UNJUST ENRICHMENT, JURISTIC REASONS AND PALM TREE JUSTICE: *GARLAND V. CONSUMERS' GAS CO.*

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I. TWO PROBLEMS WITH THE ACTION IN UNJUST ENRICHMENT

The Canadian law of unjust enrichment[1] is plagued by two related problems: (a) juristic reasons, and (b) discretionary justice.

1. Juristic Reasons

The first problem stems from the fact that different legal systems employ different strategies for determining the availability of relief. The common law traditionally has required proof of an *unjust factor* — *i.e.* a positive reason for *allowing* recovery. In the paradigm case of a mistaken payment, for example, relief is available only because the plaintiff's intention to confer a benefit upon the defendant was impaired by error. The civil law, in contrast, generally has been willing to intervene in the *absence of any legal basis* for a transfer — *i.e.* if there is no reason to *deny* relief. Every enrichment consequently is reversible unless, for example, it was given as a gift or paid pursuant to a contract. The basic distinction is therefore profound. A system that says "no restitution unless . . ." is fundamentally different than one that presumes "restitution unless . . .".

Until relatively recently, courts in Canada's common law jurisdictions unequivocally followed the common law approach.[2] The

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1. The phrase "unjust enrichment" is sometimes applied to a situation in which the defendant has received a benefit as a result of committing a wrong against the plaintiff. With respect to some types of wrongs, the plaintiff has the option of claiming either compensation for her loss or "restitution" (better described as "disgorgement") of the defendant's gain. This article is not concerned with that sense of "unjust enrichment". See L. Smith, "The Province of the Law of Restitution" (1992), 71 Can. Bar Rev. 672; M. McInnes, "The Measure of Restitution" (2002), 52 U.T.L.J. 163.

2. *Stoltze v. Fuller*, [1939] 1 D.L.R. 1 (S.C.C.) (compulsion); *Knutson v. Bourkes Syndicate*, [1941] 3 D.L.R. 593 (S.C.C.) (compulsion); *Deglman v. Guaranty Trust*

waters were muddied, however, with Dickson J.'s formulation of the cause of action in *Pettkus v. Becker*: "there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and *absence of any juristic reason* for the enrichment".[3] The italicized words do, of course, bear a resemblance to the civilian terminology. The critical question is whether they effected a substantive change.

It is not clear why Dickson J. chose to use the relevant phrase,[4] but it is hard to believe that he intended to alter fundamentally the nature of the claim. He presented the three-part cause of action as the culmination of "general principles . . . that have been fashioned by the Courts for centuries",[5] and he imposed liability on the facts only because the plaintiff had established the unjust factor of free acceptance. For the most part, subsequent courts followed suit.

Co., [1954] 3 D.L.R. 785 (S.C.C.) (failure of consideration/qualified intention); *Peter Kiewit Sons' Co. of Canada Ltd. v. Eakins Construction Ltd.* (1960), 22 D.L.R. (2d) 465 (S.C.C.) (compulsion); *George (Porky) Jacobs Enterprises Ltd. v. Regina (City)* (1964), 44 D.L.R. (2d) 179, [1964] S.C.R. 326 (compulsion); *Carleton (County) v. Ottawa (City)* (1965), 52 D.L.R. (2d) 220 (S.C.C.) (mistake); *Eadie v. Township of Brantford* (1967), 63 D.L.R. (2d) 561 (S.C.C.) (mistake); *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1965] S.C.R. 663 (mistake).

3. (1980), 117 D.L.R. (3d) 257 at p. 274, [1980] 2 S.C.R. 834 (emphasis added). In his earlier concurring opinion in *Rathwell v. Rathwell*, Dickson J. suggested the need for "an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law": (1978), 83 D.L.R. (3d) 289 at p. 306, [1978] 2 S.C.R. 436. The illustrations were not repeated in *Pettkus v. Becker*, perhaps because Dickson J. did not really have the civilian model in mind. It may also be significant that, after stating the basic test in *Pettkus v. Becker*, Dickson J. went on to say that "The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. . . . It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances." That language is, of course, more consistent with the traditional approach.

4. Two years before *Rathwell v. Rathwell*, *ibid.*, Dickson J. sat on an appeal from Quebec dealing with the civilian claim for "unjustified enrichment" known as the *actio de in rem verso* (now codified as Civil Code of Quebec, S.Q. 1991, c. 64, art. 1493). Beetz J.'s unanimous judgment held that relief was premised upon, *inter alia*, "the absence of justification" for the enrichment that the defendant received from the plaintiff: *Cie Immobilière Viger Ltée. v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67 at p. 77, 10 N.R. 277. The words may simply have stuck in Dickson J.'s mind. It has also been suggested, somewhat ironically, that the phrase may have been deliberately inserted to stress the need for the application of rules rather than discretion: *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 at para. 40, 186 O.A.C. 128, 2004 S.C.C. 25.

5. *Pettkus v. Becker*, *supra*, footnote 3, at p. 274.

Restitution was positively justified on the grounds of mistake,[6] compulsion,[7] failure of consideration,[8] free acceptance,[9] knowing receipt[10] and so on. In some cases, the Supreme Court of Canada relied upon traditional unjust factors without even referring to the concept of juristic reason.[11]

At the same time, however, another, much smaller line of cases applied a literal interpretation of "absence of any juristic reason" and imposed liability following the defendant's failure to demonstrate a basis for the retention of an enrichment.[12] Although the choice has never been explored or explained, the juristic reason analysis has most often arisen in new or unusual situations.[13] Lawyers perhaps turn to the generalized principle only after they have exhausted the traditional categories of recovery.

At least in the abstract, the choice between the two approaches is evenly balanced. Each option has advantages and disadvantages. The great benefit of unjust factors is that they inductively rise from the bottom up. They have been worked out, piecemeal and over the course of several centuries, on the basis of practical experience.

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6. *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161, [1989] 1 S.C.R. 1161 (relief denied on other grounds).
7. *Eurig Estate (Re)* (1998), 165 D.L.R. (4th) 1, [1998] 2 S.C.R. 565.
8. *Palachik v. Kiss* (1983), 146 D.L.R. (3d) 385, [1983] 1 S.C.R. 623.
9. *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1, [1986] 2 S.C.R. 38; *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, *per* Cory J.
10. *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411, [1997] 3 S.C.R. 805; *Gold v. Rosenberg* (1997), 152 D.L.R. (4th) 385, [1997] 3 S.C.R. 767 (relief denied on facts).
11. *Nepean (Township) Hydro Electric Commission v. Ontario Hydro* (1982), 132 D.L.R. (3d) 193, [1982] 1 S.C.R. 347; *Canadian Pacific Airlines Ltd. v. British Columbia* (1989), 59 D.L.R. (4th) 218, [1989] 1 S.C.R. 1133.
12. *Campbell v. Campbell* (1999), 173 D.L.R. (4th) 270 at pp. 278-79, 43 O.R. (3d) 783 (C.A.); *Toronto-Dominion Bank v. Carotenuto* (1998), 154 D.L.R. (4th) 627 at pp. 636-37, [1998] 9 W.W.R. 254 (B.C.C.A.); *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161 at pp. 172-73, 45 B.C.L.R. (2d) 99 (C.A.); *British Columbia Hydro and Power Authority v. Dunwoody Ltd.*) *Re Northern Union Insurance Co.*, [1985] 2 W.W.R. 751 at pp. 764-65, 33 Man. R. (2d) 81 (Q.B.), affd [1986] 1 W.W.R. 476, 36 Man. R. (2d) 115 (C.A.); *Duncan v. Duncan* (1987), 78 A.R. 171 at p. 174, 6 R.F.L. (3d) 206 (Q.B.); *Murray v. Roty* (1983), 147 D.L.R. (3d) 438 at p. 444, 41 O.R. (2d) 705 (C.A.).
13. *Peter v. Beblow*, *supra*, footnote 9, *per* McLachlin J.; *Reference re: Goods and Services Tax (Alta.)* (1992), 94 D.L.R. (4th) 51 at p. 71, [1992] 2 S.C.R. 445; *Nova Scotia (Attorney General) v. Walsh* (2002), 221 D.L.R. (4th) 1 at p. 42, [2002] 4 S.C.R. 325 *sub nom. Nouvelle-Ecosse v. Walsh*; *Garland v. Consumers' Gas Co.* (2001), 208 D.L.R. (4th) 494 at pp. 520, 535-41, 57 O.R. (3d) 12 (C.A.); *cf. Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762.

They are, as a result, relatively easy to comprehend. It requires little legal sophistication to appreciate, for instance, that a payment is recoverable if it was paid by mistake. A complete picture readily leaps to mind. That system has, however, been criticized for its inelegance. It has been said to be untidy (because a single action is used to deal with all sorts of restitutionary claims); non-comprehensive (because new grounds of liability may be recognized); unnecessarily fragmented (because it may be necessary to consider a number of overlapping unjust factors — *e.g.* mistake, duress and exploitation); and confusingly duplicative (because, for instance, a concept of mistake appears in both the law of unjust enrichment and the law of contract).[14]

The classic civilian model is said, in contrast, to be much simpler. The basic process works deductively from the top down. There is only ever one reason for restitution: a transfer occurred without sufficient basis. From a limited number of comprehensive principles, it is possible to work out the specific rules that are applicable in any given instance. The elegance of that system is, however, purchased at the cost of abstraction. The concept of "juristic reason" is not easy to digest. On its face, that phrase is either meaningless or hopelessly open-ended. And even for the expert, the claim in unjustified enrichment is streamlined only because much of the hard work has been assigned to other areas of law. The restitutionary question is addressed only after it has been determined that, for instance, the plaintiff acted pursuant to a contractual obligation or intended to confer a gift.

If one were to start from scratch, it would be difficult to choose between unjust factors and juristic reasons.[15] Nevertheless, it would be absolutely essential that a choice be made.[16] The sort of inconsistency that has been seen in Canada is not merely an intellectual embarrassment, but also a source of injustice. As discussed in greater detail below, unjust factors and juristic reasons represent fundamentally different *systems*. In addition to resolving the narrow

14. R. Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995), 15 Ox. J. Leg. Stud. 403 at p. 416.

15. Of course, Canadian law is not starting from scratch. Consequently, at least until recently, there was much to be said, in light of the historical context, for preferring an approach supported by centuries of experience to the one with which judges are almost entirely unfamiliar.

16. T. Krebs, *Restitution at the Crossroads: A Comparative Study* (London, Cavendish, 2001); T. Krebs, "In Defence of Unjust Factors", in D. Johnston and R. Zimmermann,

question as to which transfers are reversible, each informs a unique body of subsidiary principles and doctrines that sensitively balance the parties' competing interests. Each succeeds, on its own terms, as a stable and coherent organism. Unfortunately, over the past quarter century, Canadian courts have concocted the restitutionary equivalent of Frankenstein's monster. They have, in grafting civilian principles onto the common law claim, created a body of law that is doomed to disaster.

2. Discretionary Justice

The second problem facing the Canadian action in unjust enrichment concerns a basic question of judicial philosophy. A choice must be made as between rules and discretion. Given the history of the subject, it is rather surprising that the issue even exists. The generalized principle of unjust enrichment was long denied recognition precisely because it was thought to "clothe Judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guide-lines".[17] The situation improved only after academics demonstrated that "'unjust' can never be made to draw upon an unknowable justice in the sky", but must instead be "downward-looking to the cases".[18]

English courts firmly adhere to that proposition. As Lord Goff has explained,[19]

> restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even

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eds., *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002), p. 76; P. Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2003), cc. 4 and 5; P. Birks, "Mistakes of Law" (2000), 53 Curr. Leg. Prob. 205 at p. 232; L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 Sup. Ct. L. Rev. (2d) 211.

17. *Pettkus v. Becker*, *supra*, footnote 3, at p. 262, *per* Martland J. See also *Holt v. Markham*, [1923] 1 K.B. 504 at p. 513 (C.A.) ("well-meaning sloppiness of thought"); *Baylis v. Bishop of London*, [1913] 1 Ch. 127 at p. 140 (C.A.) ("we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'").

18. P. Birks, *An Introduction to the Law of Restitution*, revised ed. (Oxford, Clarendon Press, 1989), p. 19. Most of the hard work had been done by Seavey and Scott in the United States (W.A. Seavey and A.W. Scott, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul, American Law Institute, 1937)) and Goff and Jones in England (R. Goff and G. Jones, *The Law of Restitution* (London, Sweet and Maxwell, 1966)).

19. *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 at p. 578 (H.L.). See also *Pavey & Matthews Pty. Ltd. v. Paul* (1987), 162 C.L.R. 221 at p. 256, (H.C.A.) *per* Deane J.

> though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.

Canadian judges occasionally echo the same sentiment. The Chief Justice, for instance, has rejected the suggestion that "recovery can be awarded on the basis of justice and fairness alone"[20] and has cautioned against the "tendency . . . to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties".[21]

It is, indeed, difficult to imagine a credible argument to the contrary. In a country that celebrates cultural diversity and recognizes the inherent subjectivity of judging,[22] it is imperative to resolve disputes, to the greatest extent possible, on the basis of fixed rules rather than personal intuition. An unsuccessful litigant must not be left to wonder if a better result would have been obtained if a different judge — one with whom he or she shared greater kinship — had been assigned to the case. The court must be able to point to the governing rules and say, "Look here. This is why you lost. I simply applied the law."

And yet, remarkably, Canadian courts often approach the action in unjust enrichment as an exercise in discretion.[23] The problem is most pronounced in the cohabitational context, where both the imposition of liability and the quantification of relief occasionally appear to reflect little more than the judge's individual sense of fairness.[24] But the suggestion that business disputes can be determined on the basis of "commercial conscience"[25] is perhaps even more

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(denying that the principle of unjust enrichment creates a "judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate").

20. *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 164.
21. *Peter v. Beblow*, *supra*, footnote 9, at pp. 643-44.
22. *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193, [1997] 3 S.C.R. 484.
23. See *e.g. Campbell v. Campbell*, *supra*, footnote 12, at p. 281 ("whether it would be just and fair to the parties considering all of the relevant circumstances, to permit the recipient of the benefit to retain it without compensation to those who provided it"); *Credit Union Atlantic Ltd. v. MacLean* (1996), 152 N.S.R. (2d) 314, 13 C.C.P.B. 193 (S.C.).
24. The problem is vividly illustrated by *Nowell v. Town Estate* (1997), 35 O.R. (3d) 415, 30 R.F.L. (4th) 107 (C.A.); *cf. Hubar v. Jobling* (2000), 195 D.L.R. (4th) 123 at p. 135, 239 W.A.C. 64 (B.C.C.A.), *per* Southin J.A. (the "concept of unjust enrichment has come so far from *Pettkus v. Becker* . . . as to be well nigh unrecognisable").
25. The court that introduced that phrase actually employed a relatively restrained approach: *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R.

disturbing. Certainty and predictability ought to be at a premium in the marketplace.

II. *GARLAND V. CONSUMERS' GAS CO.*

Garland v. Consumers' Gas Co.[26] provided an excellent opportunity to deal with both of those problems. The Supreme Court of Canada unfortunately failed to seize the day.

1. Facts

The essential facts, while protracted, can easily be summarized.

- The Ontario Energy Board (OEB) has statutory authority to prohibit the sale of gas within the province except in accordance with an order of the board.[27] As a gas distribution company, the defendant accordingly applied on a regular basis for approval of its pricing scheme.
- Beginning in 1975, that scheme included a late payment penalty (LPP), which was fixed at 5% of unpaid charges. Because the amount was not tied to the number of days that a bill was overdue, it varied enormously when expressed as an annual interest rate. If a customer waited at least 38 days before paying, the rate fell below 60 percent per annum. But if payment was missed by a single day, the effective annual interest rate was, by one calculation, a whopping 5.4 billion percent per annum.
- Although the point was not immediately apparent, the LPP took on a new light in 1981 with the introduction of s. 347 of the *Criminal Code*.[28] While that provision was primarily intended to curb traditional forms of loan sharking, it prohibited anyone from receiving interest in excess of 60% per annum.

(4th) 161 at p. 171, 45 B.C.L.R. (2d) 99 (C.A.). Other courts, however, have effectively treated the notion of "commercial conscience" as a licence to resolve restitutionary clams on the basis of *ad hoc* assessments of fairness: see *e.g. Toronto-Dominion Bank v. Bank of Montreal* (1995), 22 O.R. (3d) 362, 18 B.L.R. (2d) 248 (Gen. Div.); *Porta-Flex Products (P.E.I.) Ltd. v. Bank of Montreal* (1993), 108 Nfld. & P.E.I.R. 221 (P.E.I.S.C.).

26. *Supra*, footnote 4.
27. Ontario Energy Board Act, R.S.O. 1990, c. O.13; S.O. 1998, c. 15, Sch. B, s. 36(1).
28. R.S.C. 1985, c. C-46.

- The plaintiff, who purchased gas from the defendant and was occasionally a bit neglectful of his account, commenced proceedings in 1994 for the purpose of arguing that the LPP was illegal.
- In 1998, the Supreme Court of Canada agreed.[29] While it did not address the implications of its decision, it held that the defendant's pricing scheme contravened s. 347 of the *Criminal Code*.
- Amazingly, the defendant continued for another three years to request, receive and enforce the same LPP scheme. It was only in 2001 that the OEB finally took the initiative and instructed the defendant to review its policies.

2. The Courts Below

Since 1981, the defendant had collected as much as $150 million in LPPs. The plaintiff, armed with the Supreme Court of Canada's decision in *Garland No. 1*, hoped to use class action proceedings to force repayment on behalf of himself and as many as 500,000 other customers.

The prospect for success seemed good. It was difficult to see how, given its illegality, the OEB-approved LPP scheme could constitute a juristic reason for the enrichment. And in terms of unjust factors, there were several possible positive reasons for restitution. Although Garland himself had realized the truth of the matter by 1994, many customers had paid in the mistaken belief that the LPPs were valid. It was also arguable that the LPPs had been paid for a consideration that failed insofar as the customers provided money in discharge of a debt that did not actually exist.[30] Perhaps the

29. *Garland v. Consumers' Gas Co.* (1998), 165 D.L.R. (4th) 385, [1998] 3 S.C.R. 112 (hereafter *Garland No. 1*).

30. That approach would, however, squarely raise the question as to whether restitution should be available within the context of an otherwise subsisting contract. The High Court of Australia recently awarded relief with respect to a severable portion of a contractual payment: *Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001), 208 C.L.R. 516 (H.C.A.). Its decision to do so is regarded as controversial by some commentators: see *e.g.* Birks, *Unjust Enrichment*, *supra*, footnote 16, at pp. 107-110; P. Birks, "Failure of Consideration and Its Place on the Map" (2002), 2 Ox. U. Commonwealth L.J. 1; J. Beatson and G. Virgo, "Contract, Unjust Enrichment and Unconscionability" (2002), 118 L.Q.R. 352; M. Bryan, "Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?" in *Understanding Unjust*

simplest solution, however, was based on the illegality itself.[31] Although precedents are surprisingly sparse, relief ought to be available where the plaintiff, despite being party to an illegal transaction, was the intended beneficiary of the criminal prohibition and consequently was not *in pari delicto* with the defendant.[32]

The claim nevertheless failed in the lower courts. Winkler J. granted the defendant summary judgment on the ground that the plaintiff's claim was an impermissible collateral attack on the OEB orders.[33]

The Court of Appeal rejected that analysis, but agreed, by a majority, with the result.[34] McMurtry C.J.O. held, somewhat surprisingly, that the defendant had not been enriched by the receipt of the money. He reasoned that the since the defendant operated on the basis of an overall revenue stream, it would have requested and received OEB approval to collect the disputed amounts by some other means if the LPP scheme had not been in place. He also held that, even if the defendant had been enriched, it would be "contrary to the equities"[35] to order restitution. He was moved by the fact that the defendant had acted pursuant to OEB orders (which had not been directly attacked) and by the fact that the burden of liability would ultimately fall upon the defendant's customer base as a whole.

In a lengthy dissent, Borins J.A. disagreed on both counts. Without purporting to resolve the central debate as to the reason for restitution, he said that the

> term "juristic reason," although connoting a reason for an enrichment designed to have, and capable of having, a legal effect, has also taken on the meaning of whether the defendant's acceptance or retention of a benefit under the circumstances of the case, would make it inequitable for a defendant to retain the benefit.[36]

Enrichment (Oxford: Hart, 2004), p. 47; J.W. Carter and G.J. Tolhurst, "Case Comment: *Roxborough v. Rothmans of Pall Mall*" (2003), 19 J. of Contract L. 287.

31. *Browning v. Morris* (1778), 2 Cowp. 790, 98 E.R. 1364. *Cf. Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192 (P.C.) (relief available on basis of mistake of law if plaintiff was not *in pari delicto* with defendant with respect to illegal transaction).
32. For instance, regardless of any mistake, a tenant may be able to recover "key money" that had been illegally paid to a landlord in order to secure a lease: *Gray v. Southouse*, [1949] 2 All E.R. 1019 (K.B.). See also *Schellenberg v. Ely Canada Ltd.*, [1962] O.J. No. 195 (QL) (H.C.J.); *Jeffrey v. Fitzroy Collingwood Rental Housing Association*, [1999] V.S.C. 33 at para. 44.
33. (2000), 185 D.L.R. (4th) 536 (Ont. S.C.).
34. *Supra,* footnote 13.
35. *Ibid.* at p. 520.
36. *Ibid.*, at p. 535. Strangely, Borins J.A. then said that the concept of "'the absence of juristic reason — such as a contract or disposition of law' . . . conforms with the test

He seemed to suggest, in other words, that the concept of "juristic reason" may serve as either: (i) an actual test of liability (as when a benefit is, for example, provided as a gift or pursuant to a contract), or (ii) a statement of conclusion, reached on other grounds, that the defendant must restore the benefit to the plaintiff. (That does, of course, neatly state the problem.) Finally, on the facts, Borins J.A. concluded that the decision in *Garland No. 1* had deprived the OEB order of effect and that there consequently was no juristic reason for the enrichment.

3. The Supreme Court of Canada

The gist of Borins J.A.'s dissent prevailed on further appeal. Iacobucci J. began by providing welcome confirmation that the first two elements of the action in unjust enrichment are determined on the basis of a "straightforward economic approach".[37] The receipt of millions of dollars in cash necessarily constitutes an enrichment (just as the payment of money inevitably entails a deprivation). The concerns that McMurtry C.J.O. expressed regarding the effect of the LPP scheme on the overall revenue stream were properly addressed not in terms of enrichment, but rather in terms of the defence of change of position (of which more is said below).

Iacobucci J. then turned to the heart of the matter. While agreeing with Borins J.A. that there was no juristic reason for the enrichment, he did so on the basis of a new, two-part test of liability. (1) The plaintiff is required to prove that the facts do not fall within one of the "established categories" of juristic reason: contract, disposition of law, donative intent, or "other valid common law, equitable or statutory obligations".[38] If he does so, restitution *prima facie* is available. (2) The defendant then becomes subject to a *de facto* burden of proof to show some other reason as to why the enrichment should be retained. Two considerations are particularly important at that stage: public policy and the parties' reasonable expectations.[39]

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applied in England when restitution is claimed on the ground that the defendant was unjustly enriched at the expense of the plaintiff". He further believed that "in England the third element of unjust enrichment is [stated so that] if it would be unjust or unfair to order restitution, the claim should fail" at pp. 537-38. Those comments actually stand English law on its head and suggest a profound misunderstanding of the traditional role of unjust factors.

37. *Peter v. Beblow*, *supra*, footnote 13, at p. 645.

38. *Garland*, *supra*, footnote 4, at para. 44.

39. Reliance upon the parties' reasonable expectations is problematic in a number of respects. First, it is difficult to reconcile with the traditional approach to liability. In

With respect to the first branch of the new juristic reason analysis, Iacobucci J. believed that the only relevant "established category" was disposition of law.[40] He therefore began with the observation that a benefit received by right of statute is irrecoverable.[41] That presumptively was true on the facts because the LPPs had received approval under the Ontario Energy Board Act. The rider, of course, was that the provincially approved scheme contravened s. 347 of the Criminal Code. The doctrine of constitutional paramountcy consequently rendered the OEB rate orders inoperative to the extent of the conflict. Restitution *prima facie* was available.

The second branch of the new juristic reason analysis was more complicated. On the question of public policy, Iacobucci J. cited the basic proposition that "a criminal should not be permitted to keep the proceeds of their crime".[42] And on the question of reasonable expectations, he held that the defendant's customers must have

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the paradigm case of mistaken payment, for instance, restitution has been triggered by the mere fact that the plaintiff's intention was vitiated by error. Moreover, the defendant's obligation arises at the moment of receipt: *Baker v. Courage & Co.*, [1910] 1 K.B. 56. Consequently, at the relevant time, neither party anticipates the need for restoration. Their "reasonable expectations" are relevant only in the vacuous sense that, once fully informed of the situation, they would expect the law to insist upon relief. That observation, however, simply states a conclusion reached on other grounds. It could, moreover, be applied to any cause of action.

Second, a requirement of "reasonable expectations" dangerously courts the "implied contract" theory that once afflicted the principle of unjust enrichment: *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.). To talk of the "parties' reasonable expectations" strongly suggests that liability is a function of their shared beliefs. Judges should avoid saying anything that might revive the error that their predecessors struggled so long to overcome: *Deglman v. Guaranty Trust Co. of Canada*, *supra*, footnote 2; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.).

Third, a cause of action based on reasonable expectations tends to produce a remedy calculated by reference to those expectations. There is, however, a fundamental difference between restitution and the fulfillment of expectations. The former looks backwards and seeks to restore the *status quo ante*; the latter looks forward and seeks to place the plaintiff in an anticipated position. Restitution is the only coherent response to the action in unjust enrichment: McInnes, "The Measure of Restitution", *supra*, footnote 1. Repeated references to "reasonable expectations" nevertheless have led, most often in the cohabitational context, to the fulfillment of expectations: see *e.g. Peter v. Beblow*, *supra*, footnote 9.

40. He did not address the fact that the LPP payments were made pursuant to valid and subsisting contracts. See R. Chambers, "Canada", [2004] Restitution L. Rev. 182 at p. 185.
41. *Goods and Services Tax*, *supra*, footnote 13; *Mack v. Canada (Attorney General)* (2002), 217 D.L.R. (4th) 583, 60 O.R. (3d) 737 (C.A.), leave to appeal to S.C.C. refused 223 D.L.R. (4th) vi.
42. *Garland*, *supra*, footnote 4, at para. 57.

anticipated being subject to some penalty for late payment, just as the defendant legitimately assumed that the OEB would not approve an illegal scheme.

The cumulative effect of those considerations was to curtail the plaintiff's right to relief substantially. First, the defendant was entirely immune from liability with respect to payments received before 1994, when the plaintiff commenced his action. Because there was no reason prior to that time for the defendant to suspect that anything was wrong, its "reliance upon the inoperative OEB orders provide[d] a juristic reason for the enrichment".[43] Second, with respect to payments received after the issue had come to light, "the reasonable expectations of the parties [were] achieved by restricting the LPPS to the limit prescribed by s. 347 of the Criminal Code".[44] In other words, the late payment penalties were, regardless of the defendant's knowledge, valid and irrecoverable to the extent that they did not exceed 60% per annum.[45] The final result was that, notwithstanding the general principle of public policy, the defendant *was* allowed to profit handsomely from its own illegality. Crime evidently may pay as long as the perpetrator believes that it is acting lawfully.

III. ANALYSIS

Far more than $150 million was at stake in *Garland*. Because the Supreme Court of Canada hears relatively few cases in the area, its decision had the potential, for better or worse, to affect every claim in unjust enrichment for the foreseeable future. In the circumstances, a proper resolution of the dispute required much more than tinkering at the margins. It cried out for a careful reconsideration of the claim as a whole.

1. The Reason for Restitution

On the central question regarding the choice between unjust factors and juristic reasons, Iacobucci J. began promisingly. He recognized the existence of the debate and cited a pair of articles on

43. *Ibid.*, at para. 58.

44. *Ibid.*, at para. 55.

45. *Transport North American Express Inc. v. New Solutions Financial Corp.* (2004), 235 D.L.R. (4th) 385, [2004] 1 S.C.R. 249. Justice Iacobucci's decision on point is, in fact, ambiguous. Despite his comments regarding the parties' reasonable expectations, he ultimately held, in the final paragraph of his judgment, that the defendant would be liable "in an amount determined by the trial judge": *ibid.*, at para. 91.

point.[46] In "The Mystery of 'Juristic Reason'", Lionel Smith suggested that it was "totally unclear as a matter of authority"[47] as to whether Canadian law operated on the basis of reasons for recovery (the common law model) or reasons for retention (the civilian model). As a matter of principle and practical justice, however, he came down firmly in favour of the former, primarily for fear of unnecessarily creating confusion. The argument can be broken into two parts.

- *Integration* The success of the juristic reason analysis in civilian jurisdictions like Quebec[48] and Germany is largely a function of context. The rules that determine the narrow issue of recovery are integrated within a large and sophisticated framework that *somehow* respects freedom of choice, *somehow* protects the security of receipts, *somehow* discourages officiousness, *somehow* controls the redistribution of contractual risks, *somehow* accommodates other species of claims, and so on. And as the italics suggest, each system has found success through a unique combination of rules, principles and attitudes. Each system has developed *as a whole* to sensitively strike a balance between competing interests. Rules generous to the plaintiff at one stage of the

46. M. McInnes, "Unjust Enrichment — Restitution — Absence of Juristic Reason: *Campbell v. Campbell*" (2000), 79 Can. Bar Rev. 459. Iacobucci J. did not, unfortunately, consider the excellent work that has been done by Birks (*supra*, footnote 16), Krebs (*supra*, footnote 16) or Meier: see *e.g.* S. Meier and R. Zimmermann, "Judicial Development of the Law, *error iuris* and the Law of Unjustified Enrichment" (1999), 115 L.Q.R. 556; S. Meier, "Unjust Factors and Legal Grounds", in D. Johnston and R. Zimmermann, eds., *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002), p. 37.

47. *Supra*, footnote 16, at p. 214.

48. Citing Smith's article in support, Iacobucci J. held that his approach to juristic reasons is "generally consistent with the approach to unjust enrichment found in the civil law of Quebec": *supra*, footnote 4, at para. 47. That is a misleading statement. One of Smith's reasons for rejecting the insertion of the civilian theory into the common law claim was that, even in Quebec, the juristic reason analysis merely "functions as a kind of residual category": *supra*, footnote 16, at p. 217. The *actio de in rem verso*, which imposes liability in the absence of any juristic reason for the defendant's enrichment, is confined to cases involving services or improvements. Cases concerned with the transfer of property (including money) are governed by the claim for *réception de l'indu*. And as the Supreme Court of Canada held in *Willmor Discount Corp. v. Vaudreuil (City)*, that claim resembles the traditional common law approach insofar as it requires proof of a mistake or compulsion: *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, 61 Q.A.C. 141.

analysis are carefully offset by rules favourable to the defendant at another. Conclusions reached in one area of law are acceptable only because they are counterbalanced by results arising in another. Needless to say, while Canadian common law courts enjoy access to a similarly well-developed system of unjust factors, they simply have not worked out the details of a juristic reason analysis.

- *Inevitable Error* Moreover, while the courts are certainly capable of devising a coherent and comprehensive scheme of juristic reasons, it would be naïve to believe that they could do so quickly or easily.[49] Because of the need for careful integration, wholesale adoptions from civilian jurisdictions (such as Quebec or Germany) are simply out of the question. Instead, Smith suggested, virtually the whole of the restitutionary seascape would have to be re-mapped. And as they did so, Canadian judges would inevitably "encount[er] shoals and sinkholes . . . and sometimes flounder". They would occasionally "take a wrong step, find [themselves] in too deep, and have to step back [; or] start out one way, run up against a rock, and find [they] must backtrack and take a different course."[50] Disappointed litigants and frustrated commentators would legitimately wonder why the courts had chosen to "venture far onto an uncharted sea" when it had been possible to "administer justice from a safe berth"[51] within the common law tradition.

Iacobucci J. was inexplicably silent on those points. His only response to Smith's article — indeed, his only contribution to the entire debate — pertained to the relatively insignificant issue of the burden of proof. Smith had wondered how the plaintiff could be expected to negate every conceivable juristic reason for the

49. Krebs reports that modern German law was able to overcome the natural breadth of the juristic reason analysis, and settle into an ordered system of law, only after decades of effort, and only because of the fortuitous coincidence of two brilliant scholars (Walter Wilburg and Ernst von Caemmerer) and the self-denying discipline of the *Reichsgericht* (the former German supreme court): "In Defence of Unjust Factors", *supra*, footnote 16, at p. 91.

50. Justice McLachlin, "Restitution in Canada," in W. Cornish, *et al.*, eds., *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998), pp. 275-76.

51. *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at p. 241, 54 N.B.R. (2d) 293 (C.A.) *per* La Forest J.A.

defendant's enrichment.[52] As previously noted, Iacobucci J.'s solution was to hold the plaintiff responsible for a closed list of categories and to then place an onus upon the defendant to demonstrate some other reason for retaining a benefit.

It is tempting to defend that lack of analysis by saying that the choice between unjust factors and juristic reasons had already been made, and that the purpose of *Garland* was merely "redefinition and reformulation".[53] As Iacobucci J.'s own references show, however, that explanation simply will not hold. He endorsed McLachlin J.'s statement in *Peel* that Canadian law strikes a compromise between the application of the generalized principle of unjust enrichment and reliance upon "traditional categories" of recovery.[54] Iacobucci J. did not, however, notice that McLachlin J.'s "categories" were far different than his own.

The "established categories" that Iacobucci J. cited in *Garland* are uncontroversially reasons for *maintaining* transfers of wealth. Restitution is denied because the defendant received a benefit either as a gift or in satisfaction of a disposition of law, a contractual duty, or some other legal obligation.

The "traditional categories" that McLachlin J. (non-exhaustively) listed in *Peel* historically have been treated as reasons for *reversing* transfers of wealth. "Compulsion" and "necessity" are themselves names of unjust factors. "Ineffective contract" and "request" have long been roughly synonymous with either "qualified intention/ failure of consideration" or "free acceptance". Granted, McLachlin J. did say that the "distinctions between these categories turn mainly on the circumstances giving rise to the conferral of the benefit, which in turn affect the absence of juristic reason for permitting the defendant to retain the benefit".[55] Read in context, however, that statement appears to mean that there will be no basis for the defendant's retention of the enrichment if the plaintiff can prove a positive reason for restitution. As Borins J.A. suggested in *Garland*, talk of "juristic reason" simply states, albeit in very confusing language, a conclusion reached on traditional grounds.

That certainly has been the experience in practice. Notwithstanding the phrasing of Dickson J.'s judgment in *Pettkus v.*

52. *Supra*, footnote 16, at p. 228.
53. *Supra*, footnote 4, at para. 44.
54. *Supra*, footnote 13, at pp. 151-53.
55. *Ibid.*, at p. 155.

Becker, Canadian courts have, for instance, routinely awarded restitution for mistaken payments purely on the basis of the plaintiff's impaired intention. References to the "absence of juristic reason" have been either superfluous or missing altogether.[56]

Has all of that now changed? Is it necessary, against centuries of precedent, to *Garland*-ize even a simple case of mistaken payment? Iacobucci J. did not say, and his failure to address the issue has left the lower courts in a very difficult position. In the interests of clarity and continuity, there will be a strong temptation to either ignore *Garland* or restrict it to novel claims, much as the purportedly civilian implications of *Pettkus v. Becker* were habitually avoided. On its face, however, *Garland* does not admit of exception. And if that appearance is correct, then the new test of liability will have to be applied to *every* case of unjust enrichment. Of course, given the history of the subject, that is a task for which Canadian judges are almost singularly ill-prepared.[57] Consequently, even seemingly simple cases may prove uncertain, complex and costly. Although the lack of experience makes it difficult to predict precisely where problems will arise, a few possibilities can be suggested.

- *Incidental Benefits and Self-Interest* The plaintiff, who lives below the defendant in a poorly insulated apartment building, spends a small fortune heating her unit during a long winter. The defendant takes advantage of the laws of convection and is saved the expense of heating his unit. Is the plaintiff entitled restitution for the enrichment?[58] The answer is obvious on the traditional common law approach. There is no unjust factor: the plaintiff did not, for instance, labour under a mistake or

56. See *e.g. Nepean (Township) Hydro Electric Commission v. Ontario Hydro*, *supra*, footnote 11; *Canadian Pacific Airlines Ltd v. British Columbia*, *supra*, footnote 11.

57. Even on the new juristic reason analysis, unjust factors (or, more precisely, the accumulated wisdom that they represent) will continue to play some role. As Birks explains, the two approaches are subject to a "limited reconciliation": *Unjust Enrichment*, *supra*, footnote 16, at p. 101. The civilian approach typically imposes liability, at a relatively high level of abstraction, because the plaintiff conferred a benefit in an unsuccessful attempt to fulfil a purpose (*e.g.* give a gift). In reaching that conclusion, however, it necessarily presumes that there is, at a lower level of abstraction, some reason as to *why* the intended purpose failed. Those reasons traditionally have been the work of unjust factors. A gift fails if, for instance, it is caused by a mistake or illegitimate pressure.

58. *Ibid.*, at p. 141.

illegitimate pressure. Similarly, while the case presumptively would be caught by the general rule of recovery in Quebec or Germany, the codal scheme in each jurisdiction would defeat the claim.[59] The result must also be the same under *Garland*, but the explanation is far from clear. Since there was no obligation involved, the plaintiff *prima facie* will be entitled to recover upon dis-proof of a donative intent.[60] The defendant will respond by arguing: (i) that a restitutionary enrichment must be "more than an incidental blow-by",[61] and (ii) that relief is not available with respect to actions taken in self-interest. Significantly, however, since the idea of a "collateral benefit" is largely irrelevant under the traditional common law scheme, it has not been "much discussed by . . . authorities to date"[62] and, in any event, may be "too imprecise"[63] for application. Likewise, the common law courts have not found it necessary to develop a comprehensive and consistent set of rules regarding enrichments incidentally arising from the plaintiff's own self-interest. Depending upon the existence of an independent unjust factor, restitution has been both allowed[64] and denied.[65]

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59. Civil Code of Quebec, *supra*, footnote 4, art. 1494 considers justified any enrichment that arose "from an act performed by the person impoverished for his personal and exclusive interest". In Germany, restitutionary claims are divided between those (*Leistungskondiktion*) arising from performance (*e.g.* a mistaken payment) and those arising otherwise (*Nichtleistungkondiktionen*). The latter category is, however, exhausted by three types of claims: those arising from an encroachment on another's property (*Eingriffskondiktion*), those arising from the payment of another's debt (*Rückgriffkondiktion*), and those arising from the unauthorized expenditure on another property (*Verwendungskondiktion*). The case of the rising heat would not trigger liability under any of those headings: Krebs, *Restitution at the Crossroads: A Comparative Study*, *supra*, footnote 16, at p. 264; Smith, *supra*, footnote 16, at p. 236.
60. Birks argues that the enrichment must be regarded as a "grudging gift", but that simply assumes the problem away: *Unjust Enrichment*, *supra*, footnote 16, at p. 141. However unusual, the plaintiff, perhaps resentful of the defendant's free ride, may have intended from the outset to charge for the benefit.
61. *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 160.
62. *Ibid.*
63. G. Jones, *Goff and Jones: The Law of Restitution*, 6th ed (London: Sweet and Maxwell, 2003), p. 65.
64. *Exall v. Partridge* (1799), 8 T.R. 308, 101 E.R. 1405. The same was also true in *Pettkus v. Becker* if the trial judge, however "lack[ing] . . . in . . . gallantry", was correct in finding that the plaintiff's services were provided as "risk capital invested in the hope of seducing a younger defendant into marriage": *supra*, footnote 3, at p. 272.
65. *Ruabon Steamship Co. v. The London Assurance Co.*, [1900] A.C. 6 at p. 12 (H.L.); *Ulmer v. Farnsworth* 15 A. 65 (1888, Me. S.J.C.).

- *Officiousness* While occasionally employed in a belt-and-suspenders sort of way,[66] the concept of officiousness is actually superfluous under the traditional common law approach. Regardless of its capacity to justify the defendant's enrichment, the plaintiff's officiousness precludes proof of an unjust factor. A person who knowingly confers a benefit in the absence of any request or obligation cannot, for instance, claim to have been mistaken.[67] A juristic reason model, in contrast, requires some means of determining whether the plaintiff will be required to assume the burden of a non-obligatory and unsolicited benefit.[68] A bystander saves a drowning person. The would-be victim is grateful for his life, but refuses to pay for the expensive suit that his rescuer ruined during her heroic intervention. A mechanic secretly provides necessary repairs to a colleague's car. The owner is delighted with the work, but annoyed at her friend's meddling. An industrious teenager cuts his neighbours' lawn while they are at work. They are happy to be spared the trouble, but think that his asking price is too steep. In each instance, the plaintiff may be able to prove that, since the services were not rendered pursuant to either a donative intent or a legal obligation, restitution *prima facie* is available. It is not, however, entirely clear how the second branch of the *Garland* test would resolve the issue of officiousness.
- *Natural Obligations* *Garland*'s first branch denies restitution with respect to benefits conferred pursuant to various

66. Although Maddaugh and McCamus devote considerable space to the issue of officiousness, much of their discussion pertains to concepts (*e.g.* necessity) that were traditionally addressed as unjust factors under the traditional approach: *The Law of Restitution*, 2nd ed (Aurora, Ont., Canada Law Book, 2004), cc. 31-33.

67. Though more complicated, the same is true with respect to the unjust factors of free acceptance and failure of consideration. In each instance, liability is a function of the defendant's decision to receive a benefit for which he knew the plaintiff expected payment. If, to the contrary, the defendant had refused to accept financial responsibility for the benefit, restitution would be denied. The fatal flaw in the claim would not be officiousness *per se*, but rather the fact that the plaintiff, as a result of ignoring the defendant's wishes, could not establish an unjust factor.

68. The issue is resolved in Quebec on the basis of a codal provision that bars liability where the plaintiff acted "at his own risk and peril": Civil Code of Quebec, *supra*, footnote 4, at art. 1494. The German code similarly bars recovery where the plaintiff "knew that he was under no liability to perform, or if his performance was pursuant to a moral duty": *Bürgerliches Gesetzbuch*, at para. 814.

forms of *legal obligation*.[69] Accordingly, in the absence of a donative intent, relief *prima facie* is available with respect to benefits arising in response to *natural obligations — i.e.* obligations which, while juridically unenforceable, are binding upon the plaintiff in conscience or morality. The task of dealing with such obligations falls to the second branch of the *Garland* test, where the courts once again lack guidance. For many years, a mother lets her son occupy her land free of charge and operate a dairy farm. Without her request or knowledge, he incurs considerable expense constructing new buildings on the property. Assuming that he can disprove an intention to confer a gift, he *prima facie* is entitled to relief because he did not act in fulfillment of any legal duty. Can the mother nevertheless escape liability on the ground of a natural obligation? Any answer that a Canadian judge gives to that question will reflect little more than personal intuition.[70] Precedents are sparse. While discussed by Lord Mansfield in *Moses v. Macferlan*,[71] the idea of natural obligations has been generally ignored in the common law,[72] largely because claims vulnerable to such a plea are apt to fail for want of an unjust factor as well.[73] In the preceding example, for instance, the son would be denied recovery under the traditional approach because there is no positive reason for restitution. Regardless of the effect of any natural obligation, he was not mistaken and his mother did not freely accept.

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69. *I.e.* contractual obligations, dispositions of law (statutory obligations) or "other valid common law, equitable or statutory obligations".
70. *Campbell v. Campbell*, *supra*, footnote 12, at p. 285.
71. (1760), 2 Burr. 1005 at p. 1012, 97 E.R. 676 at p. 681. Lord Mansfield said that restitution does not lie for money paid by the plaintiff, which is claimed by him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law: as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.
72. D. Sheehan, "Natural Obligations in English Law", [2004] L.M.C.L.Q. 158; Birks, *Unjust Enrichment*, *supra*, footnote 16, at p. 221.
73. The situation is changing. In the cases cited by Lord Mansfield in *Moses v. Macferlan*, the plaintiff's claim was likely to have been framed in terms of a mistake. Because the mistake tended to be one of law, rather than fact, relief was denied, regardless of the existence of any natural obligation, on the basis of the rule in *Bilbie v. Lumley*: (1802),

2. Palm Tree Justice

Even if Canadian courts unequivocally settled the content of the third element of the action in unjust enrichment, their approach to restitutionary claims would still be deeply flawed by the tendency to decide cases on the basis of discretion, rather than rules. *Garland* continues that pattern. Although Iacobucci J. was alert to the danger of "case by case 'palm tree' justice",[74] his decision actually exacerbates the problem.

(a) The Equitable Action in Unjust Enrichment

The root of the difficulty is nicely encapsulated in Iacobucci J.'s assertion that restitution "is an equitable remedy that will necessarily involve discretion and questions of fairness".[75] The first part of that statement is simply wrong; the second is badly outdated.

The vast majority of restitutionary claims are legal, rather than equitable, in origin. *Moses v. Macferlan*,[76] often treated as the wellspring of the modern action of unjust enrichment,[77] was heard by Lord Mansfield (a common law judge) sitting in the Court of King's Bench (a common law court). It is true that Lord Mansfield said that the action for money had and received[78] was "founded on the *equity*

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2 East. 469, 102 E.R. 448. However, now that the traditional mistake of law doctrine has been abandoned (*Air Canada v. British Columbia*, *supra*, footnote 6), it will occasionally be necessary to determine whether an underlying natural obligation nevertheless justifies the defendant's enrichment: Birks, "Mistakes of Law", *supra*, footnote 16, at p. 215.

The issue of natural obligations nevertheless will continue to be less pronounced with respect to unjust factors than with respect to juristic reasons. As suggested by *Moses v. Macferlan*, the natural obligations that arise in the former context are apt to be remnants of ineffective contracts. The analysis will therefore proceed on stable grounds. The court will ask whether or not restitution would stultify the policy that rendered the contract ineffective. In contrast, as the example in the text suggests, the natural obligations that arise under the second branch of the *Garland* test will often be of a much less certain character.

74. *Garland*, *supra*, footnote 4, at para. 40, quoting McLachlin J. in *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 164.
75. *Ibid.*, at para. 44. See also *British Columbia v. Canadian Forest Products Ltd.* (2004), 240 D.L.R. (4th) 1 at p. 66 (S.C.C.), *per* LeBel J. (flexible "equitable analysis" that is omnipresent in the law of restitution).
76. *Supra*, footnote 71.
77. See *e.g. Pettkus v. Becker*, *supra*, footnote 3, at p. 273.
78. Like money paid, *quantum meruit* and *quantum valebat*, money had and received was a species of the writ of *indebitatus assumpsit* that ultimately spawned much of the modern law of unjust enrichment.

of the plaintiff's case", "lies only for money which, *ex æquo et bono*, the defendant ought to refund" and creates an obligation "by the ties of *natural justice and equity* to refund". It is also true that he had a habit of analogizing between law and equity on procedural issues.[79] Nevertheless, it is clear that the "equitable" references in *Moses v. Macferlan* primarily reflect the judge's desire to draw upon Roman law roots in order to provide a generalized explanation for the nature and scope of the claim. In English law, as in Roman law, the basic reason for restitution, when extrapolated from the cases, consisted of "reasoned fairness" (*æquitas*).[80] While judges were not entitled to exercise "justice" on an *ad hoc* basis,[81] the categories of recovery were all manifestations of the basic moral proposition that one person should not be unfairly enriched at the expense of another.[82]

Consequently, outside of Canada it has long been recognized that in most cases a claim for restitution is "a perfectly legal action".[83] There certainly has never been a free-standing equitable action in

79. In contrast to other common law writs, but like bills in equity, the action for money had and received did not require the plaintiff to plead with great specificity and, by corollary, allowed the defendant to raise every defence on the general issue: S.J. Stoljar, *The Law of Quasi-Contract*, 2nd ed. (Sydney, Law Book Co., 1989), pp. 14-15; J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London, Butterworths, 2002), pp. 375-76; C.H.S. Fifoot, *Lord Mansfield* (Oxford, Clarendon Press, 1936), pp. 149-50.

    The matter was further complicated by the occasional tendency of courts of equity to proceed by analogy to the action for money had and received: see *e.g. Jacobs v. Morris*, [1901] 1 Ch. 261 (H.C.); *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655 at pp. 662-63, *per* Farwell J.; *cf. Baylis v. Bishop of London*, *supra*, footnote 17, at p. 137, *per* Farwell L.J.; G. Klippert, *Unjust Enrichment* (Toronto, Butterworths, 1983), pp. 15-17.

80. Pomponius, writing in the second century A.D., observed "For this by nature is equitable, that no one be made richer through another's loss": translated in J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston, Little, Brown, 1951), p. 3.

81. Despite the liberality with which he discussed *indebitatus assumpsit*, Lord Mansfield was attentive to the danger of overstating the scope of restitutionary relief. "I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it": *Weston v. Downes* (1778), 1 Dougl 23, at p. 24, 99 E.R. 19.

82. Several years after *Moses v. Macferlan*, Lord Mansfield wrote not of "equity", but rather of "principles of eternal justice": *Towers v. Barrett* (1786), 1 T.R. 133, at p. 134, 99 E.R. 1014. See also R.A. Samek, "Unjust Enrichment, Quasi-Contract and Restitution" (1969), 47 Can. Bar Rev. 1 at pp. 15-17; J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston, Little Brown, 1951), p. 14; Carter and Tolhurst, *supra*, footnote 30, at p. 296.

83. *Roxborough v. Rothmans of Pall Mall Australia Ltd.*, *supra*, footnote 30, at p. 533; *Sinclair v. Brougham*, *supra*, footnote 39, at pp. 454-56; *Chapman v. Forbes*, 26 N.E. 3 at p. 4 (N.Y.C.A. 1890).

unjust enrichment. Consistent with its supplementary nature, equity intervenes only if some aspect of a claim specially calls for the chancellor's attention, as when a transfer of wealth stems from an existing equitable relationship[84] or an unjust factor known only to the chancellor,[85] or when the plaintiff requires a form of relief that is unavailable at law.[86]

None of that is open for debate. A cause of action can no more change its historical foundations than a leopard can change its spots. Canadian courts occasionally recognize that fact. In *Communities Economic Development Fund v. Canadian Pickles Corp.*, for instance, Iacobucci J. noted that "an action for moneys had and received does not lie in equity".[87] Far more often, however, the whole of unjust enrichment is misattributed to equity.[88] *Garland*'s repeated references to the "equitable" nature of the restitutionary claim are typical.

The first historical error is then compounded by another. Since restitution is an "equitable" remedy, it is thought to "necessarily involve discretion and questions of fairness".[89] By some mysterious force, concepts that began life in the chancellor's court are supposedly immune to standardization; they ineluctably vary with the length of his foot.

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84. As when the defendant improperly receives trust property to which the plaintiff is beneficially entitled: *Citadel General Assurance Co. v. Lloyds Bank Canada*, *supra*, footnote 10.

85. For example, since undue influence is an equitable doctrine, a claim for restitutionary relief of benefits in such circumstances necessarily is equitable: *McKay v. Clow*, [1941] 4 D.L.R. 273 (S.C.C.).

86. Since relief at law is almost always limited to a personal judgment, the plaintiff must turn to equity for proprietary relief, such as a lien or a constructive trust: *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1989), 61 D.L.R. (4th) 14 at p. 53, [1989] 2 S.C.R. 574 (constructive trust available on claim; lien available on counter-claim).

87. (1991), 85 D.L.R. (4th) 88 at p. 107, [1991] 3 S.C.R. 388. See also *Federated Co-operatives Ltd. v. Canada* (2001), 268 N.R. 353, 2001 FCA 23 (C.A.), leave to appeal to S.C.C. refused 200 F.T.R. 106*n*; *Michelin Tires (Canada) Ltd. v. Canada*, [2001] 3 F.C. 552 (C.A.).

88. *Dominion Bank v. Union Bank of Canada* (1908), 40 S.C.R. 366 at p. 381 (S.C.C.); *Storthoaks v. Mobil Oil Canada Ltd.*, *supra*, footnote 2, at pp. 9-13, *per* Martland J.; *Air Canada v. British Columbia*, *supra*, footnote 6, at p. 167, *per* Wilson J.; *Peter v. Beblow*, *supra*, footnote 9, at pp. 642-43, *per* McLachlin J. (S.C.C.); *Campbell v. Campbell*, *supra*, footnote 12, at p. 277; *Bruyninckx v. Bruyninckx*, [1995] 5 W.W.R. 683, 94 W.A.C. 1 (B.C.C.A.); *Morgan Guaranty Trust Co. of New York v. Outerbridge* (1990), 72 O.R. (2d) 161 at p. 188, 66 D.L.R. (4th) 517 (H.C.J.). See also B. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective", in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Toronto, Carswell, 1993), 37 at p. 47.

89. *Garland*, *supra*, footnote 4, at para. 44.

If that was true, the implications would be disastrous. One example will suffice. A great deal of the country's wealth is now held in some form of trust. And much of the trust's value lies in its virtually impregnable position. While specially vulnerable to *bona fide* purchase, the beneficiary otherwise enjoys the most stringent protection imaginable. Relief is available, as of right, for even the most well-meaning and beneficial violations.[90] Any suggestion to the contrary would fatally undermine equity's most important institution.

Fortunately, of course, the purported premise is not true. There no longer is anything inherently discretionary about equitable concepts. The days have long since passed when the chancellor, as repository of the king's residuum of justice, could resolve bills simply on the basis of conscience. Today, rules are as rigid or as flexible as the context demands, without regard to pedigree. A trustee's obligations are, despite their equitable origins, ruthlessly uncompromising; the action in negligence, though a creature of law, allows judges considerable leeway.

The relevant question therefore is not whether unjust enrichment is equitable in origin, but rather whether, given its role in the legal system, it ought to involve a substantial degree of discretion. That inquiry must start from the premise that a strong judicial discretion can only ever be justified as a necessary evil. It is, at the extreme, inimical to the rule of law. But even in more modest forms, it breeds suspicion, creates uncertainty and adds to litigation costs.

What then of the action in unjust enrichment? Its purpose is to repair a disequilibrium created through a transfer of wealth.[91] Its central concern lies in the need to balance the plaintiff's desire to resile from a transaction against the defendant's claim to security of receipt. It would not be surprising to find a legal system in the early stages of development leaving the matter to judicial discretion. It requires a fairly high degree of sophistication to work out a scheme of rules that consistently mediates a sensitive compromise between the competing interests. For fear of adopting a rule that might occasionally unduly favour one party over the other, it might be thought appropriate to proceed on a case-by-case basis.[92]

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90. *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.).
91. *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 165.
92. Of course, the common law's actual historical reaction to the perceived need for a discretionary approach was occasionally to deny the claim altogether: *supra*, footnote 17.

That appears to be the theory underlying at least part of Iacobucci J.'s approach to the second branch of his new test of liability. Once the plaintiff eliminates the four established categories of juristic reason, the burden shifts to the defendant to show some other reason for retaining the enrichment. The cases are said to fall into three groups. In one the defendant fails altogether, and in another it establishes a juristic reason that creates a new category of general applicability.[93] The third group is the most interesting. "[A] consideration of the factors will suggest that there was a juristic reason in the particular circumstances . . . but which does not give rise to a new juristic reason that should be applied in other factual circumstances."[94] That seems an excellent definition of palm tree justice.

Although Iacobucci J. did not specify, *Garland* apparently fell within that third group of cases. LPPs were illegally collected from 1981 to 2001. Reading the judgment as a whole, it is very difficult to avoid the conclusion that, in light of the plaintiff's late payments and the defendant's initial good faith, the court thought that liability over a 20-year period was just too much. A cut-off date of 1994 seemed an "equitable compromise".

There is, with respect, no longer any excuse for that sort of approach. The law of unjust enrichment has matured beyond the need for judicial discretion. Thanks to the combined efforts of judges and jurists over the past quarter century, it is now possible to consistently achieve justice on the basis of fixed rules. Nothing need be left to chance. The key lies in a regime of strict liability tempered by strong defences. The plaintiff *prima facie* enjoys a broad right to relief, but the defendant's interests are amply protected, most notably by a concept of change of position that is focused on freedom of choice. *Garland*, regrettably, missed both points.

(b) The Recipient's Knowledge

The action in unjust enrichment is not a species of civil wrongdoing. Restitution is available because the defendant received an unwarranted benefit and not because it breached an obligation. That low threshold to judicial intervention reflects the limited scope of

93. Does the establishment of a new category constitute a new "established category" for which the plaintiff will in future cases bear responsibility under the first branch of *Garland*?

94. *Supra*, footnote 4, at para. 46.

relief. Liability in private law usually either hurts the defendant or helps the plaintiff. An order for compensation requires the defendant to deplete pre-existing resources, whereas an award of disgorgement positively enhances the plaintiff's position. That is why most causes of action are fault-based. Misconduct is the only possible justification for compelling the defendant to repair a loss or give up a gain. Restitution, in contrast, simply restores the *status quo ante*. The defendant cannot be held responsible for more than it gained and the plaintiff cannot recover more than it lost.[95] Consequently, so long as the court is satisfied that the transfer should not have occurred, there is no need to further insist upon proof that the defendant was somehow improperly complicit in the receipt.

The Supreme Court of Canada has occasionally endorsed that proposition.[96] *Air Canada v. Ontario (Liquor Control Board)* is the leading case. For many years, the defendant required airlines to pay a fee with respect to alcohol used for in-flight beverages. In January of 1984, Wardair persuaded the defendant that the fees were improper. Although the defendant agreed, it swore Wardair to secrecy and continued for several more years to extract payment from other airlines, including the plaintiff. The Ontario Court of Appeal held that restitution was available on the basis of the plaintiff's mistake of law, but only with respect to payments made after January 1984.[97] Robins J.A. was led to that conclusion by the fact that the defendant had received the earlier payments in good faith and without any reason to suspect the defect in its demand.

In the Supreme Court of Canada, Iacobucci J. rejected the cut-off date as "arbitrary". His explanation is, for obvious reasons, worth quoting at length.

> This "compromise" approach may seem to have a certain "equitable" appeal, but in truth it has little to recommend it. Essentially, the position of . . . the Court of Appeal is that a governmental agency may never be liable for amounts collected under an inapplicable law unless it can be shown that the agency knew that the law was inapplicable and nevertheless continued to

95. M. McInnes, "The Measure of Restitution" (2002), 52 U.T.L.J. 163.

96. *Cf. Citadel General Assurance Co v. Lloyds Bank Canada*, *supra*, footnote 10 (restitutionary liability for receipt of trust property premised upon proof of recipient's knowledge of beneficiary's rights); critiqued in M. McInnes, "Knowing Receipt and the Protection of Trust Property: *Banton v. C.I.B.C.*" (2002), 81 Can. Bar Rev. 171.

97. (1995), 126 D.L.R. (4th) 301, 24 O.R. (3d) 403 (C.A.), supp. reasons 127 D.L.R. (4th) 767, 26 O.R. (3d) 158, vard 148 D.L.R. (4th) 193, [1997] 2 S.C.R. 581.

> apply it. But Canadian law has never required a showing of bad faith as a precondition to the recovery of monies collected by a governmental agency under an inapplicable law. This Court has said that monies paid under such a law may be recovered even if it appears that the governmental agent responsible for collecting them did not know that the law was inapplicable.
>
> . . . If the question is which of two parties should be responsible for guaranteeing the applicability of a law, and the choice is between the governmental agency charged with administering that law and the citizen who is subject to that law, surely the better choice is the governmental agency. . . . The responsibility for taking care that the law is legal and applicable must rest with the party that administers the law.[98]

Of *Garland*'s many puzzling aspects, none is more mystifying than Iacobucci J.'s failure to cite even his own opinion in *Air Canada*. His decision to limit recovery to the period during which Consumers' Gas knew of the claim involved precisely the same sort of "equitable compromise" that he had previously rejected. The two cases are structurally identical. Granted, the Liquor Control Board of Ontario was a government agency, whereas Consumers' Gas was a private company. However, as evidenced by its ability to continue securing OEB approval for the LPP even after the Supreme Court of Canada had declared the pricing scheme to be illegal, Consumers' Gas was not merely the passive beneficiary of a governmental error. It exercised substantial control over the process.

In any event, the recipient's status should not, in principle, make any difference. Whether the defendant is a public body or a private party, the crucial fact is that it enjoys the benefit of money it never should have received. Consequently, unless the defendant can show, for instance, that it changed its position in such a way as to render an order for restitution inappropriate, its enrichment is unjust regardless of its lack of knowledge or wrongdoing.[99]

(c) The Defence of Change of Position

Restitutionary liability can be safely imposed without regard to the propriety of the recipient's conduct because the defendant will never even be considered enriched unless it either: (i) chose to assume the risk of financial responsibility, or (ii) in the circumstances, had no

98. *Ibid.*, at p. 214 (S.C.C.).

99. McInnes, "The Measure of Restitution," *supra*, footnote 1, at pp. 188-93; M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib", [2001] Restitution L. Rev. 29; P. Birks, "The Role of Fault in the Law of Unjust Enrichment", in W. Swadling and G. Jones, eds., *The Search for Principle* (Oxford, Oxford University Press, 1999), p. 235.

choice to make.[100] The former possibility applies if the defendant either requested or freely accepted a benefit knowing that payment was expected. The latter applies if the plaintiff provided an "incontrovertible benefit" — *i.e.* one that is "demonstrably apparent and not subject to debate or conjecture".[101] An incontrovertible benefit will exist only if the defendant received either money or its direct equivalent.[102] Money is special for two reasons. First, because it is the "universal medium of exchange",[103] it is equally valuable regardless of who holds it. Some people value shoeshines; others do not. By its very nature, however, money is immune to subjective devaluation.[104] Second, because money is fungible, it can be effectively returned even if the original benefit cannot be restored *in specie*. A shoeshine can never be given back; but if the defendant has spent one $5 bill, it can simply provide the plaintiff with another.

Given the nature of the element of enrichment, there is, *at the moment of receipt,* no danger that liability will create a hardship even if the core reason for restitution is entirely external to the recipient (*e.g.* a mistake attributable to the plaintiff's own carelessness). The defendant will merely be asked to restore either the value of a benefit for which it assumed financial responsibility or monetary value that it continues to hold.

Of course, as the italicized words in the last paragraph suggest, the real danger arises subsequently. The defendant may experience a change of position — *i.e.* an exceptional expenditure incurred in good faith and as a result of the enrichment.[105] If so, then liability

100. M. McInnes, "Enrichments and Reasons for Restitution: Protecting Freedom of Choice" (2003), 48 McGill L.J. 419.

101. *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 159.

102. The defendant receives the equivalent of money if the plaintiff either discharges a necessary expense (being relieved of a $5,000 debt is the same as receiving $5,000 cash) or provides a benefit from which a financial gain has been, or perhaps could be, realized (receiving a vase and subsequently selling it for $5,000 is the same as receiving $5,000).

103. *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 at p. 799 (Q.B.), *per* Goff J.

104. An incontrovertible benefit is "not the antithesis of freedom of choice", but rather "exists when freedom of choice as a problem is absent": *Peel (Regional Municipality) v. Canada*, *supra*, footnote 13, at p. 159, quoting in part J.R.M. Gautreau, "When Are Enrichments Unjust?" (1989), 10 Adv. Q. 258 at pp. 270-71.

105. *Storthoaks v. Mobil Oil Canada Ltd.*, *supra*, footnote 2. Occasionally, the change of position may be *anticipatory*, in the sense that the defendant, in reliance upon an incoming benefit, incurs an exceptional expenditure: *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica*, [2002] 1 All E.R. (Comm.) 193 (P.C.).

would indeed create a hardship. Take a simple example. A woman mistakenly receives a $5,000 dividend on shares. Honestly delighted with her apparent good fortune, she treats her son to a holiday in Europe. She never could have afforded it otherwise. If she was later required to provide restitution, she would legitimately feel aggrieved. Liability would hurt relative to her *status quo ante*. With the elimination of the windfall, the cost of the vacation would fall upon her, rather than upon the apparent dividend. The law of unjust enrichment therefore provides her with a defence.

The crucial question is: why? There are two possibilities.[106] The first is disenrichment.[107] A change of position demonstrates that the defendant no longer is enriched — *i.e.* that liability no longer would be consistent with the defendant's freedom of choice.[108] That theory perfectly explains the defence's components.

- *Exceptional Expenditure* The expenditure must be exceptional in the sense that it would not have been incurred in the normal course of events. The defendant in the earlier example was relieved of responsibility because her decision to give the gift to her son was vitiated by error. She never would have paid for the vacation if she had known of her liability to the plaintiff. The conclusion would have been much different, however, if she had instead spent the dividend on her monthly rent. In that situation, liability would leave her none the worse for wear. She had to pay her landlord in any event. The money that normally would have been used for that purpose can be used instead to satisfy judgment.
- *Good Faith* The expenditure must occur in good faith in the sense that the defendant did not have sufficient knowledge of the plaintiff's claim. If the woman had spent the $5,000 on her son despite knowing that the dividend had been paid in error, she could not complain that liability

106. Birks, *Unjust Enrichment*, *supra*, footnote 16 (focusing on the concept of disenrichment, but also recognizing the possibility, as yet unconfirmed by case law, of non-disenriching changes of position).

107. P. Birks, "Change of Position: The Nature of the Defence and Its Relationship to Other Restitutionary Defences", in M. McInnes, ed., *Restitution: Developments in Unjust Enrichment* (Sydney, LBC Information Services, 1996), c. 3.

108. McInnes, "Enrichments and Reasons for Restitution", *supra*, footnote 100, at pp. 453-56.

> would override her freedom of choice. She must have known that she could not burden the plaintiff with the cost of the vacation.

Even more significantly, because it operates on the basis of a clearly defined rationale, the disenrichment model of change of position carries a high degree of predictability. The parties know in advance precisely which factors will influence the court's decision.

The alternative model of change of position proceeds very loosely by reference to the issue of injustice. Liability is reduced to the extent that, given all of the circumstances, it strikes the judge as unfair. Although the defence requires proof of an exceptional expenditure,[109] that disenrichment is significant largely insofar as it creates, in an unprincipled manner, a judicial licence to "weigh the equities". The open-ended nature of the exercise is unsurprising. A rule without a particular purpose cannot be tied down.

The experiences with that model have not been encouraging. In New Zealand, legislation has forced the matter by insisting that the defendant be relieved of liability "if in the opinion of the Court, having regard to all possible implications . . . it is inequitable to grant relief".[110] Because the relevant considerations have not been spelled out, the provision, "while perhaps intuitively attractive", has been "doctrinally unstable and unpredictable",[111] largely an exercise in the "arbitrary splitting of differences".[112] "[T]he reader has the impression of judges struggling manfully to control and to contain an alien concept."[113] Though they cannot blame the legislature, Canadian courts have also fared poorly under a justice-related conception of change of position.[114] It is for those reasons that Lords Bingham and Goff, delivering the advice of the Privy Council in *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica*,

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109. *Storthoaks v. Mobil Oil Canada Ltd.*, *supra*, footnote 2.
110. Judicature Act 1908, s. 94B. See also *Thomas v. Houston Corbett & Co.*, [1969] N.Z.L.R. 151 (C.A.); *National Bank of New Zealand Ltd. v. Waitaki International Processing (NI) Ltd.*, [1999] 2 N.Z.L.R. 211 (C.A.).
111. R.B. Grantham and C.E.F. Rickett, "Change of Position and Balancing the Equities", [1999] Restitution L. Rev. 158 at p. 163.
112. P. Birks, *Restitution — The Future* (Sydney, Federation Press, 1992), p. 146.
113. *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica*, *supra*, footnote 105, at para. 45.
114. See *e.g. Durand v. Highwood Golf & Country Club* (1998), 240 A.R. 320 (P.C.); *R.B.C. Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230, 114 Nfld. & P.E.I.R. 187 (Nfld. C.A.); *A.J. Seversen Inc. v. Qualicum Beach (Village)* (1982), 135 D.L.R. (3d) 122 (B.C.C.A.).

recently rejected a broadly discretionary approach as being "hopelessly unstable".[115]

In *Garland*, the defendant was barred from change of position by virtue of its own wrongdoing. That decision undoubtedly was correct, at least in the period following the commencement of the plaintiff's claim in 1994. Unfortunately, Iacobucci J. also commented more broadly on the basis of the defence.[116] While declining the opportunity to discuss the issue "in a comprehensive manner",[117] he said that change of position is concerned not with "the net impact . . . on the [defendant's] financial position", but rather with "considerations of equity".[118] And since the defence "is intended to prevent injustice from occurring, the whole of the plaintiff's and the defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has the better claim".[119] It is a shame that the court, despite being referred to *Dextra* and other recent materials, relied exclusively on three older authorities[120] that necessarily failed to reflect the substantial advances that have been made in the past decade.

IV. CONCLUSION

Every "civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment".[121] There is no

115. *Supra*, footnote 105, at para. 45.

116. Iacobucci J.'s approach to defences is troubling in a broader sense as well. The problem stems from the fact that he did not explain the difference between a defence and a juristic reason. Indeed, at one point, he even referred to the second branch of juristic reason test as a "category of residual defence": *ibid.*, at para. 45. Not surprisingly then, aside from change of position, the defences that he discussed appeared to involve precisely the same sorts of considerations that he had addressed in connection with his new test of liability. The defendant unsuccessfully argued, for example, that certain statutory provisions precluded liability, that the OEB orders could not be undermined by a collateral attack, and that the collection of LPPs was analogous to government action made under colour of authority. The overlap between defences and juristic reasons reinforces the perception that the court has yet to fully realize a coherent cause of action.

117. *Ibid.*, at para. 66.

118. *Ibid.*, at para. 64.

119. *Ibid.*, at para. 65.

120. G.H.L. Fridman, *Restitution*, 2nd ed. (Scarborough, Carswell, 1992); *Storthoaks v. Mobil Oil Canada Ltd.*, *supra*, footnote 2; *Lipkin Gorman v. Karpnale Ltd.*, *supra*, footnote 19 (in which Lord Goff, introducing the generalized defence into English law, expressly refrained from offering a detailed formulation).

121. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, *supra*, footnote 39, at p. 61.

avoiding the issue. The courts must devise some means of deciding which transfers are reversible. That is not to say, however, that every strategy is equally acceptable. Some are better than others.

In recent years, there has been a concerted effort elsewhere in the Commonwealth to develop a principled and coherent scheme of unjust factors that consistently strikes a sensitive balance between the parties' competing interests. At the same time, civilian jurisdictions have continued to elaborate and refine the classic model of juristic reasons. Both are systems of remarkable depth and sophistication, all the more impressive because they have little need for discretion.

Canadian courts are, of course, entitled to go their own way. But in doing so, they are obliged to devise a system that is at least as good as those that they reject. Litigants in this country deserve no less. The reality, unfortunately, falls well short of the ideal.

The Canadian action in unjust enrichment continues to needlessly entail a large measure of discretion. And because the courts have never clearly isolated and defined the claim's rationale, risks and objectives, they have been unable to precisely articulate its elements of proof. Canadian law no longer (consistently) adheres to the traditional common law approach, but nor does it faithfully reflect the classic civilian model. The first branch of *Garland*'s new test of liability abandons unjust factors and with them the hope of easy comprehension; the open-ended nature of the second branch precludes the simplicity that historically has been the attraction of the juristic reason analysis.

Birks suggested, even before *Garland*, that "Canada [has] the worst of both worlds, more abstraction, unintelligible to the lay litigant, without the elegant automation that is supposed to be bought at that price".[122] With the introduction of Iacobucci J.'s new test of liability, Canada's "distinctive"[123] approach is now more troubling than ever before. And as the experience of the past quarter century has shown, there will be a high price to pay for the decision to disregard history and go it alone. The process of change will be protracted and painful, filled with uncertainty and error. A heavy burden will fall upon anyone who seeks a straightforward answer to what should be a straightforward claim.

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122. Birks, "Mistakes of Law", *supra*, footnote 16, at p. 232.

123. *Garland v. Consumers' Gas Co.*, *supra*, footnote 4, at para. 43.