Bennett*<sup>36</sup>

Lord Denning’s decision in this United Kingdom Court of Appeal case is the genesis of the doctrine of incontrovertible benefit. Bennett was a car dealer authorized by his company to sell a Jaguar that first needed some repairs. For this purpose it was entrusted to a Mr. Searle. Instead of repairing the car, Searle took it out on the road where he was involved in a collision. The car was extensively damaged, and Searle, without any colour of right, sold it for £75 to a garage owner, Mr. Harper. Harper bought it in good faith and did labour and repairs on it, to the tune of £226. He then sold it to a finance company which let it out on a hire-purchase agreement to a Mr. Prattle. Bennett’s company finally located the car, the police seized the car from Prattle, and the police, in the form of Const. Greenwood, brought interpleader proceedings. The matter resolved itself into a contest between Bennett (for his company), and Harper, who had bought the car from the rogue Searle. The County Court Judge held that Bennett’s company was entitled to the car and Harper was entitled to nothing. Harper appealed, requesting that he be paid £226 for the work done on the car. It was clear that Harper acted under an honest but mistaken belief that he had title. In allowing the appeal, Lord Denning M.R. put the issue in these words:

[Counsel for Mr. Bennett] has referred us to the familiar cases which say that a man is not entitled to compensation for work done on the goods or property of another unless there is a contract express or implied, to pay for it. We all remember the saying of Pollock C.B.: “One cleans another’s shoes; what can the other do but put them on?”: *Taylor v. Laird* (1856) 25 L.J. Ex 329, 332. That is undoubtedly the law when the person who does the work knows, or ought to know, that the property does not belong to him. He takes the risk of not being paid for his work on it. *But it is very different when he honestly believes himself to be the owner of the property and does the work in that belief...* Here we have an innocent purchaser who bought the car in good faith and without notice of any defect in the title to it. He did work on it to the value of £226. The law is hard enough on him when it makes him give up the car itself. It would be most unjust if the company could not only take the car from him, but also the value of the improvements he has done to it — without paying for them.<sup>37</sup>

As a result of Lord Denning’s lone opinion in *Greenwood*, some academics, including Goff and Jones, have concluded that where the plaintiff mistakenly improves

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<sup>36</sup> (1972), [1973] 1 Q.B. 195, [1972] 3 All E.R. 586 (C.A.) [hereinafter *Greenwood* cited to Q.B.].

<sup>37</sup> *Ibid.* at 202 [emphasis added].

the defendant's chattels, even without request or free acceptance by the defendant, the defendant must pay the plaintiff for the objective value of those services on a *quantum meruit* basis because the services are realisable in money. In *Greenwood*, Bennett would owe Harper the £226 for his services, and if necessary would have to sell the Jaguar for £400-450 to get the cash to pay Harper. With what remains Bennett can, if he really does prefer the Jaguar in a beat-up condition, pay £75 for a replacement vehicle which suits his subjective preferences.

There are at least three problems with the leap from Lord Denning's opinion in *Greenwood* to incontrovertible benefit and the assault on subjective devaluation, not counting the fact that his was only one of three judgements in the Court of Appeal. First, Bennett was a car dealer who first entrusted the car to the rogue Searle in order for him to do repairs on the car.<sup>38</sup> Suppose Bennett had figured out that Searle was a rogue before Searle sold the car to Harper and had recovered the beat-up Jaguar instead. As Searle was judgement-proof, the damage to the car is just Bennett's loss and the law cannot help him. But he would still have had to get the car repaired in order for it to be saleable. Bennett wanted a car in saleable condition and that is what he got. Viewed in this light, Harper was just providing a service that Bennett would have had to contract out and pay for anyway, and *Greenwood* becomes a case of factual necessity like *LAC Minerals*.

Secondly, Bennett had in fact sold the repaired Jaguar for £400. He had realised the market value of the improvements provided by Harper in money which cannot be subjectively devalued. In both these ways, *Greenwood* did not call on the Court to alter the fundamental principle of subjective devaluation; rather, this is a case where the facts did not allow for a persuasive claim of subjective devaluation.

Thirdly, Lord Denning found it unjustifiable for the *quantum meruit* claim not to succeed because, if Bennett had sued Harper for conversion, the Common Law would have required Bennett to pay some "fair and just allowance" for the improvements, and would have thereby reduced any damages recovered by Bennett.<sup>39</sup> Indeed, these differing results do seem incongruous, but it is submitted that the solution lies not in

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<sup>38</sup> Birks, *supra* note 5 at 124; P. Birks, "Restitution for Services" (1974) 27 *Curr. Leg. Probs.* 13 at 24.

<sup>39</sup> *Peruvian Guano Co. v. Dreyfus Bros & Co.*, [1892] A.C. 166 (H.L.) at 176, Lord Macnaghten. Lord Denning also notes that a suit against Prattle in detinue would not allow Bennett to recover the full value of the improved car without deduction. Similar reasoning was used in *Mayne v. Kidd*, [1951] 2 D.L.R. 652, 1 W.W.R. (N.S.) 833 (Sask. C.A.), where the majority noted that if the defendant had been forced to sue in detinue for a return of the wheat, he would have been obliged to pay for the increased value resulting from the plaintiff's cleaning and ruled he should not be able to recover more in one action as opposed to another. Birks also explains *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149, and *Boardman v. Phipps* (1966), [1967] 2 A.C. 46, [1966] 3 All E.R. 721, by suggesting that where there is a claim by a defendant for counter-restitution from the plaintiff for some "benefit" the plaintiff gained during the course of their dealings, for the plaintiff to raise the issue of subjective devaluation would endanger his principal claim and so the court may value the counter-restitution claim objectively unopposed: Birks, *supra* note 5 at 125-26, 420.

discarding subjective devaluation, rather, the Common Law rules regarding allowance in detinue and conversion should be changed and brought in line with contemporary principles in restitution.

### **B. Incontrovertible Benefit in Canadian Courts**

Though *Greenwood* has generally been met with a chilly and cautious reception in Canada,<sup>40</sup> there are two Canadian cases frequently cited in support of the realisable in money argument. In *Estok v. Heguy*,<sup>41</sup> the plaintiff had agreed to buy land from the defendant and, in the mistaken belief that there was a valid contract ready, the defendant gave the plaintiff permission to enter onto the land before completion of the contract. The plaintiff began to work the land and deposited \$350 worth of manure in order to make it arable. The parties had failed, however, to agree on an essential term of the contract and the Court found there was no binding agreement between them. Nonetheless, the British Columbia Supreme Court held that the plaintiff could recover the \$350, even while accepting the defendant's evidence that he had neither requested nor accepted the manuring and he now intended to use the land for subdivision development and so the manuring was of no value to him. Goff and Jones, and Bradley Crawford all consider *Estok* to be simply wrong, noting that the defendant had no use for the manuring and was thus not enriched, and Jones has reiterated his view in a further article.<sup>42</sup>

*Estok* is usually paired with another British Columbia case decided some fourteen years later: *T & E Development Ltd. v. Hoornaert*.<sup>43</sup> In this case, an agreement for purchase and sale of land was conditional upon the registration of a subdivision plan but did not stipulate when registration was to occur. The plaintiff purchaser who had entered onto and improved the land was prepared to waive this difficulty, but the vendor insisted the contract fail for want of certainty. The plaintiff sued for specific performance and lost, but the Court, considering itself bound by *Estok*, granted the plaintiff's claim for the value of the improvements made to the land despite the defendant's insistence that they had not increased the value of the land for the purposes he now had in mind for it. Maddaugh and McCamus attribute the result to "the unmeritorious nature of the vendor's withdrawal" and suggest the case can best be understood as one of a breach of the duty to bargain in good faith.<sup>44</sup>

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<sup>40</sup>See *Republic Resources*, *supra* note 25 at 401; *MacLaren v. Canada*, [1984] 2 F.C. 899 (T.D.). See also *Gidney v. Feverstein*, *infra* note 70.

<sup>41</sup>(1963), 40 D.L.R. (2d) 88, 43 W.W.R. 167 (B.C. S.C.) [hereinafter *Estok* cited to D.L.R.].

<sup>42</sup>Goff & Jones, 3d ed, *supra* note 2 at 383; Goff & Jones, 4th ed., *supra* note 11 at 486; B. Crawford, Case Comment (1964) 42 Can. Bar Rev. 318; and Jones, *supra* note 21 at 293.

<sup>43</sup>(1977), 78 D.L.R. (3d) 606 (B.C. S.C.).

<sup>44</sup>Maddaugh & McCamus, *supra* note 12 at 400. See also *Brewer Street Investments Ltd. v. Barclays Woolen Co.* (1953), [1954] 1 Q.B. 428, [1953] 2 All E.R. 1330 (C.A.).

*Estok* and *T & E Development* are exceptions, however, to a far broader line of case law exemplified by *Nicholson v. St. Denis*.<sup>45</sup> In that case, St. Denis had sold a piece of land to one Labelle, who in turn had contracted with Nicholson to put aluminium siding and to do other exterior work on the building. Labelle then defaulted on the agreement of purchase and sale for the land and St. Denis evicted him from the premises. Nicholson sued Labelle under the renovation contract and won default judgment. Nicholson then sought to recover from St. Denis "on the ground that St. Denis had 'received the benefit of said work.'"<sup>46</sup> Nicholson won at trial but lost on appeal. The Court of Appeal ruled:

It is difficult to rationalize all of the authorities on restitution.... It can be said, however, that in almost all of the cases the facts established that there was a *special relationship* between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff.... This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.<sup>47</sup>

The "special relationship" test has been frequently applied by lower courts<sup>48</sup> despite having no basis whatsoever in principles underlying restitution, and *Nicholson* has attracted heavy criticism for this reason. At the very end of his judgment, however, MacKinnon J.A. gives a succinct and independent argument from subjective devaluation to the effect that St. Denis cannot be made to pay for aluminium siding work carried out on his property, unbeknownst to him and through no fault of his own, which he neither sought nor desired.<sup>49</sup> Special relationship aside, this argument in *Nicholson* reflected the prevailing law in Canada until the Supreme Court of Canada decision in *Peel (Regional Municipality of) v. Canada*.<sup>50</sup>

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<sup>45</sup> (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.) [hereinafter *Nicholson* cited to O.R.], rev'g (1974), 4 O.R. (2d) 480, 48 D.L.R. (3d) 344 (Dist. Ct.).

<sup>46</sup> *Nicholson*, *ibid.* at 316.

<sup>47</sup> *Ibid.* at 317-18 [emphasis added].

<sup>48</sup> See *Preeper v. Preeper* (1978), 27 N.S.R. (2d) 82, 84 D.L.R. (3d) 74 (S.C.T.D.).

<sup>49</sup> MacKinnon J.A. also denies recovery on the ground that "the plaintiff had an enforceable contract with Labelle": *Nicholson*, *supra* note 45 at 320. It is, of course, a well-settled rule that in the absence of a further contract between the owner and the sub-contractor, the sub-contractor can only recover from the contractor and not the owner (see *Standing v. London Gas Co.* (1861), 21 U.C.Q.B. 209 (C.A.), *Craig v. Matheson* (1900), 32 N.S.R. 452 (C.A.)). This rule survives not simply as a relic of the age of rigidity in contract law or the age when restitution was conceived of as quasi-contract. Each of these contracts allocates among the various parties the risk of non-payment, and "it is unwise to cut across contractual boundaries and to redistribute to a stranger, such as the owner, the risks which the plaintiff implicitly agreed to bear when he contracted with a third party. ... Moreover, ... to allow the subcontractor a direct claim against the landowner may result in the subcontractor gaining priority over the contractor's general creditors in the event of insolvency" (Goff & Jones, 4th ed., *supra* note 11 at 55).

<sup>50</sup> [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140 [hereinafter *Peel* cited to S.C.R.].

### C. Peel<sup>51</sup> and the Spectre of Incontrovertible Benefit Doctrine in Canada

Under section 20(1) of the federal *Juvenile Delinquents Act*,<sup>52</sup> courts could make a variety of orders with respect to care and custody of children found to be juvenile delinquents. Section 20(2) of the Act permitted judges to order either the parents of the child or the municipality in which the child was situated to "contribute to the child's support in such sum as the court may determine." Section 20(2) also allowed a municipality to recover any money paid pursuant to such an order from the child's parents.

The Regional Municipality of Peel challenged the *JDA* on the ground it was *ultra vires* Parliament to order a municipality to contribute to the support of juveniles under a federal act. In 1982, the Supreme Court agreed.<sup>53</sup> Peel then sought to recover the \$1.2 million which it had spent on the care of juveniles under section 20(2) orders from either the Ontario government or Ottawa on the basis of unjust enrichment. In both cases, relief was granted at trial but rejected on appeal.<sup>54</sup>

In her judgement on behalf of the Supreme Court, McLachlin J. discusses the philosophical - policy tension in the law of restitution. She writes:

The traditional reluctance of the law to permit recovery to a plaintiff who had provided non-contractual benefits to another was founded on a philosophy of robust individualism which expected every person to look out after his or her own interests and which placed premium on the right to choose how to spend one's money. As one nineteenth century judge (Pollock, C.B. in *Taylor v. Laird* (1856), 25 L.J. Ex. 329, at p. 332) put it: "One cleans another's shoes; what can the other do but put them on?" The new approach of general principle, on the other hand, questions the merits of this view and the quality of justice which it entails. It shrinks from the harsh consequences of individualism and seeks to effect justice where fairness requires restoration of the benefit conferred.<sup>55</sup>

According to McLachlin J., "the new approach of general principle" aims to do justice in each individual case by reasoning from first principles laid down in *Pettikus v. Becker*.<sup>56</sup> In contrast, the "categorical" approach seeks to establish certainty in the law

<sup>51</sup> The following synopsis is taken from the case itself as well as from D. Stevens, *supra* note 17 at 84ff and M. 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.

<sup>52</sup> R.S.C. 1970, c. J-3 [hereinafter *JDA*], predecessor to the *Young Offenders Act*, R.S.C. 1985, c. Y-1.

<sup>53</sup> *Peel (Regional Municipality of) v. MacKenzie*, [1982] 2 S.C.R. 9, 139 D.L.R. (3d) 14. The Court of Appeal decision is reported at (1980), 29 O.R. (2d) 439, 113 D.L.R. (3d) 350 (C.A.). The trial judgment of Van Camp J. is not reported.

<sup>54</sup> See *Peel (Regional Municipality of) v. Ontario* (1990), 1 O.R. (3d) 97, 75 D.L.R. (4th) 523 (C.A.), rev'g (1988), 64 O.R. (2d) 298, 49 D.L.R. (4th) 759 (H.C.J.); *Peel (Regional Municipality of) v. Canada* (1988), [1989] 2 F.C. 562, 55 D.L.R. (4th) 618 (C.A.), rev'g (1986), [1987] 3 F.C. 103, 7 F.T.R. 213 (T.D.).

<sup>55</sup> *Peel*, *supra* note 50 at 785-86.

<sup>56</sup> [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [hereinafter *Pettikus* cited to S.C.R.].

of restitution by "looking to see if the case fits into any of the categories of cases in which previous recovery has been allowed."<sup>57</sup> McLachlin J. urged "a middle path" between these tensions in the law.<sup>58</sup>

With respect, these "tensions" are rather misapprehended. Firstly, it is a gross misnomer to call any approach to legal problems which simply seeks to "effect justice and fairness" in each case "principled". There is nothing principled about an approach which offers litigants and trial judges no further guidance than an admonishment to seek justice; "*ad hoc*" would be a better description. In contrast, the traditional rule which denies recovery where the plaintiff has conferred a service neither requested nor freely accepted by the defendant is, in fact, based on a clear and well-defended principle, namely subjective devaluation. To suggest this principle is part and parcel of a categorical or "pigeon-hole" approach is incorrect and unwarranted. Finally, as will be discussed below,<sup>59</sup> subjective devaluation is perfectly consistent with the first principles articulated in *Pettkus*.<sup>60</sup> Upon closer scrutiny, the suggestion that principle somehow requires the law to move away from subjective devaluation rings very hollow.

The Regional Municipality of Peel was unable to fit its case within the recognised category of recovery in restitution known as recoupment, and so it argued that there were three factors sufficient to establish a benefit on the part of the federal and provincial governments under the principled approach:<sup>61</sup> first, the potential benefit received by Ottawa and the province of being saved the costs of caring for juveniles; second, Peel's discharge of a "political, social, or moral responsibility of the defendant"; and third, the "general 'political' benefit of having the goals of its legislation furthered." To complete its case within the *Pettkus* framework, Peel argued that it would be unjust to deny recovery and allow the federal and provincial governments to retain these benefits where the federal legislation which required the municipality to make the payments was found to be *ultra vires*.

The Supreme Court dismissed Peel's appeal at the benefit stage of the analysis, and expressly refrained from addressing whether the decision of LaForest J. in *Air Canada v. British Columbia*<sup>62</sup> created a general rule barring recovery against govern-

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<sup>57</sup> *Supra* note 50 at 784. Perhaps the most memorable recent example of the categorical approach is the House of Lords' decision in *Orakpo v. Manson Investments Ltd.* (1977), [1978] A.C. 95, [1977] 3 All E.R. 1 (H.L.), where Lord Diplock denied the existence of any "general doctrine" of unjust enrichment in English law.

<sup>58</sup> *Ibid.* at 786.

<sup>59</sup> See Part V.

<sup>60</sup> *Supra* note 56.

<sup>61</sup> See *Peel*, *supra* note 50 at 792-93.

<sup>62</sup> [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161 [hereinafter cited to S.C.R.]. The province had imposed a tax on purchases of gasoline that was *ultra vires* the province. The airline sought to recover moneys paid to the province under the *ultra vires* tax based on unjust enrichment. The Supreme Court of Canada refused to allow the airline to recover in part because of the likely disruption of public finances. LaForest J. wrote: "[T]here are solid grounds of public policy for not according a general

ments for charges imposed under invalid legislation. Rather, the decisive issue, as McLachlin J. framed it, was whether “benefit” in the general test for unjust enrichment could be defined to encompass payments which fall short of discharging the defendant’s legal liability, but which nonetheless confer an incontrovertible benefit on the defendant.<sup>63</sup>

McLachlin J. reviewed the scholarly work in support of the doctrine of incontrovertible benefit and wrote “[a]ccepting for the purposes of argument that the law of restitution should be extended to incontrovertible benefits, the municipality still falls short of the law’s mark.”<sup>64</sup> She writes:

[T]he federal and provincial governments were under no legal obligation [to pay directly for juveniles’ care] ... It was neither inevitable nor likely, in McInnes’[s] phrase, that in the absence of a scheme which required payment by the municipality the federal or provincial government would have made such payments; an entirely different scheme could have been adopted ....

The fact that the municipality’s payments can be said to have furthered Canada’s general interest in the welfare of its citizens or its more particular interest in the effective administration of its scheme for the regulation of criminal conduct by minors is an insufficient “correlative link” upon which to found recovery even on the application of the broader “incontrovertible benefit” doctrine; it falls short of proof of a “*demonstrable financial benefit*” or proof that the federal government was saved an “*inevitable expense*”. The principle of freedom of choice ... is not a “spent force” in this instance.<sup>65</sup>

Rarely is the Supreme Court so explicit that it is offering alternative arguments in *obiter*. Nonetheless, the tenor of McLachlin J.’s judgment was open to the recognition of a doctrine of incontrovertible benefit in Canada consisting of two branches: saved inevitable expense and demonstrable financial benefit. The latter’s relation to the realised versus realisable in money issue is unclear. Moreover, despite her language of “saved inevitable expense” at several points in her discussion, McLachlin J. writes that incontrovertible benefit may be found where it is *likely* that a defendant would have paid for the benefits in question or “where it is clear on the facts (on a balance of probabilities) that had the plaintiff not paid, the defendant would have done so.”<sup>66</sup> Though it is true that the defendant’s valuation of a purported benefit is a question of fact, McLachlin J.’s framing of the question invites courts to find incontrovertible

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right of recovery in these circumstances, and ... this prohibition exists quite independently of the law or restitution. ... [F]iscal chaos ... would result if the general rule favoured recovery, particularly where a long-standing taxation measure is involved” (at 1204). For a critique of this case, see P. Michell, “Restitution, ‘Passing On’, and the Recovery of Unlawfully Demanded Taxes: Why Air Canada Doesn’t Fly” (1995) 53 U.T. Fac. L. Rev 130.

<sup>63</sup> *Supra* note 50 at 797.

<sup>64</sup> *Ibid.* [emphasis added].

<sup>65</sup> *Ibid.* at 798-99 [emphasis in original].

<sup>66</sup> *Ibid.* at 796.

benefit far more readily than the “no reasonable man” test would permit. “Saved inevitable expense” is a far cry from “saved likely expense.”<sup>67</sup>

#### D. Incontrovertible Benefit in the Courts Since Peel

Despite their *obiter* nature, these signals from *Peel* have been received by lower courts as establishing the doctrine of incontrovertible benefit in our law of restitution.<sup>68</sup> In *Olchowy v. McKay*,<sup>69</sup> the plaintiff had transferred a piece of land to a bank in satisfaction of a debt, while retaining a right of first refusal if anyone offered to buy it from the bank. The defendant offered to purchase the land for \$17,000 and the bank accepted, subject to the plaintiff’s right of first refusal. The plaintiff was able to arrange \$17,000 worth of financing from a local credit union, but the credit union failed to notify the bank and so the land was sold to the defendant. Operating under the mistaken belief that he had exercised the right of first refusal and retained title to the land, the plaintiff worked the land, rock picking, fertilizing, spraying and seeding the land for canola. When the defendant took possession of the land, the plaintiff sued for some \$6,000 for his improvements to the land.

On the facts, the defendant had actually witnessed the plaintiff seeding the land after the expiry of the right of first refusal and so the Small Claims Court found free acceptance. The defendant appealed to the Court of Queen’s Bench. While making reference to free acceptance, the thrust of the Court’s finding of enrichment was based on incontrovertible benefit. Quoting from *Peel* and *Maddaugh and McCamus*, the trial judge wrote: “Clearly, the appellants have benefited from the actions of the respondent in seeding land he mistakenly believed was his own. This conclusion is supportable, notwithstanding subjective devaluation, because the harvested canola crop is ‘realizable value’ in the hands of the appellants.”<sup>70</sup>

In *Gidney v. Shank*,<sup>71</sup> a case eerily reminiscent of *Greenwood*,<sup>72</sup> the plaintiff purchased a dilapidated canoe for \$100 and spent \$806.25 to repair it and have it fibreglassed. The plaintiff purchaser was unaware that the canoe had been stolen from the defendant, and had passed through various hands before reaching the plaintiff. The

<sup>67</sup> See Stevens, *supra* note 17 at 97-98.

<sup>68</sup> See *Toronto Dominion Bank v. Bank of Montreal* (1995), 22 O.R. (3d) 362, 18 B.L.R. (2d) 248 (Gen. Div.); *Alyea v. South Waterloo Edgar Insurance Brokers Ltd.* (1993), 50 C.C.E.L. 266, 20 C.C.L.I. (2d) 81 (Ont. Gen. Div.); *G.J.V. Investments Ltd. v. Katz*, [1993] B.C.W.L.D. 872, B.C.J. No. 466 (S.C.), online: QL (BCJ); *Halifax (City of) v. Nova Scotia (A.G.)* (1996), 153 N.S.R. (2d) 77, [1997] N.S.J. No. 260 (S.C.), online: QL (NSJ).

<sup>69</sup> *Olchowy v. McKay* (1995), 13 Sask. R. 241, [1996] 1 W.W.R. 36 (Q.B.) [hereinafter cited to Sask. R.].

<sup>70</sup> *Ibid.* at 249. In the end, the Saskatchewan *Land Titles Act*, R.S.S. 1978, c. L-5, barred recovery because the plaintiff had failed to register or caveat his interest in the land.

<sup>71</sup> *Gidney v. Feverstein* (1995), 101 Man. R. (2d) 197, (*sub nom. Gidney v. Shank*) [1995] 5 W.W.R. 385 (Q.B.) [hereinafter *Gidney* (Q.B.) cited to Man. R.].

<sup>72</sup> *Supra* note 36.

police seized the canoe, returning it to the original owner, and the plaintiff sued in restitution for the cost of the repairs.

The trial judge adopted Goff and Jones's, and Maddaugh and McCamus's formulations of incontrovertible benefit, quoting both of them, including their arguments that benefits realisable in money by the defendant are sufficient to impose liability.<sup>73</sup> However, her application of incontrovertible benefit to the facts did not cite this or any other specific dimension of the doctrine and instead was highly fact specific:

Where a canoe is unusable as a water craft before the repairs and becomes useable as a result of the repairs, there is clearly sufficient evidence to establish, on an objective basis, that the improvements to the chattel were of benefit to the defendant, as his useless canoe was turned into a useful water craft. This improvement qualifies as an "incontrovertible benefit" as earlier defined.<sup>74</sup>

The Judge had little difficulty reaching these conclusions on the facts because the defendant was not represented at trial. He had argued in the statement of defence that lack of request or free acceptance disposed of the plaintiff's claim, an incorrect contention which the Judge rejected. The Court had no further submissions from the defendant, such as arguing that he had other uses for the canoe or would not have chosen to make the particular repairs the plaintiff made, either because of priority of payments or a subjective preference for wood over fibreglass, or for a brand new canoe over a repaired one.

The Manitoba Court of Appeal<sup>75</sup> overturned this decision, finding no injustice in the defendant's retention of the improved canoe based on the lack of a prior relationship between the plaintiff and defendant. Though not cited by the Court of Appeal, this decision echoes the unsound special relationship argument in *Nicholson*.<sup>76</sup> On the issue of incontrovertible benefit, however, Huband J.A. said he was "in full accord" with the trial judge's conclusions on the issue of the defendant's enrichment.<sup>77</sup> This decision thus reflects a growing trend in the jurisprudence since *Peel* to accept, with little caution or qualification, the doctrine of incontrovertible benefit as put forth by McInnes, Goff and Jones, and others.

#### IV. The Idea Behind Private Law

The fallacy behind the doctrine of incontrovertible benefit becomes acutely apparent when one analyzes the principles underlying restitution. Restitution or unjust enrichment is the most recent conceptual addition to those disciplines known collec-

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<sup>73</sup> *Ibid.* at 207. Beard J. also calls *Greenwood v. Bennett* a "leading ... case" (*ibid.* at 208); see also *Republic Resources*, *supra* note 25 at 401.

<sup>74</sup> *Gidney* (Q.B.), *ibid.* at 209.

<sup>75</sup> *Gidney v. Shank* (1995), [1996] 2 W.W.R. 383, 109 W.A.C. 208 (Man. C.A.) [hereinafter *Gidney* (C.A.) cited to W.W.R.].

<sup>76</sup> *Supra* note 45.

<sup>77</sup> *Gidney* (C.A.), *supra* note 71 at 385.

tively as “private law” such as contract, tort, trusts and property. The crucial feature of all these areas of law which distinguishes them from what might be called “public law” (criminal law, administrative law, the law of evidence, even areas such as labour, family, and corporate and securities law which are now deeply pervaded by principles of distributive justice) is the requirement of a “direct connection between the particular plaintiff and the particular defendant.”<sup>78</sup> The past twenty-five years has seen the academic study of private law dominated by law and economics and critical legal studies which are animated by the idea that private law is not “an autonomous body of learning” or an intellectual discipline in its own right, but rather exists to serve some external purpose.<sup>79</sup> Ernest Weinrib calls these approaches “functionalist”<sup>80</sup> and argues that the focus on external goals rather than on the nature of the connection between plaintiff and defendant (which still must be shown in order to get into court and to eventually win) reveals functionalism’s fundamental flaw:

Instead of relating the parties directly to each other, functionalism inquires into the goals that assessing damages against the defendant and awarding damages to the plaintiff might separately serve. Having bifurcated the parties’ relationship, functionalist approaches cannot treat seriously the features that express the plaintiff’s direct connection to the defendant.<sup>81</sup>

Because of the central importance of this direct connection between plaintiff and defendant, Weinrib rejects functionalist approaches in favour of a return to legal formalism<sup>82</sup> and an internal understanding of private law.

In the process of exploring the nature of the connection between plaintiff and defendant which marks private law’s claim to be an autonomous intellectual discipline, Weinrib identifies the Aristotelian conception of corrective justice as the unifying principle that links plaintiff and defendant in their private law relationship.<sup>83</sup> Aristotle conceived of the proper or just position of two private parties as two lines of equal length. Injustice consists of wrongful gains by the defendant and correlative losses to the plaintiff which simultaneously lengthen the defendant’s line and shorten the plaintiff’s. Corrective justice re-establishes the initial equality between the parties by ordering the defendant to return the wrongful gain to the plaintiff, removing the extra segment from the defendant’s line and reattaching it to the plaintiff’s.<sup>84</sup> As Weinrib writes:

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<sup>78</sup> E.J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) at 10.

<sup>79</sup> Although these schools of thought share the view that private law is not autonomous, their explanations and prescriptions are widely divergent.

<sup>80</sup> *Supra* note 76 at 6-8.

<sup>81</sup> *Ibid.* at 11.

<sup>82</sup> It should be noted that Weinrib’s version of legal formalism is not the same as that which is criticized by Hart and the realists.

<sup>83</sup> *Supra* note 76 at 19. See also E.J. Weinrib, “The Gains and Losses of Corrective Justice” (1994) 44 *Duke L.J.* 277 [hereinafter “Gains”].

<sup>84</sup> See “Gains”, *ibid.* at 280.

Thus corrective justice does not view the gain and the loss as discrete phenomena that happen to coincide. The sufferer loses by virtue of the defendant's gain and vice versa. ... Similarly, the judge's re-establishment of the parties equality does not consist of two independent operations, one of which removes the gain and the other of which repairs the loss.<sup>85</sup>

Finally, what is the nature or content of these Aristotelian lines and the gains and losses that corrective justice equalises? Instinctively, it is not material wealth or income. The fact that one party to a contract is richer than the other does not make that party liable in a breach of contract case; nor does the mere fact that one party may have gained more from the deal while the other party lost on the bargain. The fact that the defendant in a tort case is a giant corporation does not render it liable, rather, causation and negligence on the part of the corporation must be shown for the plaintiff to recover for injuries. Moreover, if Aristotle's lines represented material wealth, plaintiff and defendant would have to have had equal resources before the tort or breach of contract for corrective justice to operate. This surely cannot be the meaning of Aristotle.<sup>86</sup> Rather, these Aristotelian lines are normative in the sense that they represent the respective rights and duties held by private parties in their relations with one another, where gains represent violations or takings of another party's rights by the defendant while losses represent the denial of the plaintiff's rights.<sup>87</sup>

Following Aristotle, Weinrib distinguishes corrective justice from distributive justice. In distributive justice, a benefit or a burden is distributed among various persons according to some criterion which determines their comparative merit.<sup>88</sup> Scholastic bell-curveing is an example of distributive justice: no matter how well a particular student does, the mark is really determined by comparative ranking in relation to other students, and even a fantastic job can result in a C if enough students have done so much better that they merit all the As and Bs. The criterion chosen usually represents an external purpose that is not inherent in the relationship between the parties but is imposed on the relationship from outside. Ontario's *Family Law Act*,<sup>89</sup> for example, deems spouses to have made an equal contribution to net family property (as defined in the *FLA*) accumulated during the marriage and foregoes any inquiry into whether the stay-at-home spouse has in actual fact contributed equally to the wealth accumulated.

Distributive justice is a close relative of functionalism in that "the selection of a particular distribution involves a decision about the desirability of a particular collective goal" and that selection of such a criterion, independent of normative rights, is an inherently political choice.<sup>90</sup> This is not to say that legislative interventions like the

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 285.

<sup>87</sup> Weinrib calls these "Kantian rights": see *supra* note 76 at 84-114 and "Gains", *supra* note 81 at 289-93.

<sup>88</sup> *Supra* note 76 at 62.

<sup>89</sup> R.S.O. 1990 c. F-3 [hereinafter *FLA*], s. 5(7) Pt. I.

<sup>90</sup> Weinrib, *supra* note 76 at 210-11.

FLA are somehow *ipso facto* wrong, rather that they should be recognised as departures from corrective justice. Moreover, in the absence of such legislation, it seems undemocratic for unelected judges to depart from a corrective justice approach in favour of one distributive criterion which they alone select from among the available options. Thus the law of restitution — as well as contract, tort, trusts, and to some extent property law, which remain in the private law realm — should continue to be governed by corrective justice, with appeals to distributive justice made to the legislature and not to the bench.

## V. Corrective Justice in the Law of Restitution

Corrective justice is reflected in the classic formulation of unjust enrichment made by Dickson C.J.C. in *Pettkus*: “an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment.”<sup>91</sup> Thus for a particular plaintiff to be entitled to restitution from a particular defendant, the plaintiff must show that the particular defendant was enriched at the plaintiff’s expense: “[I]n restitution it is not material that the plaintiff has suffered a loss if the defendant has gained no benefit.”<sup>92</sup> This article will argue that a person in the position of a defendant in a restitution case can only be considered to have been enriched if the defendant personally and subjectively values the benefit in question in a material sense.

### A. A Defendant-Centered Approach to Restitution

The identification of benefits is only one of many instances in which the law of restitution gives unique primacy to the point of view of defendants and their right to order their own priorities. In large part, this derives from the fact that the receipt of the benefit by the defendant does not constitute an actionable wrong; if it did, the plaintiff would claim in tort or contract.<sup>93</sup> Rather, assuming there is a recognised benefit in the defendant’s hands, the issue at the third stage of the analysis of unjust enrichment is whether it would be unjust for the defendant to retain the benefit. The crucial importance of the retention of a benefit as opposed to its receipt in the law of restitution goes back to the seminal case of *Moses v. Mcferlan*.<sup>94</sup>

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<sup>91</sup> *Supra* note 56 at 848. Similarly, paragraph 1 of the *American Restatement on the Law of Restitution* (1937) [hereinafter *Restatement*] states that “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other”. Likewise, Goff & Jones formulate the principle of unjust enrichment as follows: “First, the defendant must have been enriched by a receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff’s expense. Thirdly, it would be unjust to allow the defendant to retain that benefit.”: Goff & Jones, 4th ed., *supra* note 11 at 16 [emphasis removed].

<sup>92</sup> Goff & Jones, 3d ed., *supra* note 2 at 16.

<sup>93</sup> Subject, of course, to “waiver of tort”, what Birks calls “restitution for wrongs”, which allows for recovery by the plaintiff of the defendant’s gain rather than the plaintiff’s loss: *supra* note 5.

<sup>94</sup> (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.). See also the formulations of the principle of unjust enrichment in Goff & Jones, 4th ed., *supra* note 11 at 16 and *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942), [1943] A.C. 32 at 61, [1942] 2 All E.R. 122 at 135-36, Lord Wright.

“Unjust enrichment” is useful shorthand for this concept which will be used in this article, but it can obscure this crucial distinction. The enrichment is not the receipt but the retention of the benefit in question. What makes the retention of a benefit unjust where the defendant has done nothing wrong in receiving the benefit? Writers and academics are often quick to conclude that where it seems unjust that the plaintiff has rendered a service unofficially but receives nothing in return, the criteria for unjust enrichment are satisfied. While injustice from the plaintiff’s perspective can be illuminating, it behooves us to recall that restitution is granted where it would be unjust for the defendant to retain the benefit. This is different from the issue of whether, from the plaintiff’s point of view, it seems just that time or work that has been wasted. The justness or unjustness of retaining the benefit from the defendant’s perspective cannot be underestimated or minimised. It is the *sine qua non* of restitution and it is what distinguishes restitution from contract or tort. The fact that there may be some deserving plaintiffs who should get value for their services but whom the law does not allow to recover does not mean the law of restitution is somehow unfairly harsh or in need of reform, from a corrective justice viewpoint.

McLachlin J. highlighted the heightened concern for the defendant’s position and point of view in restitution, as opposed to contract or tort, in this passage from the *Peel* case:

The concept of “injustice” in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted. The restitutive form of justice is distinct from the analysis particular to tort and contract law, in the sense that questions of duty, standards, and culpability are not a central focus in restitution. ... Thus, restitution, more narrowly than tort or contract, focuses on re-establishing equality as between two parties, as a response to a disruption of equilibrium through a subtraction or taking. This observation has dual ramifications for the concept of “injustice” in the context of restitution. First, the injustice lies in one person’s retaining something which he or she ought not to retain, requiring that the scales be righted. Second, the required injustice must take into account not only what is fair to the plaintiff; it must also consider what is fair to the defendant. It is not enough that the plaintiff has made a payment or rendered services which it was not obliged to make or render; it must also be shown that the defendant as a consequence is in possession of a benefit, and it is fair and just for the defendant to disgorge that benefit.<sup>95</sup>

The defence of change of position is another example of how the law of restitution recognises the defendant’s situation as a paramount concern. This defence enables a defendant who is otherwise liable in restitution to avoid or diminish liability where circumstances have changed since the receipt of the benefit such that full restitution would leave the defendant in a worse position than before and it would thus be inequitable to require full restitution.<sup>96</sup> In the typical change of position case, the

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<sup>95</sup> *Supra* note 50 at 804.

<sup>96</sup> J. Dawe, “The Change of Position Defence in Restitution” (1994) 52 U.T. Fac. L. Rev. 275 at 276; *Restatement, supra* note 89 at § 142; Goff & Jones, 3d ed., *supra* note 2 at 691; *Storthoaks (Ru-*

plaintiff has made a mistaken payment which should otherwise be recoverable, but the defendant, having no reason to believe that the payment was a mistake, has squandered the money on an indulgent vacation or an unusually risky investment and cannot pay it back without being left in a worse position than before.<sup>97</sup> In short, there is a loss that cannot be avoided, and the law lays it at the feet of the plaintiff who made the mistake in the first place, rather than the defendant who has done nothing wrong. As Lord Goff wrote in *Lipkin Gorman*, in such a case “the injustice of requiring [the defendant] to repay outweighs the injustice of denying the plaintiff restitution.”<sup>98</sup> The change of position defence thus reflects restitution’s particular concern with fairness to the defendant (who has committed no wrong by merely receiving the benefit), especially at “the enrichment stage of the analysis before the question of whether it is just for the defendant to retain the benefit has even arisen.”<sup>99</sup>

The typical measure of damages in restitution cases where a plaintiff is allowed to recover for services rendered, known as *quantum meruit*, is also frequently favourable to the defendant. *Quantum meruit* means “the amount earned” and is usually measured by the reasonable value of such work or services if they had been procured on the market.<sup>100</sup> The plaintiff does not recover the value of the product of the services or labour. For example, if the time, labour and parts for car repairs are \$100, but together they increase the value of the car by \$300, the plaintiff can still only recover \$100. In short, if there is to be a windfall, it goes to the defendant. For example, in cases of necessitous intervention, a successful *quantum meruit* claim entitles the doctor or rescuer only to reasonable remuneration for time and labour, not the value of the life saved as a result thereof.<sup>101</sup>

More fundamentally, private law is rooted in notions of human liberty in that it recognises that individuals have normative rights, and then leaves them free to exer-

*ral Municipality*) v. *Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 at 163-64, 55 D.L.R. (3d) 1 at 13 [hereinafter *Storthoaks* cited to S.C.R.]; *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 at 577-83, [1992] 4 All E.R. 512 at 532-36 [hereinafter *Lipkin Gorman* cited to A.C.].

<sup>97</sup> Spending the money on ordinary expenses which would have been paid anyway is insufficient: *Storthoaks*, *ibid.* at 163-64; *Lipkin Gorman*, *ibid.* at 580; *Larner v. London County Council*, [1949] 2 K.B. 683 at 688-89, 1 All E.R. 964 at 966-67 (C.A.), Denning L.J. [hereinafter *Larner* cited to K.B.].

<sup>98</sup> *Ibid.* at 579. This principle is similar to that in non est factum cases in contract: see *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.

<sup>99</sup> Change of position is also a less onerous defence than estoppel in that it does not require the defendant to show any specific representation by the plaintiff that the money belongs to the defendant: *Lipkin Gorman*, *supra* note 96 at 579; see also *R.E. Jones Ltd. v. Waring and Gillow Ltd.*, [1926] A.C. 670 (H.L.). Dawe takes the reader through the debate and issues over whether change of position belongs at the “enrichment” or “justness of retention” stage of analysis. Like Birks, quoted in this respect below, this article submits change of position is best understood as going to the identification and nature of enrichment in the law of restitution: *supra* note 94.

<sup>100</sup> See *Deglman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, 3 D.L.R. 785; G.H.L. Fridman, *Restitution*, 3d ed. (Toronto: Carswell, 1992) at 285; Jones, *supra* note 21 at 283; Goff & Jones, 3d ed., *supra* note 2 at 26-29.

<sup>101</sup> See *Hastings*, *supra* note 21; *Matheson*, *supra* note 21; *Re Agnew’s Will*, *supra* note 21; “Restitution”, *supra* note 21.

cise those rights as they see fit only so long as they do not violate the rights of others. The principle of freedom of contract, for example,

respects the dispositions individuals make of their rights [and thus] carries to its logical conclusion the liberal premise that individuals have rights. ... [The] capacity to form true and rational judgments and act on them is the heart of moral personality and the basis of a person's claim to respect as a human being.<sup>102</sup>

This freedom to order one's own priorities, limited of course by respect for others' right to do the same, also informs the law of restitution.<sup>103</sup> Ever since the first American Restatement, restitution has barred recovery for intermeddlers who officiously confer benefits on others. Officiousness was therein defined as "interference in the affairs of others not justified by the circumstances under which the interference takes place."<sup>104</sup> As Bowen L.J. wrote in *Falcke*, "[I]abilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."<sup>105</sup> A contemporary example of officiousness would be squeegee people who wash the windshields of cars stopped at intersections. The law refuses to countenance such blatant and unjustified attempts to interfere with individuals' right to order their own priorities.

A plaintiff's successful imposition of restitutionary liability on the defendant necessarily involves reordering the defendant's priorities by making the defendant pay money damages to the plaintiff or perhaps carving out a lien on property legally owned by the defendant. So long as the defendant has not violated some other normative right which would give the plaintiff a claim in tort or breach of contract, the mere receipt of any benefit by the defendant is not wrongful and thus cannot ground liability. Whether the retention of the benefit would be unjust depends first on the identification of a benefit. If there is no material benefit in the defendant's hands, however, ordering payment of damages to the plaintiff in effect leaves the defendant worse off than before and forces a reordering of priorities, even though nothing normatively wrong was done. Imposing liability on the defendant in such a case is in effect a violation of the right to order personal priorities.

### ***B. Land vs. Chattels in Incontrovertible Benefit: The Principle Behind the Distinction***

In their discussion in favour of incontrovertible benefit, Goff and Jones draw a sharp distinction between land and chattels and argue that the realisable in money principle should only apply to the latter: "[A] landowner is not obliged to make restitution to the mistaken improver even though the land can, of course, be sold or mort-

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<sup>102</sup> C. Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981) at 2, 78.

<sup>103</sup> P. Birks, "In Defence of Free Acceptance" in A.S. Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 105 at 145; see also Birks, *supra* note 5 at 150.

<sup>104</sup> *Restatement, supra* note 91 at §2. See also Goff & Jones, 3d ed., *supra* note 2 at 42-43; *Norton v. Haggett*, 85 A.2d 571 (Vt. 1952); *Owen, supra* note 8.

<sup>105</sup> *Falcke, supra* note 4 at 248.

gaged.”<sup>106</sup> The commonly cited reasons for this differing treatment are revealing of the principles underlying the realisable in money argument. McInnes writes that:

[T]he potential for crippling large claims is greater [in the case of improvements to land] than in the case of chattels because of the higher monetary values associated with land and because of the greater variety of improvements to which a parcel of land can be subject. The likelihood that the subject matter of the litigation would of necessity become the means of payment may be greater, as well, insofar as land is often a person’s only major asset. Consequently, a defendant whose land was the subject of an improvement would very often not be in receipt of a financial gain, readily realisable, without detriment. In such circumstances, it could not be said that the equities argue in favour of compensation for the plaintiff.<sup>107</sup>

In contrast, McInnes has little hesitation in applying the doctrine of incontrovertible benefit to chattels, even to the point where:

[T]he defendant may have to sell the very item which was the subject matter of the litigation in order to satisfy the judgement. Because they are typically replaceable and of a fungible nature, the possibility of the necessity of a coerced sales of chattels is considered to be tolerable.<sup>108</sup>

Nonetheless, McInnes cites cases involving unrequested services rendered to land in support of the argument that courts are increasingly tending to view unrequested improvements realisable in money as incontrovertible benefits and calling for recovery.<sup>109</sup>

With respect, one’s sense from this work is that the distinction between land and chattels is not so much grounded in principle as in an effort to make the advent of the doctrine of incontrovertible benefit appear more palatable and incremental. The fact that claims for improvements to land may commonly be larger than claims for improvements to chattels, and consequently the likelihood is greater that the subject matter of the claim will indeed have to be sold in order to pay the damage award, is a feeble basis for the distinction. It smacks more of an effort to rationalise where the law stands now rather than to conceive of principles to guide the development of the law. What percentage of chattels subject to successful claims for unrequested improvements would have to be sold in order for McInnes to find the law intolerable? How much higher would or should the percentage be in land improvement cases? What if the percentages seemed too close — would the law have to be changed in favour of more coerced sales of chattels, or fewer sales of land?

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<sup>106</sup> Goff & Jones, 4th ed., *supra* note 11 at 25. See also *Republic Resources*, *supra* note 25 at 401.

<sup>107</sup> “Incontrovertible”, *supra* note 15 at 327.

<sup>108</sup> *Ibid.* at 326. Both Goff & Jones and McInnes, naturally, also make an exception of irreplaceable or unique chattels, which they would treat much like land.

<sup>109</sup> “Incontrovertible”, *supra* note 15 at 350, citing *Estok*, *supra* note 41, and *T&E Development v. Hoornaert*, *supra* note 43. Goff & Jones’s analysis maintains this sharp distinction in their discussion of the case law, see *e.g.* Goff & Jones, 4th ed., *supra* note 11 at 167.

Then there is the “hardship” defence put forth by Goff and Jones,<sup>110</sup> and McInnes which “would deny relief if, on the facts of any given case, it would be inequitable to order relief.”<sup>111</sup> Having already accepted that incontrovertible benefit will frequently result in coerced sales of personal and, in principle, real property without any wrong having been committed by the defendant, then what could possibly constitute a hardship defence? What other sort of detriment must be shown? It cannot be the lack of disposable funds to pay the damage award for the unrequested improvements — liquidating the asset provides the necessary funds. Goff and Jones would have used the concept of hardship to lobby for acceptance of the change of position defence,<sup>112</sup> which had already long been recognised in Canada in its own right<sup>113</sup> and which has since been recognised as well in the U.K.<sup>114</sup> Moreover, the resort to unspecified concerns of equity should immediately raise the spectre of “frightful images ... of judges roaming willy-nilly over the restitutionary landscape with only their inner voices to guide them”<sup>115</sup> which the modern law of restitution has steadfastly strived to avoid in order to be taken seriously and gain acceptance.

McInnes’s and Goff and Jones’s distinction between land and chattels is really an attempt to follow the common law’s long-standing but now defunct rule that specific performance is presumptively available for breaches of contracts involving land but not available with respect to chattels. This old rule was, in turn, based on the principle that chattels are typically replaceable while real property is usually irreplaceable and of unique value to its owner or purchaser. This principle was thus a recognition that innocent parties will not be denied or forced to sell assets, real or personal, if they can persuade the court that they subjectively value the assets differently from the market, as a consequence of the other party’s own action, whether a defendant’s breach of contract or a plaintiff’s mistaken improvements:

Courts of Equity decree specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law... may not be a complete remedy *to the purchaser to whom the land may have a peculiar and special value.*<sup>116</sup>

This passage was quoted by the Supreme Court in *Semelhago v. Paramadevan*.<sup>117</sup> In this case, the Court discarded the old rule which assumed all real property to be

<sup>110</sup> Goff & Jones, 3d ed., *supra* note 2 at 19 & 22.

<sup>111</sup> “Incontrovertible”, *supra* note 15 at 331. Recall also the quote from Goff & Jones 3d ed., *supra* note 12 and accompanying text, which made restitution on grounds of incontrovertible benefits conditional on the financial benefit being readily realisable “without detriment” to the defendant.

<sup>112</sup> Goff & Jones, 3d ed., *supra* note 2 at 691-95.

<sup>113</sup> *Storthoaks*, *supra* note 96.

<sup>114</sup> *Lipkin Gorman*, *supra* note 96.

<sup>115</sup> McInnes, *supra* note 15, quoted in *Peel*, *supra* note 50 at 785.

<sup>116</sup> *Adderley v. Dixon* (1824), 1 Sim. & St. 607 (V.-C.), 57 E.R. 239 [emphasis added].

<sup>117</sup> [1996] 2 S.C.R. 415 at 428-29, 136 D.L.R. (4th) 1 at 10, Sopinka J.

unique (and thus specific performance to be available for any breach of contract for purchase and sale of land) in favour of a rule that evidence must be adduced by the plaintiff that the land in question is in fact of unique value before specific performance may be granted. *Semelhago* is thus a return to the real principle behind the old rule and lends further support to the argument that innocent parties' subjective valuations of real and personal property, so long as they can be proven by sufficient evidence, are respected in law.

Finally, McInnes argues that if the improvement is mistakenly rendered at a time when the owner of the property has evinced a desire to sell it (or perhaps as a result of an attempt to sell it, for example, where an anticipated contract fails to materialise), it is not unreasonable to force the owner to sell the asset to satisfy the judgement when the asset was going to be sold anyway.<sup>118</sup> With respect, this is a feeble, not an equitable consideration. It smacks of searching for added reasons to buttress a conclusion that the main reason cannot support. The fact that the defendant contemplated selling the asset makes it no more just or equitable to force the sale now because of the plaintiff's mistake. Moreover, take the case where the plaintiff was quite naturally the focus of the defendant's efforts to sell the asset precisely because the plaintiff offered the best prospect of the best price, and the only price that would have satisfied the defendant. Once the anticipated contract with the plaintiff falls through, is it just to force the defendant to sell the asset on the market which does not offer the premium the plaintiff appeared willing to pay and which made the defendant willing to sell in the first place?<sup>119</sup>

### C. *Incontrovertible Benefit and Corrective Justice*

On a more fundamental level, incontrovertible benefit is inconsistent with the principles underlying private law. It is easy to fall into the trap of thinking that since the plaintiff has expended time and money and the defendant now has the objectively measured benefits of that labour, corrective justice requires returning that segment of the defendant's line to the plaintiff. However, Aristotelian lines are normative, not material, and so the plaintiff should not recover unless normatively it is unjust for the defendant to retain the benefit. This normative question is the final part of the three-stage formulation of the principle of unjust enrichment laid down by the Supreme Court in *Pettkus*.<sup>120</sup> Thus under the *Pettkus* approach, it is first necessary to show material benefit ""and a corresponding deprivation before the normative issue even arises. Normative concerns are also relevant, however, in the initial stage of analyzing whether there has truly been an enrichment on the part of the defendant. To establish the necessary connection between a particular plaintiff and the particular defendant successfully in private law, the plaintiff must show that the particular defendant was

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<sup>118</sup> "Incontrovertible", *supra* note 15 at 328.

<sup>119</sup> See *e.g.* the defendant's change of heart when the anticipated contract with the plaintiff fell through in *Estok*, *supra* note 41.

<sup>120</sup> *Supra* note 56.

benefited. Consistent with restitution's unique concern for fairness to the defendant, the existence of a material benefit can only be properly judged from the point of view of the particular defendant. The incontrovertible benefit doctrine, specifically the realisable in money argument, would force a defendant to pay for unrequested improvements made by mistaken plaintiffs which are not valued. This, in turn, would force the defendant to reorder priorities, either by making direct payment out of available funds with money preferably spent elsewhere, or by spending personal time, energy, and resources in efforts to sell the improved property in the marketplace and search for a suitable replacement, all the while keeping close account of the portion of the proceeds attributable to the improvement. The defendant's freedom to order personal priorities would thus be violated, despite the fact that the defendant has committed no wrong in receiving the benefit.<sup>121</sup>

Proponents of incontrovertible benefit prefer to skate over these difficulties with an objective approach to material benefit and jump immediately to the third stage of the *Pettkus* analysis where they conclude:

[T]he answer ought to turn on the relative weight assigned to the various interests and values at play. Recovery should lie when the sum total of the equities and arguments in favour of compensation are greater than those which militate against it.<sup>122</sup>

In short, restitution must simply balance the equities<sup>123</sup> between individual freedom and a certain compassion to compensate a fellow fallible human. In the final analysis, they find in favour of the realisable in money argument, so long as the benefit can be realised without detriment or hardship. Matthews offers a revealing critique of this approach and analysis:

The assumption seems to be that the owner of the property must *ex hypothesi* be rich, and must be able to afford to pay the poor starving improver who was so mistaken. But this assumption can easily be falsified. Suppose a little old lady owns a tumbledown house. She goes into hospital and her nephew, a rogue, purports to sell it to a rich development company. The company, believing it owns the house, renovates it. The truth comes out. Can the rich company recover the many thousands of pounds it has *bona fide* expended from the little old lady, who if liable will have to sell up and go into an old people's home?<sup>124</sup>

As this example illustrates, incontrovertible benefit not only mistakes material for normative inequality, but is also driven by distributive, not corrective justice. Its focus on the parties' relative ability to absorb any loss (*i.e.* wealth) is a distributive criterion. Such principles are fundamentally foreign to Canadian private law.

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<sup>121</sup> If so, the plaintiff could base his claim in tort or breach of contract and seek damages based on "waiver of tort" or expectation, not restitution.

<sup>122</sup> "Incontrovertible", *supra* note 15 at 362-63.

<sup>123</sup> *Ibid.* at 362.

<sup>124</sup> P. Matthews, "Freedom, Unrequested Improvements, and Lord Denning" (1981) 40 *Camb. L.J.* 340 at 357.

## VI. A New Remedy: The Suspended Equitable Lien

McInnes criticises Birks's realised in money argument because, among other things, "it may allow the recipient of a benefit to deny enrichment and avoid liability simply by hanging on to his improved property."<sup>125</sup> Later, if the defendant sold the improved property after the trial, the then-remaining value from the improvements in money would be realised but *res judicata* would preclude the plaintiff from making another claim.

One solution to this problem would be to grant the plaintiff in the first instance a suspended equitable lien whose enforceability is conditional on an independent decision by the defendant to sell the property or otherwise realise the value of the improvements in money.<sup>126</sup> To be consistent, the value of the lien and of the recovery would, of necessity, be limited to the value of the improvements at the time of realisation. For example, suppose the mistakenly paved driveway added \$1,000 to the value of the attached home on the date of the improvement and when, four years later, the owner decides to sell the house, the improvement has depreciated such that the owner nets only \$500 more because the house has a paved driveway. Since the owner has sold the home (and driveway) and realized the value of the paving in money, subjective devaluation can no longer be claimed, but the improver's recovery is limited to \$500, the actual extent of the owner's realization.

This remedy can be criticised as too uncertain, both in terms of when it is enforceable and for how much, to be of much use to either the court or the plaintiff — a remedy in the air.<sup>127</sup> It would also be of little comfort to plaintiffs in cases of services whose value rapidly depreciates, such as window cleaning or a car wash or muffler repair (*de minimis non curat lex?*). Indeed, such a remedy would fall far short of satisfying all mistaken improvers or the proponents of incontrovertible benefit,<sup>128</sup> but it is not designed to. This proposal is not an effort to compromise principles or to meet the doctrine of incontrovertible benefit half-way; rather, it is a manifestation of and a flexible response to the inherent limits of the underlying principle of subjective devaluation.

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<sup>125</sup> "Incontrovertible", *supra* note 15 at 337. See also R.J. Sutton, "What Should be Done for Mistaken Improvers" in P. D. Finn, ed., *Essays on Restitution* (Sydney: The Law Book Company, 1990) 241 at 255.

<sup>126</sup> Whether we call it a lien a charge, any other security interest or even just a debt hardly seems to matter so long as it is unenforceable until an independent decision by the defendant to sell his property. This is certainly not a trust interest, however; there is no duty on the defendant to preserve the improvement.

<sup>127</sup> See the court's rejection of a suspended charge in *Republic Resources*, *supra* note 25 at 402-03.

<sup>128</sup> See *Matthews*, *supra* note 124 at 357.

## Conclusion

Personal freedom is not a spent force in our law, and Pollock C.B.'s words in *Taylor v. Laird*<sup>129</sup> and Bowen L.J.'s in *Falcke*<sup>130</sup> still ring true today. The realisable in money dimension of the incontrovertible benefit doctrine would violate a defendant's right to determine personal priorities freely, and would impose liability in the absence of any normative wrong or inequality, and consequently, is fundamentally at odds with underlying principles of private law. The various other arguments or lines of case law which scholars place under the rubric of incontrovertible benefit — saved inevitable expense, whether by virtue of legal obligation or factual necessity, realised in money, or the new remedy proposed above — are not inconsistent with the principle of subjective devaluation but rather uphold and reflect the inherent limitations of that principle. Yet, packaged together, these arguments make incontrovertible benefit seem attractive and intoxicating, even while carrying the taint of the realisable in money argument, and the courts since *Peel* seem unable to resist the temptation. Eventually, however, only a return to subjective devaluation, with a proper understanding of its acknowledged limits, will bring true satisfaction to our courts and internal coherence to the law of restitution.

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<sup>129</sup> *Taylor*, *supra* note 8.

<sup>130</sup> *Falcke*, *supra* note 4.