

# RESTITUTION – UNJUST ENRICHMENT

Introduction & Overview

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## OVERVIEW



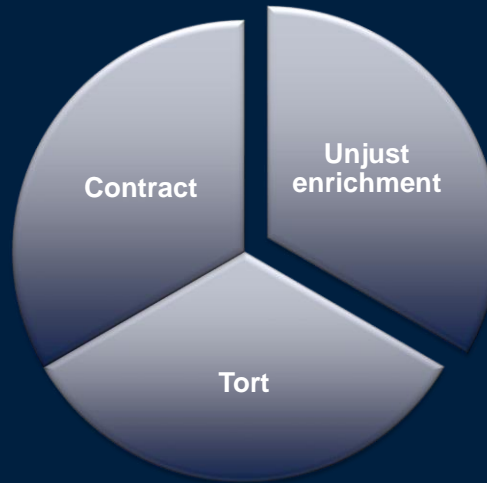
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1. Introduction to the course
2. Housekeeping
3. Introducing ourselves
4. The approach of this course
5. Key historical developments
6. The structure of this course

## ROLE OF UNJUST ENRICHMENT



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## A THIRD BRANCH OF LAW OF OBLIGATIONS



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- **Contract law**—responds to breaches of agreements.
  - *Remedy = **damages** from  $\Delta$  to restore  $\Pi$  to the position she would have been in had the contract not been breached.*
- **Tort law**—responds to legal wrongdoing.
  - *Remedy = **damages** from  $\Delta$  to restore  $\Pi$  to the position she would have been in had the tort not occurred.*
- **Unjust enrichment law**—responds to unjustified gains.
  - *Remedy = **restitution** from  $\Delta$  to  $\Pi$  transferring the benefit that  $\Delta$  unjustly gained at  $\Pi$ 's detriment.*

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## COURSE LEARNING OBJECTIVES



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- Understand and apply the fundamental doctrine and concepts that underpin Canada's modern unjust enrichment framework.
- Understand the core controversies and difficulties within the law of unjust enrichment today.

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## UNRESOLVED DEBATES AND CONTROVERSIES



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1. Is unjust enrichment a third branch of the law of obligations? (In Canada, yes.)
2. Terminology—what is “restitution” and “unjust enrichment”?
  - Is **restitution** a subject description, a cause(s) of action, or a legal response/remedy?
  - Is **unjust enrichment** an overarching principle, a cause(s) of action, or an overworked concept?
3. What is the nature of the law of unjust enrichment?
4. What is the structure of the law of unjust enrichment?
5. What is the law in Canada?

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**TERMINOLOGY & KEY CONCEPTS: THIS COURSE****PETER A. ALLARD  
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- **Unjust enrichment**—a causative event / cause(s) of action; also called “unjustified enrichment;” previously, the more narrow “quasi-contract” or “implied contract.”
  - *But is it plural (tort-like) or unitary (contract-like)?*
- **Restitution**—a legal response/remedy in the form of gain-based recovery (as opposed to the loss-based recovery afforded by compensatory damages).

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**NATURE OF LAW OF UNJUST ENRICHMENT:  
COMPETING APPROACHES****PETER A. ALLARD  
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“The fox knows many things, but the hedgehog knows one big thing.”

- Archilochus of Paros



## NATURE OF LAW OF UNJUST ENRICHMENT: COMPETING APPROACHES



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### Principled/conceptual approach:

- Prof. Mitchell McInnes (Alberta)
- UE = cause of action
- UE law is unified like contract law
- Narrow scope—encompasses the old law of quasi-contract; excludes restitution for wrongs/torts
- Patron Saint: Prof. Peter Birks (Oxford)



### Category/contextual approach:

- Prof. John McCamus (Osgoode)
- UE = overarching principle
- UE law is plural like tort law
- Broad scope—encompasses all instances of restitution in law, including restitution for wrongs/torts
- Patron Saint: American Restatement of Restitution



*cf.* **Sceptical approaches**

## STRUCTURE OF UNJUST ENRICHMENT: COMPETING APPROACHES



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### England & Wales:



- Contemporary tri-partite approach:
  1. Enrichment/benefit of  $\Delta$
  2. At  $\Pi$ 's expense
  3. Some legal factor makes  $\Delta$ 's retention of the benefit unjust.

... and then consider defences.

- Patron Saint: Prof. Peter Birks (1985)

### Canada:



- Novel tri-partite approach:
  1. Enrichment/benefit of  $\Delta$
  2. Corresponding deprivation of  $\Pi$
  3. Absence of a juristic reason for the enrichment.

... and then consider defences.

- Patron Saint: Prof. Peter Birks (2005)

## NATURE & STRUCTURE: A MIDDLE PATH: THIS COURSE



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*Peel v. Canada* [1992] 3 SCR 762 (SCC), [27], ¶8, McLachlin J. for the Court:

“It is my conclusion that we must choose a **middle path**;

one which acknowledges the importance of proceeding on general principles but **seeks to reconcile the principles with the established categories of recovery**;

one which charts a predictable course without falling into the trap of excessive formalism;

one which recognizes the importance of the right to choose where to spend one's money while taking account of legitimate expectations and what, in the light of those expectations, is fair.”

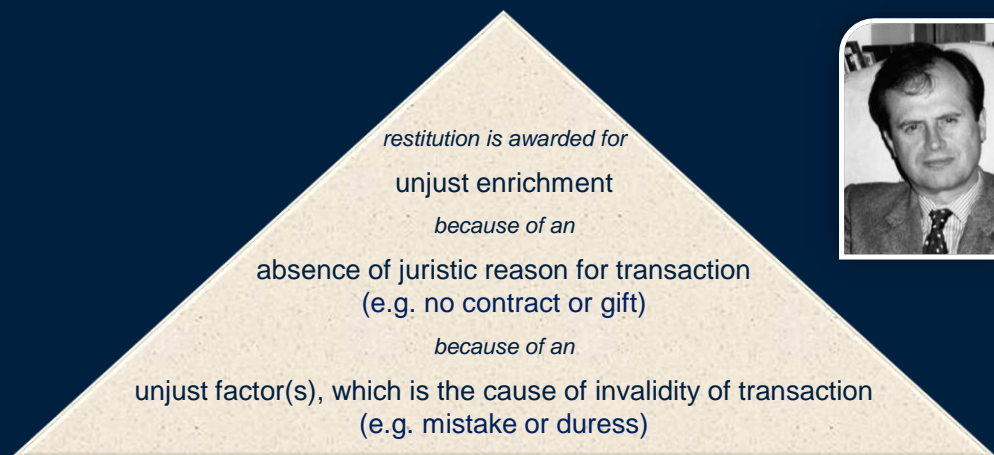
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## NATURE & STRUCTURE: A MIDDLE PATH: THIS COURSE



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**Birksian Pyramid of Injustice:** Peter Birks, *Unjust Enrichment* (2nd edn, OUP, 2005), p.116.



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## KEY HISTORICAL DEVELOPMENTS



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- Roman law → Gaius → Institutes of Justinian → Scottish law → English common law ...
- 1760: *Moses v. Macferlan* (Lord Mansfield) → Blackstone's Commentaries
- 1937: American First Restatement of Restitution: Quasi Contracts and Constructive Trusts
- 1966: *Goff and Jones on the Law of Restitution* (Sweet & Maxwell, London)
- 1980s-90s: Prof. Birks' Restitution course in the Oxford BCL programme
- 1980: SCC affirms unjust enrichment principle in Canada: *Pettkus v. Becker*
- 1990s: UK interest-rate 'swaps' cases
- 2004: Birks' about-face on "unjust factors" approach and switch to "absence of basis" approach
- 2004: SCC affirms "juristic reasons" approach(?): *Garland v. Consumers' Gas Co.*
- 2011: American Third Restatement of Restitution and Unjust Enrichment
- 2020: Harvard Law Review symposium on Unjust Enrichment

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## COURSE STRUCTURE



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1. Introduction to Unjust Enrichment and Restitution.
2. Canada's (novel and unique) approach to Unjust Enrichment:
  - a. Enrichment/benefit of  $\Delta$
  - b. Corresponding deprivation of  $\Pi$
  - c. Absence of a juristic reason for the enrichment.
3. Defences.
4. Restitution Remedies.
5. Alternative Approaches to Unjust Enrichment in Canada.
6. Debates, controversies, and review.

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