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THE LAW OF RESTITUTION
by The Late Peter D. Maddaugh and John D. McCamus
Release No. 1, June 2021

Publisher's Special Release Note 2021

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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New Publication on Restitution from Thomson Reuters

Thomson Reuters has recently published a concise introduction to the law of restitution by Professor John D. McCamus. The volume, titled An Introduction to the Canadian Law of Restitution and Unjust Enrichment, was published in 2020. Sparing in its citation of authority, this volume provides a concise overview of the subject for members of the profession who have not studied the subject in depth. The aim of the volume, as noted on the Preface, is "to provide a concise and accessible account of the Canadian law of restitution that can be consumed by a professional reader in a few evenings and constitute, hopefully, a satisfactory introduction to the subject — its scope, structure, liability rules, remedies and defences — that will equip a reader, previously untutored in the subject, to recognize a restitution issue when it arises and seek an appropriate solution." The volume explains the various possible roles to be played by the unjust principle and explicates the various possible meanings of the central concepts of "restitution" and "unjust enrichment." Uncertainty concerning the meaning of these core concepts has created much confusion and has made the subject unnecessarily difficult for the reader who is unfamiliar with these terminological disputes. The author attempts to dispel the confusions that may arise as a result of these definitional issues. Each of the areas of substantive liability traditionally considered to be restitutionary in nature — benefits conferred by mistake, under duress and compulsion of various kinds, through performance of contracts unenforceable at law or in equity, in necessitous circumstances and upon the dissolution of relationships of cohabitation — are briefly explained. As well, an account is provided of the restitutionary recovery of profits of wrongful conduct such as breach of fiduciary duty, breach of confidence, breach of contract and so-called "waiver of tort." A brief treatment is included of three-party cases in which a third party confers a benefit on the defendant which, in justice, ought to be turned over to the plaintiff. A leading illustration of this latter phenomenon is the recent decision of the Supreme Court of Canada in *Moore v. Sweet*, 2018 SCC 52, in which the plaintiff former wife of the deceased, recovered life insurance benefits paid to the defendant new spouse who had been designated, in breach of an undertaking given by the husband, as the beneficiary of the policy.

What's New in this Update:

- In *Re Citibank*, U.S. District Ct., Southern District of N.Y., August 11, 2020, an American court denied the plaintiff bank recovery of a mistaken wire transfer of approximately $900 million to a syndicate of lenders resulting from a slip on the

part of the bank employee handling the transfer. The amount precisely corresponded to what would have been a correct prepayment of the outstanding balance of the loan with interest. The bank was acting as the administrative agent on a syndicated loan advanced to Revlon Inc. The bank notified the lenders of the error within a day or so. As a result, the lenders had not suffered a detrimental change of position on the basis of the receipt of the funds. The court applied the American "discharge for value" defence and held that the full debt had been discharged and, accordingly, the payment could not be recovered. The authors suggest that the result is unsatisfactory and should not be followed by a Canadian court. The bank would have no basis for recovering the transfer from the borrower with the result that the borrower has been very substantially unjustly enriched at the expense of the bank.

- In *CropConnect v. Bank of Montreal et al.*, 2020 MBQB 186 (Man. Q.B.) and *Bank of Montreal v. Asia Pacific International Inc.*, 2018 ONSC 4215 (Ont. S.C.J.), trial judges applied a balancing test to determine, in the context of mistaken payments, whether the mistaken payer or the payee should assume liability for the resulting loss. In each case, the payer and the payee were both innocent victims of a third-party fraudster. Neither party would have an effective remedy against the fraudster. In determining which of the two parties should accept liability for the loss, each court weighed the parties' respective blame for the loss in the sense of determining which party may be considered to have had the primary responsibility for causing the loss by failing to detect and prevent the fraud. In *Asia Pacific*, the judge determined that the plaintiff bank's carelessness was the primary cause for the loss. Accordingly, notwithstanding the payee's lack of prudence, the payer bank was precluded from recovering the mistaken payment. In *CropConnect*, the judge concluded that the payee was in the best position to discover the fraud and prevent the loss. Accordingly, the claim for the mistaken payment succeeded. Although the reasoning in these cases is unsatisfactory on various grounds, the results appear to be sound. The practical effect is to apply a balancing test quite similar to that expressed in the American jurisprudence on the change of position defence. Under American law, negligence of the payee in inducing the payment precludes the defence unless the payer is more at fault than the payee.
- In *Li v. Li*, 2021 BCCA 39 (B.C. C.A.), the British Columbia Court of Appeal affirmed a trial decision awarding a constructive trust on real property purchased by the defendant with funds converted by the defendant from the plaintiff. The decision thus confirmed that restitutionary property relief may be available in the context of converted funds and that the

plaintiff's relief in a conversion case is not limited to recovery of the actual loss suffered.

- In *Australian Financial Services and Leasing Pty. Ltd.*, [2014] HCA 14, the Australian High Court held that where a change of position defence is raised to a mistaken payment claim on the basis of prejudicial dealings with third parties, it may not be necessary for the defendant to demonstrate the precise economic impact of the detrimental reliance. In such a case, the defence of change of position constitutes a complete rather than a *pro rata* defence to the claim. The plaintiff financial services corporation had been induced by the fraud of one of its customers to make payments to two of the customer's suppliers. The defendant suppliers, in turn, released claims they had made against the fraudster, gave up other possible avenues of redress, and recommenced dealings with the customer. Precise proof of the extent of the financial impact of the opportunities for recovery foregone was unnecessary in the High Court's view where, as here, the negative consequences of the reliance were substantial and "were irreversible as a practical matter." The detrimental change of position constituted a full defence to the claim.

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