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## ENRICHED

There is nothing wrong with enrichment, as long as it is not unjust. Sounds good, but how does one determine what is unjust? Are there any rules or is it palm tree justice? In Pacific National Investments Ltd. v. Victoria (City) (2004), 42 C.L.R. (3d) 76, the Supreme Court of Canada not only says that there are rules, but also outlines them in a reasonably succinct fashion. What is the world coming to?

## Long Road

A developer commenced an action against the City after the City downzoned its land midway through the developer's development of it. The City did this after negotiating a development agreement that enticed the developer to contribute \$1.08 million in extra services, which the City would not otherwise have been entitled to demand, and after the developer had provided those extra services.

The developer claimed both in contract and, alternatively, unjust enrichment. As to contract, the developer claimed that there was an implied term of the contract that the City, in consideration of the developer's extra services, would not downzone the lands. The trial judge agreed with the developer and therefore did not bother to render a decision on the unjust enrichment claim.

The Supreme Court of Canada decided that the claim in contract could not succeed because the City did not have the statutory power, either expressly or by implication, to bind itself regarding the future exercise of its zoning regulation powers. Since a claim for unjust enrichment is based upon different evidence and law from a claim in contract and since the trial judge

did not rule on the unjust enrichment claim, the court sent the matter back for trial on the unjust enrichment claim.

The difference in damages between unjust enrichment and breach of contract was immense. A breach of contract would have rendered the City liable for the developer's lost profit. For unjust enrichment, the City was liable only to pay for the extra services.

The trial judge in the second trial held that there was unjust enrichment and ordered the City to repay \$1.08 million. The British Columbia Court of Appeal reversed and the developer appealed to the Supreme Court of Canada.

## Test

The test for unjust enrichment has three elements:

- a) An enrichment of the defendant;
- b) A corresponding deprivation of the plaintiff; and
- c) no juristic reason for the enrichment.

This sounds nice, but what does it mean?

## Enrichment

The concept of enrichment is easy, even intuitive. It is a tangible benefit or a savings.

The City argued that the extra services were not a benefit because it had to pay \$40,000 per year on upkeep of the beautiful seawall, road improvements, extra parkland, and walkways that the developer provided. Accordingly, the extra services were not a benefit, but really a burden. It also argued that the City itself, in its corporate capacity, had

not benefited, only the City's inhabitants.

The Court dealt with these arguments with barely concealed contempt. The Court stated, "*The City's portrayal of itself as a victim of the appellant's generosity is not credible.*" It noted that enrichment occurs when the works are done for the benefit or at the request of another. The Court held that there was enrichment.

## Deprivation

Normally, when there is enrichment, it almost always follows that there is deprivation. The City argued that the developer was not deprived because it had already made oodles of money on the portion of the development that it had completed. The Court stated that the question was not whether the developer made a success of the project generally, but whether it suffered a detriment corresponding to the enrichment. The developer was "*not required to subsidize city amenities from the profits earned elsewhere on the project in the absence of some legal requirement.*" The Court held that there was a corresponding deprivation.

## Juristic Reason

This is the toughest portion of the test. If there is a juristic reason for a transfer of money, then the enrichment is not unjust.

There is a two-stage approach to the determination:

- a) The claimant must show that there is no juristic reason within the established categories to deny recovery. Since the number of established categories is still small, the Court felt that the requirement to prove a negative was manageable. We will refer to each of these estab-

lished categories.

b) If the claimant gets past the first stage, the onus shifts to the respondent to rebut the prima facie case by showing that there is some other valid reason to deny recovery.

## Stage One

### i) Contract Existence

The City argued that there was a contract, which said that the developer had to supply the services. The City also argued that it was normal for developers to give more than necessary to get the zoning they wanted.

The Court honed in on the fact that the ultra vires arrangements were based on a common mistake, the assumption that the City had the legal authority to make zoning commitments. The developer did not sweeten the deal to get what it wanted; the developer and the City each contracted to do something, with the City's consideration being held ultra vires.

The Court noted that the very element of the contract that the City successfully argued in the first Supreme Court hearing was ultra vires, it now relied on as the juristic reason for its just retention of the services at no cost to it. The Court held that the City could not "*rely on the contractual arrangements, which in their relevant parts flowed from the City's ultra vires demand, to defeat the claim*" for unjust enrichment.

### ii) Disposition of Law

The City argued that the Local Government Act provided that no one could claim for compensation arising out of the adoption of a bylaw. The Court held that the loss had nothing to do with the bylaw. The developer was no longer suing in contract. The loss occurred when the developer completed the extra services on the mistaken belief that its contract with the City was enforceable.

### iii) Donative Intent

The City again flogged the "sweetener" argument. The Court again rejected it. The extra services were not a donation; they were consideration based on a common mistake.

### iv) Other valid common law, equitable, or statutory obligations

The City argued that forced payment for the extra services would be an indirect fetter on the exercise of its legislative powers. The Court held that the developer never attacked the validity of the downzoning and no longer was able even to seek damages for breach of contract. The focus was not on the developer's loss, but the City's enrichment. The power to downzone did not render the City immune to claims of unjust enrichment.

## Stage Two

The City argued that the success of the developer's

claim would frustrate the reasonable expectations of the parties and would be bad public policy.

The Court held that the only frustration of reasonable expectations was the inability of the developer to complete the development as planned. The Court also held that there was no frustration of public policy because:

- a) The City did downzone the lands;
- b) The City and the developer did not make an agreement for an improper purpose; and
- c) It was not good public policy for a city to make agreements and then attack them as illegal and attempt "*to scoop a financial windfall at the expense of those who contracted with them in good faith.*"

## Outcome

The City was ordered to pay, as it should have originally and without court intervention. The Bar received a "how to" lesson on unjust enrichment.

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