THE LAW OF RESTITUTION AND THE UNEXPECTED TERMINATION OF PETROLEUM AND NATURAL GAS LEASES

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The prevailing Canadian authorities more than justify John Ballem's conclusion that "many a lease has come to an untimely and unexpected end". This paper explores the right of a lessee to obtain compensation in the law of restitution for work performed where a lease has unexpectedly terminated. It examines the extent to which the case law relating to mineral leases supports a lessee's claim and considers the impact on that case law of the rapidly-emerging law of restitution.

I. INTRODUCTION

An uneasy relationship has developed between general doctrines of private law and the petroleum and natural gas lease. Certainly, ordinary principles of law are applied to cases dealing with the lease, but the document itself and the litigation to which it gives rise are so specialized that those principles must frequently be moulded to deal with novel problems.

In some areas, such as the law of damages, intractable problems posed by the mineral lease have tested the limits of existing doctrine and offered solutions that are important throughout private law.[1] More frequently, like the cuckoo which places its eggs in the nests of other birds,[2] the courts have imported into cases involving mineral leases developing concepts of private law. As with the baby cuckoos, the source of the concept remains clear but, once it is adopted into the mineral lease jurisprudence, it develops without any influence from its natural parents. Thus, for example, the doctrine of estoppel was imported into the Canadian jurisprudence surrounding the mineral lease about twenty years ago, but it was then applied in a specialized manner which took little account of the subsequent history of the doctrine in the law of contracts.[3] In the more recent cases, the courts have relied mainly on the earlier authorities involving mineral leases and have scarcely referred to modern contract cases in which the doctrine of estoppel has been elaborated.[4] Like the cuckoo abandoned by its parents, the doctrine of estoppel in oil and gas law has grown up with little guidance from the doctrine to which it owed its original existence.

The mineral lease cases thus involve, in part, a detailed application of general principles of private law and, in part, a body of law that is *sui generis*. This hybrid characteristic makes it difficult to predict how the mineral lease will be affected by trends in other areas of law. For example, the approach of Canadian courts to the interpretation of leases has been fairly characterized as "determinedly literalistic" and leading to results which "...frequently astound those who originally prepared the document".[5] Although this approach still has considerable influence in the drafting

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1. *See e.g., Cotter* v. *General Petroleums Ltd. and Superior Oils Ltd.* [1950] 4 D.L.R. 609; Sychuk, "Damages for Breach of an Express Drilling Covenant" (1970) 8 *Alta. L. Rev.* 250.
2. The cuckoo does not hatch its own young, but places its eggs in the nests of other birds, which then rear the baby cuckoos as if they were their own.
3. *Canadian Superior Oil Ltd.* v. *Paddon Hughes Development Co. Ltd.* (1969) 67 W.W.R. (N.S.) 525, *affd.* (1970) 74 W.W.R. (N.S.) 356 (S.C.C.); *Weyburn Security Company Limited* v. *Sohio Petroleum Company* (1969) 69 W.W.R. 680 (Sask. C.A.), *affd. sub nom. Sohio Petroleum Company* v. *Weyburn Security Company Limited* (1970) 74 W.W.R. 626 (S.C.C.); *Canadian Superior Oil Ltd.* v. *Cull* (1970) 75 W.W.R. 606 (Alta. S.C.A.D.), *affd.* [1971] 3 W.W.R. 28 (S.C.C.).
4. *See e.g., Weyburn Security Co. and Canadian Superior Oil Ltd., id.*
5. Ballem, *The Oil and Gas Lease in Canada* (2nd Ed., 1985) 87-88.

and interpretation of leases within the industry, it must be noted that it was developed by the Supreme Court of Canada in an era which was marked by the literal interpretation of most contracts. In recent years, this Court has adopted a much more flexible attitude and the Supreme Court of Canada has tended to interpret contracts in the light of the clear commercial intention of the parties.[6] This more pragmatic view of contracts in general might mean that senior courts in Canada will modify their earlier treatment of the mineral lease[7] despite the well established precedents which favour a strict construction.

Although a different approach might emerge, an examination of the existing law leads inexorably to the conclusion that "...many a lease has come to an untimely and unexpected end".[8] Where, as is often the case, the lessee has expended considerable funds on the lands held under the terminated lease, major issues of unjust enrichment arise. For example, the lessee, unaware that the lease has terminated, may have completed a producing well on the leased lands or may have incurred the expense of drilling a well which is subsequently capped because of the absence of available markets.

In this area, courts appear to have applied isolated strands of the law of restitution to a clear problem of unjust enrichment. Arguably, because of the tendency of the law of mineral leases to develop in isolation from the mainstream of private law, the impact of restitution upon the problem has never been coherently analyzed. In addition, because the law of restitution was itself in a state of flux when the leading cases on the termination of mineral leases were decided, few decisions have taken into account recent developments in restitution. Many of the major Supreme Court of Canada decisions in restitution arose after the first wave of oil and gas cases and the lingering theoretical difficulties in restitution have been addressed by the courts only in recent times.

It is, accordingly, the purpose of this paper to explore the application of the principles of restitution where a mineral lease has unexpectedly terminated, but the lessor has received a benefit for which the lessee will not be compensated under the terms of the lease. In Part II, a short explanation will be given of the development of the general law of restitution and in Part III there will be a consideration of the impact of this development on some of the classic cases involving the petroleum and natural gas lease. In Part IV, some alternative grounds of recovery will be outlined and in Part V, there will be a brief assessment of the importance of restitution in mineral lease cases.

II. THE DEVELOPMENT OF RESTITUTION

The underlying function of the law of restitution was described by Rand J. in the Supreme Court of Canada as the prevention of "...what would otherwise be an unjust enrichment of the defendant at the plaintiff's expense".[9] Remedies based in unjust enrichment, which are totally independent of any breach of contract or tort on the part of the defendant, are by no means the invention of courts in a litigious age. An independent law of restitution is found in virtually all developed legal systems and

6. *See ITO Ltd.* v. *Miida Electronics Inc.* (1986) 28 D.L.R. (4th) 641, especially at 667, 675. *See also Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. (H.L.), adopted in *Beaufort Realties 1964) Inc.* v. *Belcourt Construction (Ottawa) Ltd.* [1980] 2 S.C.R. 718.
7. There are signs of a more flexible approach in *Canadian Superior Oil Ltd. v. Cull* case, *supra* n. 3; see Ballem, *supra* n. 5 at 115.
8. *Supra* n. 5 at 269.
9. *Deglman v. Guaranty Trust Co.* [1954] 3 D.L.R. 785.

was well known in Roman law.[10] The common law roots of restitution are equally deep and in a celebrated case in 1760, Lord Mansfield cited six instances of restitutionary recovery which were well established at that time in English law.[11] The common thread in the old English cases was that in justice and fairness[12] the courts ought not to countenance unjust enrichment by allowing the defendant to retain money received from the plaintiff in certain circumstances, including cases in which the plaintiff had paid the money to a defendant by mistake.

The basis of restitutionary recovery in principles of justice and fairness was soon obscured by the exigencies of pleading under the forms of action in the 18th and 19th centuries. Most cases of restitution came under the writ of *assumpsit*, which was primarily used for actions which would today be described as involving breaches of contract.[13] Because of the nature of *assumpsit*, actions in restitution were pleaded as if recovery depended upon the implied promise of the defendant to pay (or re-pay) a sum of money to the plaintiff. When the forms of action were abolished in the mid-nineteenth century, it became necessary to re-classify private law, because the reference points provided by the old forms of action had disappeared. All of the cases under the writ of *assumpsit*, including those that were based on the principle of unjust enrichment, were subsumed into the law of contracts.[14] As a result of this historical accident, it appeared that restitution was simply a branch of the law of contract and recovery in restitution was said to be limited to cases in which a contract could be implied between the defendant and the plaintiff.[15] The theoretical notion that recovery in restitution was based in implied contract was woefully inadequate. Actions were allowed in many cases in which the existence of a contract between the parties was entirely fictional, with the result that the implied contract theory began to disintegrate in the face of reality. It was finally exploded in Canada by the landmark decision of the Supreme Court of Canada in 1954 in *Deglman* v. *Guaranty Trust Co.*,[16] where the Court firmly decided that recovery in restitution was not dependent on any implied contract between the parties, but that it was granted because fairness demanded that the defendant pay for benefits received from the plaintiff if retention of the benefits would result in unjust enrichment.

The law of restitution in Canada had long been more advanced than in England[17] and the liberation from the theory of implied contract provided by the *Deglman* decision marked the beginning of an era of rapid development. A number of Supreme Court of Canada decisions[18] emphasized the importance of restitutionary remedies

10. *Justinian's Institutes, Book III*, Tit. XXVII 585-587, found in translation in Lee, *Elements of Roman Law* (4th Ed., 1956) 376. The examples given by Justinian of the action *negotiorum gestoroum* bears some resemblance to the old common law cases on agency of necessity. The agency of necessity cases today are best regarded as an instance of restitution. *See* Goff and Jones, *The Law of Restitution* (3rd Ed., 1986) 331.
11. *Moses* v. *Macferlan* (1760) 97 E.R. 676.
12. *Id.* at 680.
13. American Law Institute, *Restatement of Restitution* (1937) 1-9.
14. *See* Anson, *Principles of the Law of Contract and of Agency* (8th Ed., Huffcut Ed., 1895) 436.
15. *See e.g.*, the comment of Holdsworth that "the accepted doctrine of English law is that the basis of quasi-contractual liability is the existence of a relationship between persons from which the law will imply a contract", quoted in Landom, "Note" (1937) 53 *L.Q.R.* 302.
16. *Supra* n. 9.
17. *See e.g., Trades Hall Co.* v. *Erie Tobacco Co.* (1916) 29 D.L.R. 779 (Man. C.A.) in which the Manitoba Court of Appeal circumvented the House of Lords decision in *Sinclair* v. *Brougham* [1914] A.C. 398.
18. *See e.g., County of Carleton* v. *City of Ottawa* (1965) 52 D.L.R.(2d) 220 (S.C.C.), as discussed in the text, *infra* Part III. C. 2, *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* [1976] 2 S.C.R. 147.

and indicated an independence from the more limited English authorities that is unusual in Canadian private law. Nevertheless, the function of the principle of unjust enrichment remained somewhat restricted. It was generally viewed only as an explanation for a number of existing categories of recovery, rather than as a more general principle which could justify new categories of recovery.[19]

Once it became clear that the justification for this type of recovery lay in the prevention of unjust enrichment, the question soon arose whether it should be extended to other cases that did not fit precisely within the existing categories. It became apparent in the landmark case of *Pettkus* v. *Becker*,[20] in which the Supreme Court of Canada imposed a remedial constructive trust to prevent the unjust enrichment of one party in a common law relationship, that the existing categories could be expanded. This view was given a firm theoretical basis by LaForest J.A. in *White* v. *Central Trust*,[21] where he emphasized that the existing instances of recovery in restitution were not exclusive, but were examples of a general principle of preventing unjust enrichment which transcended the recognized categories. The principle could thus justify new types of recovery. Indeed, LaForest J.A. emphasized that, contrary to the traditional view, "the law will afford a remedy for unjust enrichment in the absence of a valid judicial policy militating against it".[22] This approach brought into the mainstream of the general law of restitution the comment of Dickson J. in *Pettkus* v. *Becker* that a remedy for unjust enrichment should be available if three conditions are satisfied: "an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment".[23] The principle of unjust enrichment is thus much more than an explanation of a number of categories of recovery. In the same way as the neighbour principle in negligence, it expresses an underlying policy which both explains existing cases and provides a basis for allowing recovery in novel cases that do not fit within the established categories. As a result, the categories of restitution, like those of negligence, are not closed.[24]

The evolution of the underlying principle of restitution affects cases involving the unexpected termination of mineral leases in three ways. Firstly, some of the cases and the commentary upon them bear traces of the early phases of the development of restitution, particularly when the implied contract theory held sway. Some of the assumptions in the cases and the commentaries are no longer valid in light of the present state of the law. Secondly, there are isolated examples of the operation of the unjust enrichment principle in mineral lease cases. These have often been regarded as difficult to explain and have led to somewhat arid debates on such questions as whether a former lessee is a good faith or a bad faith trespasser.[25] Once it is appreciated that these examples are mere instances of a wider principle, their role can be seen more clearly and their influence on other similar cases can be more accurately

19. *See* Guest, *Anson's Law of Contract* (24th Ed., 1975) 618.
20. (1980) 117 D.L.R. (3d) 257 (S.C.C.): Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 *Can. B. Rev.* 265.
21. (1984) 7 D.L.R. (4th) 236 (N.B.C.A.).
22. *Id.* at 245.
23. *Supra* n. 20 at 274.
24. This notion was embraced by Morden J. in *James More & Sons Ltd.* v. *University of Ottawa* (1975) 490 D.L.R. (3d) 666 at 676, where he commented: "Just as the categories of negligence are never closed, neither can those of restitution. The principles take precedence over the illustrations or examples of their application". *See* Fridman, "Reflections on Restitution" (1976) 8 *Ottawa L. Rev.* 156, 160-162 and *see* Flittie, Ed., 5 *Summers Oil and Gas* (1966) 182.
25. *See* Harrison, "Selected Cases, Legislation and Developments in Oil and Gas Law" (1972) 10 *Alta. L. Rev.* 391 at 405-407.

measured. In addition, as one commentator has noted, once the cases are characterized as involving unjust enrichment, "...restitutionary principles can be useful in identifying anomalous results and in providing an analytical framework for assessing the merits of claims brought in novel circumstances".[26] Thirdly, although this paper will deal primarily with well established categories of recovery, the recent cases emphasize that the lessee may be compensated even if its claim does not fall precisely into one of those categories.

The following section of this paper will deal with the notion of unsolicited intervention, which provides the main basis of restitutionary recovery upon the unexpected termination of a mineral lease.

III. UNSOLICITED INTERVENTION

A. THE DEVELOPMENT OF A THEORY OF RECOVERY

The claim of the lessee who has improved the land by completing a well without any contractual right to compensation, because the lease has terminated or is about to terminate without the knowledge of the lessee, is analogous to cases in restitution involving unsolicited intervention. The owner's invitation to the lessee to perform the work, as crystallized in the terms of the lease, has expired. Thus, the work which the lessee performed was either no longer at the request of the mineral owner or, alternatively, was performed in circumstances in which the mineral owner had not assumed any obligation to compensate for the work. Viewed in the least favourable light, the lessee's claim is for services rendered for the benefit of the owner, without any operative request on the part of the owner.

The courts in the nineteenth century appeared to take an uncompromising attitude to such claims. In the leading case, more than a century ago, Bowen L.J. purported to state the fundamental principle that:[27]

> Work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefitted, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit on a man against his will.

According to this principle, a person who renders services for the benefit of another without the latter's express or implied request has no ground for recovery. However, it must be remembered that this principle was enunciated when the implied contract theory of restitution was at its apex. The principle is also far from comprehensive, for Bowen L.J. acknowledged that the law did allow a recovery for services rendered to people "behind their backs" in some circumstances. One of these cases, maritime salvage, was explained away as an historical exception to the general rule and the others were said to be based on either agency of necessity or implied contract.[28] However, the judgment overlooked the fact that the creation of an agency of necessity or an implied contract was frequently no more than a convenient legal fiction which justified a conclusion that a person could recover for an unrequested benefit conferred upon another. If Bowen L.J. had considered other examples in which the courts had allowed recovery for unrequested benefits in the nineteenth

26. *See* McCamus, "Note" (1980) 18 *Osg. Hall L.J.* 478 at 479.
27. *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234 (C.A.).
28. *Id.* at 248.

century,[29] there would have been even more evidence that the principle that he set out did not represent English law.

Despite its deficiencies, the view that recovery for benefits conferred could result only from an express or implied contract, resulting from a request from the recipient of the benefit, continued to be very influential. It was inevitable, however, that cases would arise which could not be reconciled with this view. For example, in *Matheson* v. *Smiley*,[30] Smiley attempted to commit suicide; his friends found him unconscious and in a very serious condition and called a doctor. The doctor in turn asked a surgeon to look after Smiley. The surgeon conducted an operation, but without avail, and sued Smiley's estate for his fees. The Manitoba Court of Appeal found that Smiley could not be taken to have requested the assistance of the surgeon, for he was in no condition to do so. Nevertheless, his estate was bound to pay a reasonable price for the surgeon's services on the basis of an obligation imposed by the general law rather than by any contract.

The existence of cases in which recovery was allowed without any real possibility of implying a request by the recipient of a benefit eventually led to the emergence of an alternative explanation. It can now be said, as it was under Lord Bowen's principle, that a person who confers the benefit on another can be compensated in contract if the benefit was genuinely requested. However, in the absence of a request, recovery can occur in restitution if the intervenor's conduct was unofficious and if it conferred a genuine benefit. Each of these requirements will be examined in turn.

B. THE UNOFFICIOUS INTERVENOR[31]

Although there have always been instances in which restitution has been allowed for unrequested benefits, claims have never been favourably regarded where the plaintiff has voluntarily conferred a benefit which the plaintiff knows the defendant neither solicits nor desires.[32] If recovery were allowed in these circumstances, the principle that liabilities are not to be imposed upon people behind their backs would be genuinely threatened. The voluntary intervenor is commonly described as "officious" and is normally denied relief. In contrast, if the intervenor acts under a mistake, out of compulsion or, like the surgeon in *Matheson* v. *Smiley*, out of necessity, his or her actions will probably be characterized as "unofficious" and deserving of compensation, provided that they genuinely benefit the recipient.

The distinction between officious and unofficious intervention has arisen in disputes involving mineral leases, although it generally occurs in the guise of a discussion of whether the lessee is a *bona fide*, innocent trespasser or a *mala fide*, wilful trespasser. In a pair of Canadian cases, the lessee had commenced production on the unfounded assumption that it was operating under a valid lease. When the leases were found to have expired, the mineral owner sought an accounting for the production that had been removed from the land after the termination of the lease. In *Weyburn Security Co. Ltd.* v. *Sohio Petroleum Co.*,[33] drilling had commenced shortly before the end of the primary term of the lease, but was not completed until after the end of the term when the well was brought into production. On the authority of

29. *See e.g.*, the line of old cases in which strangers have recovered from the relatives of the deceased the expenses that they incurred in arranging for the burial of the deceased. *See* Goff and Jones, *supra* n. 10 at 348-349.
30. [1932] 2 D.L.R. 787 (Man. C.A.).
31. The term is adopted from the *Restatement of Restitution*, *supra* n. 13 at para. 2.
32. Goff and Jones, *supra* n. 10 at 42.
33. *Supra* n. 3.

Canada-Cities Service Petroleum Corp. v. *Kininmonth*,[34] the lease was held to have expired. The Saskatchewan Court of Appeal dealt with the lessor's claim for an accounting as follows:[35]

> The court has jurisdiction to grant this relief on terms which will be just and equitable to all parties involved. The respondent, Sohio, proceeded under a mistake as to its rights, and did not knowingly take an unfair advantage of the appellant's lack of appreciation of its legal rights. The respondents were first aware that their position was challenged when the writ of summons was served upon them. At that time the revenue which they had received from the sale of the production exceeded the amount they had expended. Under the circumstances, it would appear just and equitable to order the respondents to account for all benefits from production received by them after the date of the service of the writ of summons upon them.

In *Paramount Petroleum and Mineral Corporation Ltd.* v. *Imperial Oil Limited*,[36] in which one of the leases in dispute was found to have expired, the mineral owner was held to be entitled to all of the leased substances that had been removed from the land after the expiry of the primary term. Johnson J. commented "the fact that [the lessee] was unaware of its rights until years after it brought wells into production does not alter its position".[37]

Two aspects of these decisions have troubled the commentators. The first concerns the basis of the lessee's claim and the second deals with the measure of recovery to which the lessee is entitled.

1. The Basis of The Lessee's Claim

The solution in the *Weyburn* case has been characterized as "a broad brush approach to the problem, relying heavily on equitable principles".[38] It has been seen as a reflection of the position found in the American cases, where an innocent trespasser is entitled to set off the costs of drilling and operating the well in any accounting, but a wilful trespasser, who had cause to doubt the validity of its lease when the well was drilled, has no similar right.[39] However, the *Weyburn* case, rather than involving broad equitable principles, was a routine decision in the law of restitution. The source of the commentator's difficulty arose from the failure of the Court, in its desire to avoid a blatant unjust enrichment of the lessor, to clarify that the decision was firmly grounded in the law of restitution rather than upon any vague notions of equity.

This failure confuses the issues at stake in the cases. The fact that the lessee in the *Weyburn* case had acted under a mistake as to its rights, and thus constituted in American terminology an innocent trespasser, meant that it had conferred a benefit on the lessor unofficiously. In the unlikely event that the lessee completed the well in the knowledge that its rights had already terminated, it would have failed to recover its expenses because its intervention would then have been officious. As a result, the comment in *Paramount Petroleums* that the lessee's lack of awareness of its rights did not alter its position in accounting for the proceeds of the well is misleading.[40]

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34. [1964] S.C.R. 439.
35. *Supra* n. 3 at (1969) 69 W.W.R. 687.
36. [1970] 73 W.W.R. 417 (Sask.Q.B.).
37. *Id.* at 434. In Ballem, *supra* n. 5 at 304, the author points out that the judgment did not deal expressly with a question of whether the lessee was entitled to take drilling and completion costs into account and that in the actual accounting between the parties these costs were deducted and recovered.
38. *Supra* n. 5 at 302.
39. *Id.* at 302-304.
40. *Supra* nn. 36 and 37.

The lessee's mistake was crucial because it established that it had unofficiously conferred a benefit on the lessor by bringing the wells into production and marketing the leased substances.

The function of the notion of unofficious intervention is rarely controversial in cases involving the oil and gas lease. It explains why a lessee cannot recover if it bestows a benefit which it knows the plaintiff does not want and it integrates the apparently specialist concept of the good faith trespasser into the mainstream of the law of restitution. The notion can, however, be controversial, as is illustrated by the treatment of a subsidiary issue in the well-known case of *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*[41]

It will be recalled that in that case, two companies, Lac and Corona, were negotiating a possible partnership or joint venture in respect of certain gold mining properties held by Corona. During the course of negotiations, Lac saw some confidential information which strongly suggested that an adjoining property would also be rich in gold. Lac proceeded to acquire the adjoining property, even though it was aware that Corona was also actively trying to purchase it. In the major portion of the case, the Ontario Court of Appeal found that Lac had been in breach of a fiduciary duty in acquiring the property and that Lac held the property as constructive trustee for Corona. In effect, Corona was entitled to require Lac to transfer the property to it.[42]

The transfer of the property was complicated by the fact that Lac had expended in excess of $150,000,000 in building a mine and a mill on the property. The Ontario Court of Appeal decided that Lac was entitled to a lien and that Corona must pay to Lac an amount equal to the value to Corona of the improvements.[43] The Court based this portion of the decision on the nature of the constructive trust, which enabled it to relieve Lac from full liability. It was equitable to require Corona to pay for improvements which it inevitably would have been required to make to the property, for otherwise Corona would have received an enormous benefit at Lac's expense.

In essence, this decision allowed Lac to be compensated for an unrequested benefit conferred on Corona. However, the Court was concerned that Lac might have been officious; most of the work on the property was performed after Lac had become aware of Corona's claim. The Court felt that it was going further than the position urged by Goff and Jones in their text when it allowed Lac to recover for the improvements, notwithstanding that they had made their expenditures with knowledge of Corona's claim of ownership.[44]

Despite the concerns expressed by the Court, surely Lac had not acted officiously. It had not improved the land knowing that it belonged to Corona. Lac thought that it owned the land, although it was aware of Corona's claim. Corona's claim was ultimately vindicated, although only at the conclusion of ground-breaking litigation which, at the time of writing, in June 1988, is still to be considered by the Supreme Court of Canada. On an assessment of the law prevailing at the time of the improvements, Lac had reasonable grounds for thinking that it owned the land and

41. (1988) 44 D.L.R. (4th) 592 (Ont. C.A.). For further discussion of this case, *see* Gertner and Lenczner, "A Tale of Two Cases" published in this Supplement. In Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of the Constructive Trust" (1988) 26 *Alta. L. Rev.* 407, the author discusses the major issue in the case from an unjust enrichment perspective.

42. *Id.* at (1988) 44 D.L.R. (4th) 649.

43. *Id.* at 661.

44. *Id.* The reference is to the discussion in Goff and Jones, *supra* n. 10 at 698-699.

thus it was not officious in continuing to build the mill and the mine. The result reached by the Court is, accordingly, less radical than the judgment indicates.

2. The Measure of Recovery

The failure to recognize that, in cases such as *Weyburn*, the courts were concerned to avoid the enrichment of the landowner at the expense of an unofficious lessee has also confused the discussion of the measure of recovery to which the lessee is entitled. In the *Weyburn* case, the lessee was allowed to retain the revenue that it had obtained prior to the service of the writ, even though this amount exceeded its expenses.[45] It has been argued that it would have been more correct to allow the lessee to offset the costs of production and marketing until it knew of the mineral owner's challenge and, thereafter, to allow only the marketing costs.[46] The basis of this argument is that the lessee can no longer claim to be an innocent trespasser once its title has been challenged and that, as a result, it loses its right to claim the cost of production. However, in an action by the lessor for the value of oil actually sold, the law of conversion will allow the lessee to deduct from the damages payable the expenses that were necessary to market the oil.[47]

Both of these positions are incorrect in principle. It is fairly pointed out that the principle of the *Weyburn* case can produce fortuitous results. It discriminates between mineral owners and lessees according to the time at which the invalidity of the lease is discovered.[48] If it is discovered early, the mineral owner obtains more of the benefits of production and the lessee is likely to recover only a small proportion of its costs. If the defect in the lease is discovered later, the lessee is favoured and the mineral owner is correspondingly prejudiced. However, the proposed alternative is equally flawed, for the right of the lessee to recover the costs of production and severance remains dependent upon the date that the lease is found to be invalid. If that date is shortly after production begins, most of the costs of severance will not be recovered.

When the lessee's claim is seen to lie in the law of restitution, the recovery of expenses does not depend upon the date of the service of the writ or the technicalities of the law of conversion. If the lessee conferred the benefit of drilling the well and bringing it into production unofficiously, the ordinary measure of restitution will require the mineral owner to restore the value of that benefit to the lessee.[49] In effect, this means that the lessee will recover the reasonable costs of drilling and production from the revenue provided from the well. In contrast to the *Weyburn* decision, the lessee must account to the lessor for any revenue received in excess of those costs. In contrast to the proposed alternative, no artificial distinction is made between the costs of production and the costs of marketing.

Thus, once the lessee has shown that its action was unofficious, it has passed the first obstacle to recovery in restitution, in which the measure of recovery is based upon the extent to which the mineral owner has been unjustly enriched. The second obstacle, which will be considered in the following section, requires the lessee to demonstrate that the mineral owner was benefitted by the improvements to the property.

45. *Supra* n. 3.
46. *Supra* n. 25.
47. *Id.*
48. *Id.*
49. Goff and Jones, *supra* n. 10 at 16.

C. THE CONCEPT OF BENEFIT

Even where the plaintiff's conduct has been unofficious, courts have been slow to require the defendant to pay for services which the defendant did not request or at least did not expect to pay for.[50] As was indicated earlier,[51] cases where the court felt that the plaintiff should be compensated for an unrequested benefit conferred on the defendant were traditionally explained by implying that the defendant had requested the plaintiff's services or in some circumstances by the doctrine of agency of necessity. There is no doubt that sometimes the notion of implied request was used by the courts as a convenient method of imposing a result that was demanded by justice and fairness. In one nineteenth century case, *Weatherby* v. *Banham*,[52] the plaintiffs were publishers of the Racing Calendar and had for some years supplied the magazine to one Westbrook as soon as it came off the press. In 1820, Westbrook died and the defendant went to live in his house. The plaintiffs, unaware of Westbrook's death, continued to send magazines to his house, where they were received and used by the defendant. Although the defendant never asked for the magazine, the plaintiff succeeded in an action for goods sold and delivered in respect of magazines supplied in 1825 and 1826. The contractual basis of decisions such as *Weatherby* v. *Banham* is clearly fictional for, as counsel vainly argued, the publisher never even knew of the defendant. Nevertheless, the implied contract analysis continued to be used to justify recovery for unrequested benefits until cases arose such as *Matheson* v. *Smiley*, which exposed its underlying weakness.

Although the implied contract fiction lingered well into the twentieth century, it offers little assistance where a mineral lease is terminated without the knowledge of the lessee. Under the terms of the lease, the lessor promises only to pay for services provided during the lifetime of the lease in certain circumstances. The lessor's promise expires when the lease is terminated, unless the lessee's actions fall within one of the provisos which permit the lease to be extended. In virtually all cases, it is difficult to imply a request that the lessee continue operations after the termination of the lease or to imply an obligation to pay for such operations.

It may, therefore, be safely concluded that the lessor owes no contractual obligation to pay for services rendered after the unexpected termination of the lease. However, the implied contract theory has now been replaced by a more satisfactory explanation of cases in which recovery for unrequested benefits is allowed. Most conventional accounts now recognize that the plaintiff can recover for a benefit conferred on the defendant without the latter's request either if the defendant freely accepts the benefit conferred or if, in the absence of free acceptance, the defendant is incontrovertibly benefitted by the plaintiff's action.[53] Each of these principles will be considered in turn.

1. Free Acceptance of Benefit

If A confers a benefit on B without B's request, a claim for compensation by A can often be met by the convincing argument that B did not choose to receive the benefit and, therefore, ought not to be required to divert funds to pay for it. Thus, if A's

50. Jones, "Restitutionary Claims for Services Rendered" (1977) 93 *L.Q.R.* 273.
51. *See* the discussion in the text at Part III. A, "The Development of a Theory of Recovery", *supra*.
52. (1832) 5 Car. & P. 228; 172 E.R. 950. The case is discussed in Birks, *Introduction to the Law of Restitution* (1985) 268-276.
53. *See* Jones, *supra* n. 50 at 274-276.

service station mistakenly tunes B's car to racing specifications, rather than carrying out routine maintenance in accordance with B's instruction, it can be argued that B should not be required to forego other purchases by being forced to pay for the additional, unrequested services performed on the car.

However, the situation is different if B knows that A confers a benefit in the expectation that A will be paid for it and B accepts the benefit, having had the opportunity to reject it.[54] In these circumstances, B can be described as having freely accepted the benefit and the courts are likely to require B to pay a reasonable sum for the benefit received. Thus, for example, in *Deglman* v. *Guaranty Trust Co.*,[55] a nephew provided services to an aunt under an agreement that ultimately proved to be unenforceable under the Statute of Frauds. The nephew was thus unable to obtain the anticipated compensation under the terms of the contract, but he was found to be entitled to receive a *quantum meruit* for the services rendered on the restitutionary basis that the aunt had freely accepted his services knowing that he expected to be paid for them.[56] It is also argued by a distinguished commentator that B may be taken to have freely accepted a benefit if the benefit was conferred upon B without request but B, having had the opportunity to reject the benefit, elects to keep it.[57]

The concept of free acceptance is central to those cases in which a mineral owner seeks an accounting from a lessee who has obtained production from a well under a lease which has unexpectedly terminated. For example, in *Sohio Petroleum Co.* v. *Weyburn Security Company Limited*,[58] where the well was completed and brought into production after the expiration of the lease, the mineral owner could simply have treated the lease as terminated and regarded the well as a useless and unsightly addition to the landscape. In those circumstances, it would be open to the owners to argue that the well was not the type of benefit that they would choose to pay for. However, the owners demanded that the lessee account for the leased substances removed from the land. Their argument of free choice is now entirely hollow, for they cannot validly claim both the proceeds of the well and that they would not have chosen to expend their funds on the well. They have had the opportunity to reject the fruits of the lessee's labours, but instead they have chosen to take maximum advantage of them. As a result, there would be a blatant unjust enrichment if the owners were allowed to keep the benefits bestowed by the lessee without paying the costs incurred in providing the benefits. It follows that the statement in the *Paramount Petroleum* case[59] that the lessor was entitled to an accounting for all the leased substances removed and that the lessee's mistake was irrelevant, is dangerously misleading. Once the lessor adopts the benefit of the well, by demanding an accounting, it must pay the costs of the well.

The cases in which the plaintiff seeks an accounting of the proceeds of the well following the termination of the lease are the easiest to deal with in restitution, although, as discussed earlier,[60] they raise problems relating to the appropriate measure of recovery. A more difficult case could arise if the mineral owner were to seek a declaration that the lease had terminated shortly after the well was brought into production, without asking for an accounting for the production that had already

54. Birks, *supra* n. 52 at 265; Goff and Jones, *supra* n. 10 at 18-19.
55. *Supra* n. 9.
56. *See* McManus, *supra* n. 26 at 486.
57. *Supra* n. 50 at 276-284.
58. *Supra* n. 3.
59. *Supra* n. 36.
60. *See* the discussion in the text at Part III. B. 2. "The Measure of Recovery", *supra*.

occurred. Again, it might be possible for the owner to argue that the well was an unwelcome intrusion on his land, but if the owner continues to produce from the well and to gain revenue from it, surely he has freely accepted a benefit that was initially bestowed without any request. In these circumstances, the owner ought to be required to compensate the lessee for the costs incurred in completing the well.

In both of these types of cases, there are very strong arguments in restitution that the lessee should recover its costs, for otherwise the owner would clearly be enriched at the lessee's expense. A more difficult problem arises if the lessor fails to put into production a well that was completed under an expired lease. This problem will be considered in the following section.

2. Incontrovertible Benefit

As was shown in the previous section, there is a strong claim in restitution if, despite the fact that a benefit was conferred without request, the benefit was nevertheless freely accepted by the recipient. However, there are cases in which a recipient has been required to pay for a benefit, even though it was not requested and there was no opportunity to reject it. Before recovery is allowed on these grounds, the courts must be certain that the services provided are indeed a benefit to the recipient and the cases are thus classified as involving an incontrovertible benefit.[61] One commentator provides as examples of recovery for incontrovertible benefits, cases in which the unofficious act of an intervenor has discharged a legal liability owed by the recipient, or discharged a positive duty which the recipient would otherwise have been obliged to bear or satisfied an expenditure which the recipient would otherwise have been inevitably required to pay.[62] It is perhaps fair to conclude that there are instances of recovery in each of these cases and indications that a principle is emerging that the plaintiff can recover for an incontrovertible benefit which is unofficiously conferred.

One of the best known examples of recovery is provided by the Supreme Court of Canada decision in *County of Carleton* v. *City of Ottawa*.[63] Following the annexation of lands in neighbouring counties, the City of Ottawa assumed the obligation of looking after indigents in the annexed areas. The name of one indigent was accidentally omitted from the list of those for whom Ottawa assumed responsibility and the County of Carleton continued to pay for her upkeep until 1960, when the omission was noticed. Carleton took the position that Ottawa must reimburse it for the cost of caring for an indigent for whom Ottawa was responsible. The case was analogous to those in which reimbursement was allowed to a person who, under legal compulsion, discharged another's liability,[64] but not identical, because Carleton's payments arose out of a mistake rather than compulsion. However, the mistake demonstrated that Carleton's intervention was unofficious and recovery was allowed under general principles of restitution. Although Ottawa did not freely accept Carleton's services, there is no doubt that it was benefitted, because Carleton had

61. *See* Jones, *supra* n. 50 at 284-294.
62. Birks, "*Negotiorum Gestio* and the Common Law" (1971) 24 *Current Legal Problems* 110 at 125. *See* for examples of such recovery, the cases involving compulsory discharge of another's debt, such as *Brook's Wharf & Bull Ltd.* v. *Goodman Brothers* [1937] 1 K. B. 534 (C.A.); the cases involving the performance of another's duty to bury the dead described in Goff and Jones, *supra* n. 10 at 348-349; *County of Carleton* v. *City of Ottawa*, *supra* n. 18; *Mechanical Contractors Association* v. *J.G. Rivard Ltd.* (1977) 90 D.L.R. (3d) 585 (Ont. H.C.).
63. *Supra* n. 18.
64. As in the *Brook's Wharf* case, *supra* n. 62.

satisfied an expenditure which Ottawa would otherwise have been bound to incur.

A similar justification exists for the recovery by Lac of the value of the improvements effected upon the lands to which Corona was found to be entitled in *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*[65] The earlier discussion demonstrated that Lac had not been officious in building the mill and the mine, but it was still necessary to demonstrate that Corona was benefitted by the improvements, which it had not asked Lac to undertake. It may be obvious that a mining property is more valuable once the mine and the mill have been built, but the Ontario Court of Appeal specified that "the expenditures made by Lac to make the property productive inevitably would have been required on the part of Corona".[66] Thus, Corona was required to reimburse Lac for improvements which were an incontrovertible benefit, because they saved expenses which otherwise Corona would have been required to bear.

The same clarity which marked the treatment of this issue in *Lac Minerals* is not found in an important case in which it was argued that there should be recovery for an incontrovertible benefit conferred under an expired mineral lease. In *Republic Resources Ltd.* v. *Ballem*,[67] drilling began under a lease shortly before the end of the primary term. Natural gas was discovered after the term had expired, but the well was capped and then shut-in because of an absence of available markets. The lessee assumed that the lease was still valid, because it was engaged in drilling on the expiry date, and as a result it failed to exercise an option to renew within the stipulated time. However, the lessee was caught by a form of lease, similar to that found in the *Kininmonth* case,[68] which requires production to commence within the primary term in order for the lease to be extended by the continuous operations clause. The lessee thus had no further rights under the lease and sought, as an alternative, the costs which had been incurred in drilling the gas well in the amount of approximately $189,000.

It was difficult to argue that the mineral owner had freely accepted the benefit of the well. She was not aware that the well was being drilled until after the primary term had ended although, through her agent, she became aware that the lease was probably invalid before the plaintiff's option to renew had expired. Accordingly, the plaintiff argued that the lessor was incontrovertibly benefitted because she had a well which could be placed into production as soon as a market for natural gas became available and she had been saved the inevitable expense of drilling a well in the future.

The Court dismissed the plaintiff's claim for a confusing variety of reasons. It distinguished the *Weyburn* case by pointing out that there was no production out of which the plaintiff's costs could be taken and appeared to treat that case as involving the principle of free acceptance.[69] Several other streams of reasoning converged in the denial of the claim that the lessor had incontrovertibly benefitted from the plaintiff's activities. The more important reasons can be set out as follows:

(a) Absence of Precedent

The Court was of the opinion that apart from the controversial English case of *Greenwood* v. *Bennett*,[70] it had not been referred to any authority where restitution

65. *See* the discussion in the text at III. B. 1. "The Basis of the Lessee's Claim", *supra*.
66. *Supra* n. 42 at 661.
67. [1982] 1 W.W.R. 692 (Alta. Q.B.).
68. *Supra* n. 34.
69. *Supra* n. 67 at 704.
70. [1973] 1 Q.B. 195 (C.A.).

was awarded for services which had been mistakenly rendered without the knowledge, acquiescence, or free acceptance of the recipient. It came to the remarkable conclusion that *Carleton* v. *Ottawa*[71] did not count as such an authority, because it was merely an example of the well recognized restitutionary ground of recovery for money paid under mistake of fact. This explanation is clearly unsatisfactory, for that case did not refer to any authorities dealing with money paid under mistake of fact and it raises far more complex issues than the ordinary mistake of fact case. Indeed, even the English text upon which the judgment in *Republic Resources* heavily relies, clearly classifies *Carleton* v. *Ottawa* as an example of a successful restitutionary claim where the defendant received an incontrovertible benefit from the plaintiff.[72]

(b) Mistaken Improvements to Land

Although the Court in *Republic Resources* was prepared to concede that *Greenwood* v. *Bennett* allowed recovery to one who had improved another's chattel in the mistaken belief that it was his own, it noted that there is more reluctance to allow a similar claim to one who improves land. It seems that this reluctance is explained by a feeling that it is less unreasonable to require an owner whose chattel has been improved to sell the chattel if necessary in order to make restitution than it is to require the owner of land to sell or mortgage it in order to compensate the improver for unsolicited benefits.[73] The reluctance of the common law to compensate one who mistakenly improves another's land thus has an understandable basis. It does not follow, however, that compensation will never be allowed, for cases arise in which the concerns that underlie the traditional approach are far from compelling.

In addition to the risk of imposing hardship on the owner, the simplest case of mistaken improvements to land offers a further reason against recovery. If A builds a garage on B's land, under the mistaken impression that A owns the land, A's claim for compensation will be met with a free choice argument. B can respond that the garage was not a benefit, or at least not the type of benefit which B would choose to pay for at the expense of other purchases. However, there are circumstances in which B's free choice argument is less persuasive. If B sells the land for a price that is $10,000 higher than it would have been if the garage had not been built, the response that the garage is no benefit to B is empty. B has benefitted to extent of $10,000 and the objection that it is unfair to require a person to sell land in order to pay for the improvement is removed.[74] Unless A is compensated, B will have received a windfall of $10,000 at A's expense and solely as a result of A's mistake, in violation of the unjust enrichment principle.

Apart from statute, there are no examples of an action successfully brought by a person in A's position to recover the $10,000 benefit. However, A's claim has received indirect recognition in cases such as *Weyburn*, where B sought an accounting for revenue produced from the land by the improvement, and in cases where B sued A in tort for wrongful occupation.[75] Indeed, when the case is measured against the principle of unjust enrichment, and the reasons for the traditional reluctance to allow recovery for mistaken improvements to land are examined, there is a strong argument that A should be compensated.

71. *See* the discussion in the text at Part III. C. 2, "Incontrovertible Benefit", *supra*.
72. Goff and Jones, *supra* n. 10 at 149.
73. *See supra* n. 67 at 707, where Holmes J. quotes from Goff and Jones, *The Law of Restitution* (2nd Ed., 1978) 113-114.
74. *See* Birks, *supra* n. 52 at 121.
75. *Id.*; *see also Peruvian Guano Co.* v. *Dreyfus Bros. & Co.* [1892] A.C. 170.

If B does not sell the land, the free choice argument is stronger, for the benefit of the garage may not be realized until some time in the future. Nevertheless, the benefit remains and the primary question must be whether some appropriate remedy can take into account the deferred realization of the benefit by B. The next two sections of this paper will examine how this issue was treated in *Republic Resources*.

(c) Is a Capped Gas Well a Benefit?

Although in the previous section it was argued that in theory there can be recovery for unsolicited improvements to land, the Court in *Republic Resources* was concerned with the question whether the mineral owner truly obtained a benefit from a gas well which had been capped because of an absence of available markets. It was not known when a market for the defendant's gas might develop and, although gas had been found in commercial quantities, the Court was uncertain whether the costs of drilling the well equalled the value of the benefit to the defendant.

In examining this question, it is important to note that the defendant owned only a mineral estate, without any surface rights. If the mineral rights were ever to be exploited, it would be necessary to drill a well. If, rather than developing the property, the defendant chose to sell it, the value of the property would presumably be enhanced by the existence of a completed gas well. Thus, if the defendant chose to proceed to production, she would be saved the inevitable expense of completing a well or, if she chose to sell her mineral rights, she would capture the value of the well upon sale. Unlike the surface owner who receives an unrequested garage, the mineral owner surely cannot claim that a completed well is no benefit at all. The Court appeared to recognize this argument, for it conceded that the plaintiff had conferred an "unascertained benefit"[76] on the defendant. However, unlike the *Lac Minerals* case,[77] in which Corona was required to pay for the benefits as a condition of receiving the conveyance of a valuable property, the mineral owner in *Republic Resources* might have been forced to sell her property in order to compensate the plaintiff. The real problem thus seems to be whether there is an appropriate remedy which could take into account the unascertained nature of the benefit without causing hardship to the mineral owner.

(d) The Availability of an Effective Remedy

The plaintiff in *Republic Resources* recognized that courts are reluctant to force a defendant to sell or mortgage land in order to pay for an unrequested improvement. Accordingly, it sought an order in which the costs of drilling the well would have been set off against the net proceeds of the eventual initial production from the land and would be secured by a lien or charge against the defendant's title. The Court took the view that any such order could be issued only under the Alberta Land Titles Act,[78] but that the relevant section authorized only the registration of existing charges or liens and not their creation. This interpretation of the statute is uncontroversial, but surely the absence of authority in the Land Titles Act is not fatal if the plaintiff's right to a lien or charge can be established on other grounds.

76. *Supra* n. 67 at 708.
77. *Supra* n. 42.
78. *Supra* n. 67 at 708. The relevant statutory section is now found in the Land Titles Act, R.S.A. 1980, c. L-5, s. 180(1).

In examining whether there can be a non-statutory basis for an equitable lien, it is important to note that a revolution has occurred in the use by Canadian courts of *in rem* equitable remedies in the law of restitution. A successful claim in restitution ordinarily results in a monetary judgment, which is enforceable against the defendant as a personal obligation. Traditionally, proprietary claims, in the form of equitable tracing under a constructive trust and equitable liens, were available only where it could be shown that a fiduciary relationship existed between the parties.[79] In later years, courts tended to find a fiduciary relationship whenever it was necessary to do so and this obscured the candid assessment of the the considerations which governed the availability of these remedies.[80] In Canada, both this tendency and the traditional restriction of equitable proprietary claims to fiduciary relationships were swept away by the celebrated decision in *Pettkus* v. *Becker*.[81] In that case, the majority of the Supreme Court of Canada made it clear that a constructive trust would be imposed where necessary simply in order to avoid the unjust enrichment of one party at the expense of another, without any investigation of whether a fiduciary relationship existed.[82]

Although the comments in *Pettkus* v. *Becker* dealt with the constructive trust, they are equally applicable to the equitable lien, which is merely an alternative form of proprietary remedy.[83] As a result of the expanded availability of these remedies, it appears that Canadian law has already reached the position, which Goff and Jones urge upon the English courts, where proprietary claims will be granted if "it is just in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets".[84]

The availability of the equitable lien in cases such as *Republic Resources* thus depends initially upon establishing that the mineral owner was unjustly enriched at the expense of the lessee. If, as was argued earlier, an unjust enrichment occurred because the lessee conferred an incontrovertible benefit on the mineral owner, current principles suggest that the remedy of an equitable lien should be available. This position is supported by old authority in which mistaken improvers of land were found to be entitled to secure their claim by an equitable lien.[85] However, because this remedy is ultimately enforceable by an order for the sale of the charged property, it is still necessary to address the Court's reluctance to require the owner to sell the land in order to pay for the improvements.

This concern can be met in a variety of ways.[86] For example, because the equitable lien is a discretionary remedy, presumably it can be granted subject to the condition that it is enforceable only upon the commencement of production or the transfer of the mineral estate. Alternatively, if this condition is too cumbersome, the same object can be accomplished by immediately vesting the property in the lessee until it has

79. Goff and Jones, *supra* n. 10 at 77-78; Dewar, *supra* n. 20 at 271-275.
80. *See* Goff and Jones, *supra* n. 10 at 77; Dewar, *supra* n. 20 at 273.
81. *Supra* n. 20.
82. *Id.* at 273-275.
83. Klippert, *Unjust Enrichment* (1983) 201; Goff and Jones, *supra* n. 10 at 78; American Law Institute, *Restatement of the Law of Restitution (2nd)*, Tentative Draft No. 2 (1984), s. 30.
84. Goff and Jones, *supra* n. 10 at 78.
85. *Unity Joint Stock Mutual Banking Assoc'n.* v. *King* (1858) 25 Beav. 72; 53 E.R. 563. *See also Lee Parker* v. *Izzet (No. 2)* (1972) 2 All E.R. 800, in which in principle an equitable lien was found to be available to a purchaser who went into possession and made improvements under a contract that was later found void for uncertainty.
86. Palmer, *2 Law of Restitution* (1978) s. 10.9, describes a substantial body of American authority which grants relief to the mistaken improver and the variety of relief granted with the aim of lessening the hardship on the landowner.

received the value of the improvements or upon payment of compensation to the mineral owner.[87] Whether one of these options or some other alternative is chosen, once the propriety of recovery and restitution is recognized, it will surely be possible to fashion an appropriate remedy to meet the circumstances of the individual case.

IV. ALTERNATIVE GROUNDS OF RECOVERY

Much of this paper has dealt with a discussion of the right of the lessee to recover for improvements in the law of unsolicited intervention. Because the law of restitution consists of a number of established categories of recovery, united by the principle of unjust enrichment, it is necessary for the sake of completeness to examine two other categories which are relevant to the lessee's claim. The first deals with the recovery of benefits conferred under an ineffective contract and the second with a right to restitution that is conferred by statute.

A. INEFFECTIVE CONTRACTS

A well established ground of restitution occurs where benefits have been conferred under a contract that has proved to be ineffective. Thus, for example, benefits can frequently be recovered under contracts which fail for reasons such as mistake, infancy, uncertainty, frustration and informality.[88] This group of cases present a clear case for recovery in restitution for, unlike the cases of unsolicited intervention considered in the previous section, the recipient of the benefit cannot argue convincingly that he or she never wanted the benefit and ought not to be required to pay for it. This is illustrated by the *Deglman* case,[89] where the Court found that the nephew had agreed to provide services to his aunt in exchange for her promise to bequeath a house to him. The aunt's promise was contained in a contract which was unenforceable under the Statute of Frauds. The existence of the contract, despite its unenforceability, demonstrated both that the aunt desired the benefit of the nephew's services and that they were not intended to be gratuitous.

It is possible that a lessee who has improved land under an expired lease might claim a *quantum meruit* under this head of recovery. There is a textbook suggestion that services rendered after the termination of a contract should be treated in the same way as services rendered under ineffective contracts, but it is not supported by convincing authority.[90] In principle, there is an argument in favour of the lessee, because it performed the work (as in many of the other types of ineffective contracts) in the erroneous belief that a valid contract was in existence. The original lease, which invited the lessee to complete the well, also makes it difficult to argue that the well was of no benefit to the mineral owner. On the other hand, the mineral owner can argue that the request for the lessee's services expired with the lease and that the

87. *Cf. Taylor* v. *Taylor* [1956] N.Z.L.R. 99 (S.C.), in which the Court adopted this technique without direct statutory authority in the case of mistaken improvements to land; *cf. also* the discussion of the operation of s. 60 of the Law of Property Act in the text, Part IV. B, "Improvements Made Under Mistake of Title", *infra*.

88. *See* generally McCamus, "Restitutionary Remedies" [1975] *Law Society of Upper Canada Special Lectures* 255.

89. *Supra* n. 9 and *see* the discussion in the text at Part III. C. 1, "Free Acceptance of Benefit", *supra*.

90. Fridman and McLeod, *Restitution* (1982) 452-453. The case upon which the authors rely, *Parklane Private Hospital Limited* v. *Vancouver* (1974) 47 D.L.R. (3d) 57 (S.C.C.), seems to involve the free acceptance principle, discussed in the text at Part III. C. 1, *supra*, rather than a typical case of an ineffective contract.

lessee should now be in no better position than a person who drilled the well when no contract had ever existed.

On balance, the lessee's claim is analogous to cases of recovery for benefits transferred under ineffective contracts. However, it is perhaps better treated as a case of unsolicited intervention, in which the existence of the expired lease establishes that the lessee was not officious and diminishes the credibility of the mineral owner's claim that the completed well is not a benefit for which payment should be required.

B. IMPROVEMENTS MADE UNDER MISTAKE OF TITLE

Although the law of restitution is almost entirely judge-made, a number of provinces have enacted statutes which provide relief to those who improve land in the mistaken belief that they own it. The origins of this legislation are found in American statutes dating back to 1890[91] and they provide an alternative basis for a lessee's claim for improvements made under a terminated lease.

The present Alberta legislation is found in section 60 of the Law of Property Act.[92] It provides two types of remedy to a person who "has made lasting improvements on land under the belief that it was his own". The remedy can take the form of a lien or a forced sale of the land to the improver.

An initial barrier to the use of this section in the mineral lease cases is caused by the requirement that the improver must have a mistaken belief of ownership. Those who improve land under the mistaken impression that they are working under a valid mineral lease rarely believe that they own the land. At most, they believe that they hold an ownership interest in the land in the form of a *profit à prende*.[93] In interpreting the equivalent Ontario section, the Supreme Court of Canada in *Montreuil* v. *Ontario Asphalt Co.*[94] denied the benefit of the Act to a lessee whose lease contained an invalid option to purchase the land. However, in a dissenting judgment in that case, Duff J. pointed out that it is not drafted with any technical precision and that the phrase "under the belief that the land is his own" does not "contain a single word (except the word "land") having a definite legal meaning".[95]

The applicability of section 60 to those who mistakenly believe that they hold a valid mineral lease requires further research. However, it seems that lessees can fit within the words of the Act, for they believe that they hold a valid ownership interest in the land. In addition, they are within the policy of the Act, because they have improved land in the belief that they have the right to do so and that under the terms of the lease they will reap the benefit of the improvements.

On the assumption that the lessee can overcome this initial barrier to recovery, it must then be shown that the well constitutes a lasting improvement. It is established by a solid line of authority that "lasting" means permanent and not easily removable[96] and there is little doubt on this test that a completed well constitutes a lasting improvement. The available remedies depend upon whether the lessee can establish that the value of the property has been enhanced by the well. It is clear that the

91. *Supra* n. 86 at 441-444.
92. R.S.A. 1980, c. L-8, as am.
93. Following the characterization in *Berkheiser* v. *Berkheiser* [1957] S.C.R. 401.
94. (1922) 63 S.C.R. 401.
95. *Id.* at 414.
96. *Gay* v. *Wierzbicki* (1967) 63 D.L.R.(2d) 88 (Ont. C.A.); *Mildenberger* v. *Prpic* (1976) 65 D.L.R. (3d) 67 (Alta. S.C.T.D.); *Maly* v. *Ukrainian Episcopal Corp'n of Western Canada* (1977) 1 Alta. L.R. (2d) 277 (Alta. D.C.).

enhancement of value is not measured by the costs incurred by the lessee[97] and this caused some difficulty in the *Republic Resources* case. The Court conceded that the mineral owner had obtained some benefit by the completion of the well, but because this well and others in the neighbourhood had been capped, the Court mentioned that it was open to doubt whether the costs of drilling the well equalled the monetary value of the benefits received by the mineral owner.[98] The lessee might be able to resolve this doubt by presenting evidence of the market value of the improvements which might consist, for example, of a comparison between the value of an unimproved mineral estate and a mineral estate which has been developed by the completion of a well. However, this comparison might be affected by a large number of other variables.

If the lessee cannot establish the value of the improvements, or if the value of the property has not been enhanced, the statute contains an alternative remedy in the form of a forced sale.[99] The lessee may have a right or a duty to retain the improved land if the court considers it just, upon payment of compensation to the original owner. The measure of compensation is also discretionary, but the Act provides a clear alternative if the value of the improvements cannot be satisfactorily calculated.

The predecessor of section 60 of the Law of Property Act was mentioned in passing in the *Republic Resources* decision when Holmes J. commented that it had not been suggested that the lessee might have a lien or charge under the Statute.[100] Although its application to a mineral lessee would be novel, these *dicta* appear to provide a strong argument for recovery in statutory restitution.

V. CONCLUSION

The unexpected termination of a mineral lease frequently gives rise to questions of unjust enrichment. Where production has occurred following the termination of the lease, courts have sometimes recognized the danger of unjust enrichment by granting an allowance to the lessee in the accounting of the proceeds of production. Even cases of this type have not been characterized as restitutionary in nature, with the result that they appear *ad hoc* in nature and the exact measure of compensation available to the lessee remains obscure. Where a well is completed but there has been no production, the problem was at least recognized as one of restitution in the *Republic Resources* decision. However, the Court in that case failed to analyze the case in the context of modern developments in restitution and, as a result, it may have hampered the future application of restitution in mineral lease cases. When the problem posed in *Republic Resources* is viewed in restitutionary terms, it can be seen that the lessee has a strong claim for recovery of its expenses under the heading of unsolicited intervention. In addition, the lessee's position is analogous to recognized cases of recovery under ineffective contracts and may be supported by statute. The lessee's claim presently lies at the frontier of the developing law, but in the light of recent pronouncements in senior Canadian authorities, it would not be in the least surprising if the claim were recognized in a future decision.

97. *See* the *Maly* case, *id.* at 282.
98. *Republic Resources Ltd.* v. *Ballem*, *supra* n. 67 at 708.
99. *Mildenberger* v. *Prpic*, *supra* n. 96.
100. *Supra* n. 98.