CONFERENCE PROGRAMME 2006

British Association for Canadian Studies, Legal Studies Group
International One Day Conference, Canadian High Commission,
Macdonald House, 1 Grosvenor Square, London on Friday 30 June 2006

Anglo-Canadian Perspectives on Contract and Unjust Enrichment/Restitution

KEYNOTE SPEAKER: PROFESSOR STEPHEN WADDAMS (University of Toronto):

The relation between contract and unjust enrichment

PANEL DETAILS

9.30 – 10.00	**Registration and Coffee/Tea/Fruit Juice (Foyer)**
10.00-10.05	**Welcome** ♦ Paula Giliker, Conference Co-Ordinator Guy Saint-Jacques, Deputy High Commissioner for Canada in the United Kingdom
10.05 – 11.00	**Plenary Session –Large Salon** ♦ Chair: Paula Giliker ♦ Professor Stephen Waddams: The relation between Contract and Unjust Enrichment.
11.00 - 11.15	**Refreshments (Foyer)**
11.15 – 12.45	**Panel 1 – The division between contract and restitution, Large Salon (Chair – Jane Wright)** ♦ Peter Jaffey, Brunel: 'Contract and unjust enrichment and the problem of classification' ♦ Steve Hedley, UCC: 'Implied contract and the law of restitution' ♦ Robert Stevens, Oxford: 'Restitution within a valid contract' ♦ Duncan Sheehan, UEA: 'Implied Contract and the Taxonomy of Unjust Enrichment'
12.45 – 2.00	**Lunch (Canada Room/Salle du Canada)** (Wine kindly donated by the Canadian High Commission)

2.00 –3.15	**Panel 2 – Issues in Restitution, Large Salon** ♦ Mitchell McInnes, University of Alberta: 'Competing conceptions of "injustice" in English and Canadian unjust enrichment' ♦ Stephen Watterson, Bristol: 'Subrogation as a Response to Unjust Enrichment: Unexplored Implications for the Law' ♦ Leonard I. Rotman, University of Windsor: 'Fiduciary obligation and its relationship with contract and unjust enrichment'
2.00 –3.15	**Panel 3 – Issues in contract: Remedies, Small Salon** ♦ Jill Poole, UWE: 'Awarding damages for distress and loss of reputation in England and Canada' ♦ James Davey, Cardiff: 'Once more into the breach: Remedies for Non-payment of Insurance Claims after *Blake*' ♦ Robert Bradgate and Séverine Saintier, Sheffield: '"Compensation" and "indemnity" under the Agency Regulations: How the common law system copes with the invasion of civilian concepts.'
3.15 – 3.40	**Refreshments (Foyer)**
3.40 – 4.55	**Panel 4 – Issues in Contract, Small Salon** ♦ Vanessa Simms, UEA: 'Good Faith in Pre-contractual Negotiations' ♦ Jesse Elvin, City: 'The Purpose of the Doctrine of Presumed Undue Influence' ♦ Cliona Kelly, University College Dublin: 'Drafting an Irish Frustrated Contracts Act: Lessons from British Columbia'
3.40 – 4.55	**Panel 5 – Issues in Contract and Restitution, Large Salon** ♦ Catharine MacMillan, QMUL: 'Mistake of Law in Contract and Restitution' ♦ Kate Bracegirdle, Sheffield: 'The Doctrine of Mistake in Contract and Unjust Enrichment' ♦ Gerard McMeel, Bristol: 'The primacy of contract in unjust enrichment claims' ♦ Adeline Chong, Nottingham: 'Choice of Law for Void Contracts and their Restitutionary Aftermath: The Putative Governing Law of the Contract'
4.55 – 5.00	**Closing Remarks/Close of Conference**

ABSTRACTS OF PAPERS

PROFESSOR PETER JAFFEY, BRUNEL UNIVERSITY: Contract and unjust enrichment and the problem of classification

The relationship between contract and unjust enrichment or restitution has been a matter of persistent controversy. The underlying problem is to determine what sort of legal category is in issue. There are different possible criteria or principles of classification that could be applied to make a legal classification. Three in particular seem to be important in understanding this controversy and other difficulties concerning restitution and unjust enrichment: classification by reference to justification, remedy, and what I will call "modality". These different types of classification play different roles in the law. Often attempts to explain the relationship between categories of law are not explicit about the nature of the classification, and this can be a source of confusion. It also appears to be a problem in interpreting Birks's well-known classification, described as a classification of "causative events".

ROBERT STEVENS, UNIVERSITY OF OXFORD: Restitution within a valid contract

In his final work, Peter Birks argued that the English law of unjust enrichment possessed a greater degree of unity than had hitherto been supposed. He argued that an obligation to make restitution of a benefit conferred arose whenever that benefit was conferred without legal ground. This contrasted with the traditional approach of the common law, which Birks had previously defended, of seeking to identify and classify a large number of specific reasons why restitution of a benefit should be awarded.

In the context of contractual transfers, Birks argued that whenever a contract was void, voidable, or terminable an obligation to make restitution arose. This paper argues that the proposition that restitution follows whenever a contract is void or voidable is defensible, but that neither the terminability nor termination of a contract are necessary or sufficient conditions for the award of restitution. However, it will be argued that this flaw is not necessarily fatal to Birks' overall thesis.

A careful consideration of the relevant authorities, including the decision of the High Court of Australia in Roxburgh v Rothmans, reveals that in order to understand when the restitution of a benefit will be awarded it is necessary to distinguish between those cases where performance is due and where it has been earned. Only then can the law be understood.

DR DUNCAN SHEEHAN, UNIVERSITY OF EAST ANGLIA: Implied Contract and the Taxonomy of Unjust Enrichment

This paper looks at two linked issues, the taxonomy of unjust enrichment and Hedley's implied contract theory. Hedley has for the past twenty years been a critic of what he terms "the unjust enrichment school", and Birks' attempts to structure unjust enrichment, and private law more widely, by means of a "taxonomic grid". The first part of the paper looks at the objection that the grid is methodologically flawed, and in particular at objections raised by Hedley and Samuel. They are correct that Birks aims

at an unworkable degree of logical precision in constructing and using the grid. The paper examines whether on that basis there remains any role for Birks' style of taxonomic reasoning, and what that role might be.

Alongside his critique of the grid, Hedley introduces his concept of implied contract. Eschewing the precision of Birks' exposition of unjust enrichment, implied contract is a much more flexible notion, and straddles various categories of the Birksian grid. If right, implied contract demonstrates the inutility of the grid. Contract cannot, Hedley says, be based on consent, and the fact that "unjust enrichment" cases are not based on consent is therefore no answer to the claim that they are contractual. Consent theories of contract can, however, respond to Hedley's critique, although it is beyond the paper's scope to prove a consent theory. The paper goes on to examine whether Hedley's version of implied contract can provide a coherent interpretative category for the law, or a single normative or explanatory principle for the cases it encompasses.

PROFESSOR MITCHELL MCINNES UNIVERSITY OF ALBERTA: Competing conceptions of "injustice" in English and Canadian unjust enrichment

After twenty years of uncertainty, the Supreme Court of Canada has now conclusively decided that the third element of the Canadian action in unjust enrichment consists of an absence of any juristic reason for the enrichment (*Garland v Consumers Gas Co* 2004). In contrast, it appears that the English action in unjust enrichment continues, despite Professor Birks' powerful argument to the contrary, to require proof of an unjust factor.

I propose to present a paper that examines the implications of those competing conceptions of "injustice." The discussion will focus on claims that arise at the intersection of restitution and contract, and the manner in which such claims ought to be resolved under the Canadian and English formulations of unjust enrichment.

DR STEPHEN WATTERSON, UNIVERSITY OF BRISTOL: Subrogation as a Response to Unjust Enrichment: Unexplored Implications for the Law

DR LEONARD ROTMAN, UNIVERSITY OF WINDSOR: Fiduciary obligation and its relationship with contract and unjust enrichment

This paper examines the issue of fiduciary obligation and how it fits within the areas traditionally marked out for contract and unjust enrichment. In particular, I propose to carve out necessary distinctions between contract, fiduciary duty, and unjust enrichment. The paper will illustrate the distinctive, exemplary function of fiduciary law, as opposed to contract and unjust enrichment, that justifies its separate treatment in law. The paper will build upon materials contained in my recent book, *Fiduciary Law* (Toronto: Thomson/.Carswell, 2005).

PROFESSOR JILL POOLE, UNIVERSITY OF THE WEST OF ENGLAND: Contract/remedies

JAMES DAVEY, CARDIFF LAW SCHOOL: "Once More into the Breach: Remedies for Non-payment of Insurance Claims after *Blake*"

Across the common law world, judges have struggled to find a suitable cause of action to restrain opportunistic behaviour by insurance companies and in particular where this is manifested in an unjustified refusal to meet an objectively valid claim. Responses to this dilemma can be mapped across a linear scale, from the timidity of the English judiciary to the (reputedly) rampant bad faith jurisdiction in the United Sates. However, the lines are shifting as our conception of damages and their function changes. In Canada, important questions on the limits of punitive damages have been answered in the insurance non-payment case of *Whiten v Pilot Insurance*. The UK Financial Services Ombudsman has seriously mooted granting damages for non-pecuniary losses against insurers who turn a drama into a crisis of their own making. The English judiciary seems less concerned. However, whilst United Kingdom remains far from the vanguard, *AG v Blake* has provided new avenues for developing restraints on insurer behaviour. Whilst *Blake* and its successors may cast something of a pall over contract damages in general, this paper goes in search of a small but significant silver lining for insurance law.

PROFESSOR ROBERT BRADGATE AND DR SÉVERINE SAINTIER: "Compensation" and "indemnity" under the Agency Regulations: How the common law system copes with the invasion of civilian concepts

In 1986, the Council of Ministers of the European Union enacted Directive 86/653 on self-employed commercial agents. The Directive was implemented in English law by the Commercial Agents (Council Directive) Regulations 1993 which came into effect on January 1, 1994. The Directive (and the Regulations) are not of merely parochial interest. The Regulations have been held to be in the nature of mandatory law so that they applied where an agent acted in the UK for a Californian principal under a contract governed by Californian law (*Ingmar GB Ltd v Eaton Leonard Inc*).

The Directive is based on the civil law assumption that commercial agents are in need of protection. In contrast the English common law position is that principals are the ones who deserve protection. When the Regulations came into force, confusion arose because they introduce a degree of protection for commercial agents on termination, by way of civil law concepts of "compensation" and "indemnity", which are alien to the common law. Confusion was exacerbated by the lack of guidance as to the application of such concepts in the Directive and a near-verbatim implementation in English law, further compounded by the apparent similarity between the Directive's concept of "compensation for loss" and the function of damages at common law. In implementing the Directive, the UK, alone amongst EC Member States, chose not to opt for one remedy – either "compensation" or "indemnity", but provided for both to be available and the choice between the two to be made by the parties. As a result, much depended on the common law courts to clarify the scope of application of the Regulations and ensure their efficiency in protecting commercial agents. To complicate matters further, the Directive and implementing Regulations permit the agent to maintain an action for damages at common law where the agency is terminated in breach of contract.

The aim of this paper is to study the impact of the French-based "compensation" and the German-based "indemnity" on the common law and to examine how the

Directive's remedial scheme maps onto the traditional taxonomy of remedies. Are they compensatory, restitutionary or completely *sui generis*? It will first consider the nature and rationale of the Directive's remedies to see how they differ from common law concepts and then examine how the common law courts have applied such concepts with, perhaps, unexpected ease.

DR VANESSA SIMMS, UNIVERSITY OF EAST ANGLIA: Good faith in pre-contractual negotiations

One of the most frequently cited quotes in the context of the good faith debate is Lord Ackner's famous dictum in *Walford* v *Miles*, that "[a] duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party"[1]. Almost equally frequently, those who use this statement (usually as an argument against the notion of good faith *per se*) fail to give due regard to the particular context in which it was made – namely that of pre-contractual negotiations. I have already argued elsewhere[2] that English contract law should recognise a concept of good faith in the enforcement and performance of agreements, but that this must be kept separate from the pre-formation stage. This paper uses a comparison with the German concept of *culpa in contrahendo* to investigate whether my theory of good faith can now be extended to pre-contractual negotiations.

JESSE ELVIN, CITY UNIVERSITY: The purpose of the doctrine of presumed undue influence

This paper examines the doctrine of presumed undue influence in the light of a number of recent appellate court decisions. It argues that they have failed to clarify the law, and that they show that there are two main competing judicial views about the purpose of this doctrine. These are, firstly, one that focuses on whether the 'weaker' party's will was 'overborne' and which regards any misconduct on the 'stronger' or ascendant party's part as irrelevant, and, secondly, one that focuses on whether the stronger party was guilty of a form of wrongdoing in relation to a position of influence or trust. I argue that neither of these interpretations may be viewed as constituting the predominant concept of presumed undue influence among the judiciary. Taking account of the academic debate between advocates of each of these views, I conclude that the conflict between these two notions should be resolved by the House of Lords in favour of the idea of presumed undue influence as a form of wrongdoing, and that the victims of this form of wrongdoing should be entitled to compensatory damages.

CLIONA KELLY, UNIVERSITY COLLEGE DUBLIN: Drafting an Irish Frustrated Contracts Act: Lessons from British Columbia

Unlike most other common law jurisdictions, Ireland does not have legislation to deal with the restitutionary implications of frustration of contract. Any attempt to draft an Irish Frustrated Contracts Act should draw from the experiences in other jurisdictions. In this paper I intend to analyse the British Columbia Frustrated Contracts Act, both in terms of its basis in principle and its practical application, and to suggest whether its provisions should form the basis of legislative reform in Ireland or elsewhere.

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[1] [1992] 2 A.C. 128, 138.

[2] "Good Faith In Contract Law: Of Triggers and Concentric Circles" (2005) 16 KCLJ 293.

C MACMILLAN, QUEEN MARY, UNIVERSITY OF LONDON: Mistake of law in contract and restitution

Canadian and English common law both recognise that a mistake of law can be an unjust factor which triggers restitution. Both legal systems, after a long period of denial, now allow that a mistake of law can be a vitiating element in the formation of a contract. The question that this paper considers is the relationship between a mistake of law as an unjust factor in restitution and a mistake of law as a vitiating element in the formation of a contract. To what extent does the role of a mistake as an unjust factor guide the developing role of a mistake of law as a vitiating factor? In the process of this examination, a comparison will be made between Canadian and English common law. This is an appropriate time for such an examination given the Supreme Court of Canada's decision in *Pacific National Investments Ltd* v *Victoria (City)* (2004) and as English law awaits further development in this area.

KATE BRACEGIRDLE, UNIVERSITY OF SHEFFIELD: The doctrine of mistake in contract and unjust enrichment

The subject of this paper is the doctrine of mistake (insofar as there can be said to be any such coherent doctrine) considered from the particular focus of examining the differences in its application in the law of contract and the law of unjust enrichment. The paper will consider some of the difficulties that have been historically encountered in this area as well as considering recent case law developments such as *The Great Peace* and *Shogun Finance v Hudson* and their impact on the application of the doctrine. The paper will also consider the future for the doctrine in the light of a recent shift to a more civilian approach to unjust enrichment in Canada confirmed in the Supreme Court of Canada decision in *Pacific National Investments v Victoria.*

PROFESSOR GERARD MCMEEL, BRISTOL: The primacy of contract in unjust enrichment claims

DR ADELINE CHONG, NOTTINGHAM: Choice of Law for Void Contracts and their restitutionary aftermath : The Putative Governing Law of the Contract

The concept of the putative governing law provides an indispensable escape route from some of the most vexing issues in the whole conflict of laws. A classic conundrum is which law applies to determine whether a contract is void. Questions arising from a contract, such as whether the parties have fulfilled their mutual obligations, or the interpretation of certain terms used in the contract, are referred to the governing law of the contract. However, when the very question is the validity of the contract itself, there can apparently be no governing law of the contract unless and until the contract is pronounced valid. The generally accepted approach is to apply the putative governing law of the contract; in other words, to apply the law which would have governed the contract if it were valid, to determine whether the contract is valid.

Furthermore, the role of the putative governing law is not spent once it has adjudged a contract as void. It may also play a major part in restitutionary claims arising in the aftermath of voidness, that it, it functions as a choice of law rule for a personal unjust enrichment claim arising pursuant to a void contract. In view of the pivotal role that the putative governing law of the contract plays, it is surprising that not more thought has gone into what exactly would constitute a putative governing law. At what point would a particular law be deemed as the putative governing law? This paper has its aim the investigation of the concept of the putative governing law, the justification for

the concept in view of its inherent illogicality, and the determination of a proper definition of what is a putative governing law. These aims will be pursued through an examination of its role in establishing a void contract and personal unjust enrichment claims arising in the aftermath of voidness.