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<p>THE LAW OF RESTITUTION by The Late Peter D. Maddaugh and John D. McCamus Release No. 1, July 2025</p>

What's New in this Update:

In *Canadian Pacific Railways v. Saskatchewan*, 2024 SKKB 157 (Sask. K.B.), a Saskatchewan trial court confirmed the ability of combined provincial and federal legislation to retroactively extinguish claims to payments of taxes which were, at the time of payment, *ultra vires* the provincial government that demanded that they be paid. As a general proposition, claims for recovery of *ultra vires* tax payments were recognized by the Supreme Court of Canada in *King-street Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3 (S.C.C.).

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In *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, the Supreme Court of Canada upheld decisions of the Ontario courts below granting restitutionary recovery to the operator of a Ponzi scheme of interest payments and commissions paid by the operator to investors and other participants in the scheme. The claims were brought by the trustee in bankruptcy of the corporation that operated the scheme. The scheme was promoted to the public by one Lacasse, the owner of a one-person corporation, Golden Oaks, that operated the scheme. The scheme was presented to the public as a benign rent-to-own operation that would enable aspiring purchasers of realty that could not afford outright purchases to rent properties at inflated rental rates with the possibility of eventual purchase. Lacasse financed the scheme by inviting lenders to advance loans to Golden Oaks at very high – indeed, eventually criminal – rates of interest. The interest payments made to early lenders were financed by the recruitment of new or later lenders. In the traditional Ponzi fashion, the scheme collapsed into insolvency when it became impossible to recruit further lenders. The trustee in bankruptcy successfully launched restitutionary claims as successor to Golden Oaks to recover the interest payments to early lenders. As well, the trustee pursued such a claim against existing lenders who had been paid commissions by Golden Oaks for the recruitment of new lenders that the existing lenders had attracted to the scheme. Although this aspect of the claim did not succeed at trial, such relief was granted by the Court of Appeal in addition to affirming the recovery of interest payments awarded at trial. The doctrinal basis for granting such relief, in effect, to the corporate perpetrator of such a scheme at trial and at the Court of Appeal is a matter of considerable interest and is discussed in the appropriate chapters in the text. On further appeal to the Supreme Court of Canada, however, these restitutionary issues were not directly engaged. The four grounds of appeal were: (i) that the trustee’s action was statute-barred by limitation rules as the critical events had occurred more than two years prior to the advancement of the claim by the trustee, (ii) that the lenders were entitled to an equitable set-off against the trustee’s claims for interest and commissions of the outstanding balance of the loans made by the defendants, (iii) that the Court of Appeal had erred in finding that the commission agreements were unlawful and (iv) that the Court of Appeal had erred in finding that the real estate agent, Scott, who had participated in the scheme in various ways, was not dealing “at arm’s length” with Golden Oaks under insolvency law. The Supreme Court dismissed all four grounds of appeal. In particular, on what the court considered to be the main ground of the appeal, the majority held that although the doctrine of corporate attribution does generally apply to one person corporations, it should not be held to do so where, on the basis of the discoverability principle, the effect of doing so would undermine the public policies underlying the insolvency legislation. With respect to the third issue relating to illegal contracts, the court held that even if Scott was not subjectively aware of the il-

legal nature of the Ponzi scheme, the lack of subjective knowledge of the illegality did not preclude a finding that the commission agreements were tainted with illegality. The decisions of the courts below, then, stand as authority for the proposition that, in these particular circumstances at least, the perpetrator of a Ponzi scheme may bring a successful restitutionary claim to recover interest and other payments made to participants in the Ponzi scheme. The authors suggest in Chapter 15 that it is a critical factor in granting such relief that recovery is being sought in aid of providing an equitable distribution of the assets recovered to all victims of the illicit scheme.

In *Hiltz v. Armstrong*, 2024 NSCA 91, the Nova Scotia Court of Appeal awarded a proprietary joint family venture claim against a residential property occupied by a cohabiting couple by one cohabiting partner against the mother of the other cohabitating partner. The circumstances were unusual. During a lengthy relationship of cohabitation, the couple lived in a residence built by one partner on property co-owned by that partner and his mother. Although the property was initially owned solely by the mother, she invited the couple to live on the property and eventually transferred a half-interest in the property to her son. The mother lived in a separate residence on the same property. Prior to dissolution of the relationship, the other partner had contributed in various ways to the increase in the value of the property. A claim by that party for a proprietary interest against the co-owners enjoyed success at trial and was affirmed on appeal. The authors suggest that a joint venture claim should lie, in principle, only against the cohabiting partner.