B.M.P. GLOBAL DISTRIBUTIONS INC. V. BANK OF NOVA SCOTIA: THE UNITARY ACTION IN UNJUST ENRICHMENT

1. Introduction

The rule of law demands that like cases be treated alike. That proposition usually is cited in support of a principle of fundamental equality. The same fact pattern ought to generate consistent results regardless of, say, the parties' personal characteristics or the courts' political inclinations. An objective observer should never be left to wonder whether the outcome might have been different if the judge had shared the losing party's demographic profile. Fairness and equality, however, are not the only goals to be served. Exposition and understanding also are at stake.

The common law traditionally was perceived as a "heap of good learning",[1] discrete bits of wisdom accumulated from many minds, in many circumstances, over many years. And early in the piece, when the heap was relatively small, it was just about possible for a single person, intellectually equipped and sufficiently motivated, to master something close to the whole.[2] That time, however, has long since passed. The law has grown in both size and complexity. Aspects of life previously considered out-of-bounds to lawyers are now heavily regulated. Traditional subject areas similarly have been transformed. Academic commentary, largely absent in earlier eras, has both reflected and shaped judicial doctrines. Moreover, there simply is much more law than ever before. Whereas the various divisions of the High Court of England and Wales managed to get by with less than 20 judges in 1875, Ontario's Superior Court of Justice today employs somewhere in the range of 300. And whereas case reporters previously exercised a filtering function, QuickLaw and other data retrieval systems indiscriminately add to the mass on a daily basis.

The sheer volume of material threatens to overwhelm even the most discerning readers. The heap, having grown unwieldy, must be divided into manageable parts. Discrete instances of recovery — perhaps seemingly unrelated at first glance — must be drawn together under unifying principles. *Donoghue v. Stevenson*[3] provides the prototype. Lord Atkin surveyed the ostensibly disparate categories of recovery, recognized the unifying rationale, and formulated the

1. T. Wood, *An Institute of the Law of England* (1722) preface, as quoted in P. Birks, ed., *English Private Law* (Oxford: Oxford University Press, 2000), p. xliv.
2. See *e.g.* W. Blackstone, *Commentaries on the Laws of England* (1765-1769).
3. [1932] A.C. 562 (H.L.).

neighbour principle that continues to guide the tort of negligence. Rather than being restricted to enumerated relationships (*e.g.* carrier-passenger, innkeeper-guest), liability now is available upon satisfaction of the general model.

A similar enterprise has informed the modern law of unjust enrichment. Indeed, the history of the subject largely is one of repeated attempts at unification. In 1760,[4] Lord Mansfield explained the most important grounds of restitutionary recovery[5] by reference to the Roman law concept of *quasi ex contractu*.[6] In 1937, the American Law Institute's *Restatement of the Law of Restitution*[7] essentially agreed, but organized the materials around a three-part principle of unjust enrichment.[8] The first edition of *Goff & Jones: The Law of Restitution*,[9] in 1966, performed a similar service within English law. The Supreme Court of Canada adopted that thesis in 1954[10] and authoritatively formulated its components in 1980.[11] As a result, there is now wide (though not universal[12]) acceptance that restitution is triggered by unjust enrichment.[13]

4. *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676.
5. *Ibid.*, at p. 1012.
6. Properly interpreted, the phrase indicates that relief is available "as if upon a contract" — *i.e.* like contract in some respects, but not others. Obligations in restitution and contract are similar insofar as they arise without fault. They differ, however, insofar as the former (like obligations in tort) are imposed upon the defendant by operation of law, whereas the latter arise voluntarily from the parties.

   Unfortunately, after Lord Mansfield, the operative phrase was bastardized to *quasi*-contract, which incorrectly suggested that unjust enrichment was a "sort of" contract. That slip in turn led to the pernicious belief that restitution was possible only if a true contract could arise on the same facts. The independence, if not the existence, of the subject was drawn into doubt: *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.); *cf. United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 at p. 28-29 (H.L.); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 at p. 61 (H.L.) *per* Lord Wright.
7. American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (St. Paul: American Law Institute, 1937).
8. Unfortunately, in drafting the *Restatement*, Professors Seavey and Scott artificially extended their subject to include not only restitution for unjust enrichment, but also disgorgement for wrongdoing. That issue is addressed below, *infra*, footnote 66.
9. R. Goff and G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966). Now see G. Jones, ed., *Goff & Jones: The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007).
10. *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725.
11. *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834.
12. *Cf. Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001), 208 C.L.R. 516 (H.C.A.) *per* Gummow J.; S. Hedley, *Restitution: Its Division and Ordering* (London: Sweet & Maxwell, 2001).
13. M. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration

It would be difficult to overstate the significance of that history. The individual heads of restitutionary liability constitute a sizeable heap in themselves: money had and received, money paid, *quantum meruit*, *quantum valebat*, constructive trust, resulting trust, subrogation, equitable lien, rescission and so on. Left to themselves, those labels suggest a baffling diversity. There appear to be many subjects where, in fact, there is only one: unjust enrichment. The consequences are invidious. Historically, restitution seldom was taught in law school, and because intellectual categories tend to solidify over time, potential claims often were overlooked in practice (two problems that sadly persist even today). Equally damaging, the apparent heterogeneity of restitutionary claims has obscured structural similarities. Because different species of recovery developed separately, the constituent elements of proof assumed different forms, with resulting inconsistencies and anomalies. Law and equity, for instance, may approach essentially the same situation from opposite perspectives and, worse yet, may arrive at different conclusions.[14] The rule of law — the foundation of our legal system — is violated. Like cases are not treated alike.

Although responsibility ultimately lies with the courts, much of the credit for overcoming the fractured state of restitutionary liability is due to the academics. The *Restatement* constituted an important, though flawed,[15] first step, but it largely was Professors Jones and

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Thesis", [1999] Rest. L. Rev. 118; M. McInnes, "Misnomer: A Classic", [2004] Rest. L. Rev. 79.

14. A third party improperly shifts money from the claimant to the defendant. The third party has disappeared or is judgment proof. Is the defendant liable to make restitution? If the case arises in law, the defendant's liability appears to be strict, albeit subject to defences: *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.). In contrast, if the action lies in equity (because the money was taken from a trust fund), liability is fault-based insofar as the plaintiff must show that the defendant received the money with at least constructive knowledge of the underlying impropriety: *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 at p. 435, [1997] 3 S.C.R. 805.

    And again, wealth is transferred between the parties despite the lack of any genuine intention to benefit the recipient. Law requires the transferor to prove that lack of intention in order to receive a personal judgment. Equity, in contrast, generally presumes not only the lack of intention, but also a right to proprietary relief. It is not a question of alternative analysis or concurrent liability, as when the same facts are analyzed in terms of both tort and contract. Instead, although the gist of the claim is the same in either event, it receives very different treatment.

15. As explained below, the primary flaw consists of the failure to distinguish between restitution for unjust enrichment and disgorgement of ill-gotten gains: *infra* at section 2(a).

Birks, and a generation of Oxbridge graduate students, who meticulously mapped the contours of the subject. It is difficult to think of another area of law that has experienced such remarkable growth — both quantitatively and qualitatively — in the past quarter century. It therefore is not surprising that unjust enrichment enjoys a robust existence in England.[16] Even when reaching controversial conclusions,[17] English courts consistently have employed a relatively stable terminology and have engaged in the issues at considerable depth.

The situation in Canada, unfortunately, is somewhat less inspiring. Even though the Supreme Court of Canada regularly deals with restitutionary claims, its decisions often appear to be inconsistent, if not irreconcilable.[18] Several explanations for the subject's current condition leap to mind. The perverse belief that unjust enrichment, as a whole, is "equitable", and therefore susceptible to broad discretion, has caused considerable damage.[19] The relative paucity of academic attention has contributed to the ongoing difficulties as well. Whatever the reasons, however, the Canadian principle of unjust enrichment has become a frustratingly erratic enterprise. Every positive development, it sometimes seems, is counterbalanced by a step backwards. This commentary is concerned with one manifestation of that general condition: the continued uncertainty as to the precise means by which transfers are determined to be "unjust" and hence reversible. That issue, as will be seen, must be traced back to decisions taken in 1980 and 2004. The more immediate point of departure, however, is the Supreme Court of Canada's recent judgment in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*.[20]

16. See *e.g. Lipkin Gorman*, *supra*, footnote 14 (recognition of independent principle of unjust enrichment); *Sempra Metals Ltd. v. I.R.C.*, [2008] 1 A.C. 561 (H.L.) (full restitution entails availability of compound interest); *Deutsche Morgan Grenfell Group plc v. I.R.C.*, [2007] 1 A.C. 558 (H.L.) (restitution for mistake of law).
17. *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.) (expanded doctrine of mistake); *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.) (vindication of property rights); *Jones & Sons Ltd. (Trustee) v. Jones*, [1997] Ch. 159 (C.A.) (entitlement to traceable proceeds).
18. M. McInnes, "Taxonomic Lessons for the Supreme Court of Canada" in C. Rickett and R.B. Grantham, eds., *Structure and Justification in Private Law: Essays for Peter Birks* (London, Hart Publishing, 2007), p. 77 at pp. 91-93 (identifying pairs of mutually incompatible decisions).
19. M. McInnes, "The Equitable Action in Unjust Enrichment: Ambiguity and Error" (2007), 45 C.B.L.J. 253.
20. (2009), 304 D.L.R. (4th) 292, 386 N.R. 296 (S.C.C.).

2. Reasons to Reverse

Every "civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment".[21] And broadly speaking, the operation of the claim is always the same. There is a transfer of wealth between the parties that the law regards as unjust and reversible. The invariable response is restitution. The defendant must give the benefit back to the plaintiff. Within that general scheme, however, there is ample room for disagreement. Every system must answer a series of questions. What counts as an enrichment? Must the plaintiff suffer a loss that economically corresponds to the defendant's gain? Is restitution available proprietarily? And so on. Different answers reflect different values and different strategies for balancing competing interests (*e.g.* the plaintiff's desire to recover a benefit, the defendant's desire for security of receipt, the community's desire for clear standards and efficient rules).

The most significant point of difference concerns the reason for restitution. Assuming that there has been a transfer of wealth, precisely how does a court determine whether or not it is reversible? To simply say that restitution is available for *unjust* enrichments obviously is inadequate. There must be some means of defining, or at least identifying, injustice. Broadly speaking, there are two possibilities.

(a) Unjust Factors

The first approach focuses on reasons for *reversing* enrichments. The general proposition says, "no restitution unless...". The plaintiff must positively justify the court's intervention by demonstrating that the impugned transfer occurred by reason of some *unjust factor*. Those factors fall into three categories.[22] The plaintiff may act with an *imperfect intention* (*e.g.* by mistakenly paying the same debt twice — the second time in forgetfulness of the first).[23] The defendant may act *unconscientiously* (*e.g.* by refusing to pay for a service that he had

21. *Fibrosa Spolka Akcyjna*, *supra*, footnote 6, at p. 61.
22. P. Birks and R. Chambers, *Restitution Research Resource 1997* (Oxford: Mansfield Press, 1997), pp. 2-3.
23. The vast majority of restitutionary claims arise from *imperfect* intentions. That concept encompasses a number of possibilities. Intention may be imperfect because it is: (1) *absent*, as when the plaintiff is *ignorant* of the transfer or *powerless* to stop it, (2) *impaired*, as when the plaintiff's apparent intention is not truly an expression of autonomy, either because it was a function of *mistake* or *compulsion*, or because the plaintiff suffered from *incapacity*, or (3) *qualified*, as when the plaintiff, while truly intending for the defendant to receive the benefit,

freely accepted with knowledge of the plaintiff's expectation of remuneration). Or, regardless of the integrity of the plaintiff's intention or the propriety of the defendant's behaviour, there may be some overriding *policy factor* that demands relief (*e.g.* the constitutional principle that prohibits unauthorized taxation and requires the repayment of money collected pursuant to *ultra vires* demands).

Unjust factors traditionally were employed within the common law and, true to that system's basic orientation, inductively operate from the bottom up.[24] The specific reasons for restitution evolved, piecemeal and over a prolonged period, on the basis of practical experience. The results of that process cut both ways. Because they are closely connected to the underlying facts, unjust factors are readily accessible. The layperson easily understands, for instance, how a mistake vitiates the transferor's apparent intention to give and triggers a right of recovery. By the same token, however, the common law's approach to unjust enrichment has been criticized for its inelegance,[25] for being a "heap of good learning".

(b) Juristic Reasons

The second approach to the issue of injustice or reversibility focuses on reasons for *retaining* enrichments. The general proposition says, "restitution unless . . .". Upon proof of a transfer of wealth, a court is prepared to intervene unless there is some compelling ground — some *juristic reason* — for leaving the benefit where it lies. An enrichment therefore must be returned unless, for example, it was provided by way of gift or pursuant to a contractual obligation.

Juristic reasons traditionally operated within civilian systems and, true to that system's basic orientation, deductively operate from the

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ultimately intended for it to be retained only upon the satisfaction of some condition, which in fact failed.

24. There is some danger of overstatement. Especially in recent years, the common law principle of unjust enrichment occasionally has exerted an influence from the top down. For instance, La Forest J. said that "the judicial development of the law of restitution or unjust . . . enrichment renders otiose the distinction between mistakes of fact and mistakes of law": *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 at p. 191, [1989] 1 S.C.R. 1161, drawing upon *Nepean (Township) Hydro Electric Commission v. Ontario Hydro* (1982), 132 D.L.R. (3d) 193 *per* Dickson J., [1982] 1 S.C.R. 347. Consequently, the court abandoned the traditional rule in *Bilbie v. Lumley* (1802), 2 East. 469, 102 E.R. 448, which generally denied liability for benefits conferred by mistake of law.

25. R. Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995), 15 O.J.L.S. 403.

top down. At root, there is only ever one reason for restitution: a transfer occurred without legal basis. That single principle then generates specific rules to govern particular cases. Once again, there are pros and cons. The primary attraction of the classic civilian model is elegance. Essentially the same explanation applies in every case (*i.e.* there is no legal basis for the transfer). That elegance, however, is purchased at the cost of abstraction. The idea of an absence of juristic reason is not readily understood. It is easier to comprehend the existence of one thing than the non-existence of many things. Moreover, the civilian model of unjust enrichment appears streamlined only because it delegates much of the work to other areas of law. The restitutionary question is addressed only after it has been determined, for instance, that the plaintiff unsuccessfully[26] attempted to give a gift or fulfill a contract.

3. Historical Developments

The common law historically has required the claimant to establish a positive reason for reversing a transfer of wealth. While Lord Mansfield did not speak in terms of "unjust factors", his judgment in *Moses v. Macferlan*[27] enumerated the most important grounds. He explained that the action for money had and received — ancestor to much of the modern law of unjust enrichment — lies for

> . . . money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.[28]

That model was employed, without challenge, throughout the common law world for more than two hundred years. It was only in the last part of the twentieth century that the issue was cast in doubt, and English and Canadian courts parted ways.

(a) England

The English side of the story, though interesting, can be abridged. As late as the mid-1990s, Professor Birks[29] was on solid ground in

26. As explained below (*infra*, footnote 85), an absence of juristic reason almost always exists because wealth was transferred pursuant to some purpose (*e.g.* fulfillment of a gift or contract), which ultimately failed on the grounds of some concept (*e.g.* mistake or compulsion) that operates within the common law model as an unjust factor. In that sense, unjust factors and juristic reasons are subject to a "limited reconciliation".
27. *Supra*, footnote 4.
28. *Ibid.*, at p. 1012.
29. P. Birks, "No Consideration: Restitution After Void Contracts" (1993), 23 U. of

rejecting, as heretical and harmful, isolated *dicta* suggesting that restitution might be available where money is paid for "no consideration".[30] That phrase, redolent of the civilian approach, would reverse a transfer not because the claimant established a positive reason for relief, but rather because the defendant's enrichment lacked any juristic reason. The same *dicta* resurfaced several years later,[31] but this time, having set out to reaffirm the established position, Birks found himself converted to the opposing cause.[32] The explanation for that apostasy remains clouded. Birks undoubtedly was attracted to the elegance of the civilian model, especially in its German formulation.[33] So too, he believed that the House of Lords had stretched the concept of mistake — the paradigm unjust factor — to the point of abandonment.[34] Whatever the precise reason, however, Birks came to insist, with the self-assuredness of a recent convert, that "[i]t is impossible to go back... Absence of basis is now the only unjust factor in English law."[35]

Although Birks' transformation seemed to some observers more a leap of faith than a function of logic,[36] his reputation and the strength of his convictions ensured that his view would be taken seriously. A number of influential scholars were converted to the civilian model of unjust enrichment. Highest authority nevertheless ensures that traditional orthodoxy will continue to prevail for the foreseeable future. *Deutsche Morgan Grenfell Group plc v. I.R.C.*[37] involved a company which, while liable to pay a tax, was denied an opportunity to defer payment. The ensuing action accordingly pertained to the benefit that the government enjoyed by virtue of being in possession of money early. In ordering restitution, the House of Lords expressed

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West. Australia L. Rev. 19. Lord Goff subsequently observed "considerable force in the criticisms" that Birks had expressed: *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, [1996] A.C. 669 at p. 683 (H.L.).

30. *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, [1994] 4 All E.R. 890 at p. 936 (Q.B.).
31. *Guinness Mahon & Co. Ltd. v. Kensington & Chelsea Royal L.B.C.*, [1998] 3 W.L.R. 829 (C.A.).
32. P. Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2003) at p. xiv.
33. 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; German *Civil Code* (*Bürgerliches Gesetzbuch*), especially BGB §§ 812-822.
34. *Kleinwort Benson Ltd.*, *supra*, footnote 17.
35. Birks, *supra*, footnote 32, at pp. 86 and 100.
36. Symposium, "Review Article: The New Birksian Approach to Unjust Enrichment", [2004] Rest. L. Rev. 260; M. McInnes, "Book Review: *Unjust Enrichment*", [2004] L.M.C.L.Q. 491.
37. *Supra*, footnote 16.

doubts regarding Birks' proposal.[38] Even more significantly, the decision to allow relief was irreconcilable with the civilian method. Regardless of the fact that it proceeded in the mistaken belief that payment was required immediately, the company undoubtedly paid money pursuant to an existing tax liability. It therefore would have been impossible for the court to find an absence of juristic reason for the defendant's enrichment.[39]

(b) Canada

The Canadian story is more complicated. Until recently, courts in this country unwaveringly used the common law model. Restitution was awarded in response to the unjust factors of mistake,[40] compulsion,[41] failure of consideration (qualified intention),[42] and so on. A shadow of doubt was introduced, however, by a line of cases starting in 1977. *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*[43] involved a claim of unjustified enrichment on appeal from Quebec. In the circumstances, Beetz J. uncontroversially formulated the civilian action to require proof of, *inter alia*, "the absence of justification"[44] for an impugned transfer.

That decision would be irrelevant to the current debate except for the fact that it drew a supporting vote from Dickson J., who also participated, a year later, in *Rathwell v. Rathwell.*[45] That case, on appeal from Ontario, dealt with the division of property rights upon the dissolution of a cohabitational relationship. In delivering a concurring opinion, Dickson J. carried the key phrase over from the earlier judgment. He suggested that an unjust enrichment exists, in the common law, where "the facts display an enrichment, a

38. *Ibid.*, at pp. 569 and 612-13.
39. See also *Sempra Metals Ltd.*, *supra*, footnote 16.
40. *R v. Beaver Lamb & Shearling Co. Ltd.* (1960), 23 D.L.R. (2d) 513, [1960] S.C.R. 505; *Carleton (County) v. Ottawa (City)* (1965), 52 D.L.R. (2d) 220, [1965] S.C.R. 663; *Eadie v. Brantford (Township)* (1967), 63 D.L.R. (2d) 561, [1967] S.C.R. 573; *Breckenridge Speedway Ltd. v. Alberta* (1969), 9 D.L.R. (3d) 142, [1970] S.C.R. 175; *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147.
41. *Stoltze v. Fuller*, [1939] 1 D.L.R. 1, [1939] S.C.R. 235; *Knutson v. Bourkes Syndicate*, [1941] 3 D.L.R. 593, [1941] S.C.R. 419; *Peter Kiewit Sons' Co. of Canada Ltd. v. Eakins Construction Ltd.* (1960), 22 D.L.R. (2d) 465, [1960] S.C.R. 361; *George (Porky) Jacobs Enterprises Ltd. v. Regina (City)*, [1964] S.C.R. 326, 47 W.W.R. 305.
42. *Deglman*, *supra*, footnote 10.
43. *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, 10 N.R. 277.
44. *Ibid.*, at p. 77.
45. (1978), 83 D.L.R. (3d) 289, [1978] 2 S.C.R. 436.

corresponding deprivation, and the *absence of any juristic reason* — such as a contract or disposition of law — for the enrichment".[46]

Finally, two years after *Rathwell*, Dickson J. commanded a majority on essentially the same issue in the momentous decision in *Pettkus v. Becker*.[47] The language by now was familiar.

> [T]here 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 . . . 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.[48]

That statement appears to pull in two directions. While his reference to "an absence of any juristic reason" strikes a civilian chord, Dickson J. also evoked the common law in requiring the plaintiff to prove both a transfer of wealth and the injustice of the defendant's enrichment. A crucial question therefore arose: Did the civilian terminology mark a substantive shift away from the traditional focus on unjust factors, or was there some less dramatic explanation for Dickson J.'s phrasing? A period of uncertainty followed.

It would have been extraordinary, of course, if the court had intended, by use of a single phrase and without any supporting analysis, to jettison a venerable common law concept and adopt a civilian model of liability. Such a development would seem stranger still once it is realized that, while many civilian jurisdictions generally award restitution in response to an absence of juristic reason, that form of action enjoys only subsidiary status in Quebec.[49] Within that province, cases concerned with the transfer of property (including money), which comprise the bulk of the subject, 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)*,[50] that claim resembles the traditional common law approach in requiring proof of a mistake or compulsion.

It therefore was predictable that the change wrought by Dickson J.'s formulation of the unjust enrichment principle was, for the most

46. *Ibid.*, at p. 306 (emphasis added). The illustrations provided in *Rathwell*, which very strongly suggest the civilian model, were not repeated in *Pettkus v. Becker*, perhaps because Dickson J. never really intended to abandon the common law tradition.
47. *Supra*, footnote 11.
48. *Ibid.*, at p. 274 (emphasis added).
49. L. Smith, "The Mystery of Juristic Reason" (2000), 12 Sup. Ct. L. Rev. 211 at p. 217.
50. *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, 61 Q.A.C. 141.

part, purely semantic. Without ever directly addressing the issue, judges almost invariably maintained tradition by insisting upon proof of an unjust factor. In *Pettkus v. Becker* itself, restitution was available only because the plaintiff positively justified the court's intervention by demonstrating the defendant's free acceptance. On subsequent occasions, the Supreme Court of Canada similarly decided cases on the bases of mistake,[51] compulsion,[52] *ultra vires* demand,[53] failure of consideration,[54] free acceptance,[55] and knowing receipt.[56]

At the same time, however, Dickson J.'s infelicitous phrase unfortunately spawned another line of cases, always slim, in which the civilian language was literally applied and transfers were presumed to be reversible in the absence of some reason for retention.[57] Accordingly, although no court ever expressly indicated that the common law action in unjust enrichment had been fundamentally reconceived, Canadian law fell into the deeply confusing practice of saying one thing and doing another.[58]

51. *Nepean (Township) Hydro Electric, supra*, footnote 24; *Canadian Pacific Airlines Ltd. v. British Columbia* (1989), 59 D.L.R. (4th) 218, [1989] 1 S.C.R. 1133, supp. reasons 63 D.L.R. (4th) 768, [1989] 2 S.C.R. 1067; *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 *per* La Forest J., [1989] 1 S.C.R. 1161 (relief denied on other grounds).
52. *Eurig Estate (Re)* (1998), 165 D.L.R. (4th) 1, [1998] 2 S.C.R. 565; *cf. Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762.
53. *Air Canada v. British Columbia, supra*, footnote 51, *per* Wilson J.
54. *Palachik v. Kiss* (1983), 146 D.L.R. (3d) 385, [1983] 1 S.C.R. 623.
55. *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 *per* Cory J., [1993] 1 S.C.R. 980.
56. *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).
57. *Peter v. Beblow, supra*, footnote 55, *per* McLachlin J. (compare Cory J.'s reliance upon the unjust factor of free acceptance); *cf. 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*.

    See also *Garland v. Consumers' Gas Co.* (2001), 208 D.L.R. (4th) 494 at pp. 520 and 535-41, 57 O.R. (3d) 127 (C.A.), revd 237 D.L.R. (4th) 385, [2004] 1 S.C.R. 629; *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* (1997), 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, 37 E.T.R. 16 (B.C.C.A.); *British Columbia Hydro & Power Authority v. Dunwoody Ltd.*, [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.).
58. Not surprisingly, some commentators believed, against the great weight of

(i) Garland v. Consumers' Gas Co.

The issue came to a head in *Garland v. Consumers' Gas Co.*[59] The remarkable story need not be fully recounted. It is enough to know that, over the course of 20 years, the defendant collected in excess of $150 million, from more than 500,000 customers, in the form of Late Payment Penalties (LPPs). Halfway through that period, the plaintiff began to allege that the LPPs constituted illegal interest under s. 347 of the *Criminal Code*. The Supreme Court of Canada agreed.[60] The plaintiff's next step, as representative of a class action, was to demand restitution.

The prospects were bright. As a matter of precedent, the facts fell squarely within several traditional common law theories of liability. Restitution could have responded to the unjust factor of *mistake* (because customers were unaware that the LPP scheme was illegal), *failure of consideration* (because customers paid to discharge debts which were void), or *illegality* (because the customers, as the intended beneficiaries of the criminal prohibition, were not *in pari delicto* with the defendant).

In the course of delivering a unanimous judgment,[61] however, Iacobucci J. observed that, notwithstanding "much academic commentary and criticism", there was "no specific authority that settles [the] question"[62] as to whether the Canadian action in unjust enrichment turns on the presence of unjust factors or the absence of juristic reasons. He therefore took the opportunity, in the interests of "redefinition and reformulation", to restate the Canadian rule. Though unique in some respects, the resulting two-part test undeniably is civilian in nature. Having established an enrichment and corresponding deprivation, the plaintiff must disprove the "established categories" of juristic reason: contract, disposition of law, donative intent, and other valid common law, equitable or statutory obligations. Discharge of that burden *prima facie* raises a right to restitution. To escape liability, the defendant must then

precedent, that the availability of restitution in this country invariably turned on the civilian model. That belief was particularly pronounced among commentators who were viewing the situation from abroad and who, understandably, were not fully familiar with the actual practice of Canadian courts: J. Beatson, "Restitution in Canada: A Commentary" in W. Cornish *et al.*, eds., *Restitution: Past, Present & Future* (Oxford, Hart Publishing, 1998), p. 296 at p. 298.

59. *Supra*, footnote 57.

60. *Garland v. Consumers' Gas Co.* (1998), 165 D.L.R. (4th) 385, [1998] 3 S.C.R. 112.

61. It is interesting to observe that the panel in *Garland* included four judges with largely, if not exclusively, civilian backgrounds: Bastarache, LeBel, Deschamps and Fish JJ.

62. *Supra*, footnote 57, at pp. 400-401.

"show . . . another reason to deny recovery", with a special view to "the reasonable expectations of the parties, and public policy considerations".[63]

4. The Way Forward

In the abstract, the competition between unjust factors and juristic reasons is a close run.[64] The arguments are evenly balanced and, given that both systems generate similar results in most cases, the choice might be a matter of indifference if one was to start from scratch. In the circumstances facing the Supreme Court of Canada in 2004, however, it is difficult to find much love for *Garland*. The court was not starting anew; it was acting against the backdrop of centuries of common law analysis. A shift from unjust factors to juristic reasons consequently was bound to create uncertainty, error and injustice in the short run. Furthermore, if a move to the civilian approach was thought necessary, it would have been desirable, to the extent possible, for the court to adopt a formulation that had been tried and tested abroad. The specific model that Iacobucci J. settled upon, in contrast, is truly novel. It was proposed by neither party nor any scholar. Its peculiar division of labour between plaintiff and defendant is unknown to any civilian jurisdiction. A host of other issues must be resolved before *Garland* can operate properly in practice.[65]

Against that backdrop, it might have been hoped that *Garland* would meet the same fate as *Pettkus v. Becker* insofar as the earlier judgment was civilian in form, but not substance. There was no chance of that, however. Whereas Dickson J.'s civilian influence was confined to the adoption of a five-word phrase, Iacobucci J. expressly adopted a new test for reversing enrichments. The operative question therefore is not *whether*, but *when*, the juristic reason model will apply. At first glance, the answer would appear to be obvious: *Garland* should apply every time that the claimant seeks restitution. That proposition, however, must be qualified in two respects.

The first qualification arises from the fact that Canadian courts use "restitution" ambiguously. The term properly applies in cases of autonomous unjust enrichment, with which this paper is concerned. The animating goal is to reverse transfers of wealth which, regardless

63. *Ibid.*, at p. 402.
64. T. Krebs, *Restitution at the Crossroads: A Comparative Study* (London, Cavendish, 2001).
65. M. McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment After *Garland v. Consumers' Gas Co.*" (2004), 42 Alta. L. Rev. 399.

of any wrongdoing, are unwarranted. The cause of action invariably consists of the three-part test articulated in *Pettkus v. Becker* and revised in *Garland*: enrichment, corresponding deprivation, and absence of juristic reason. The remedy invariably is restitution, narrowly defined. The defendant must *give back* the benefit received from the plaintiff. Unfortunately, "restitution" also is used to describe gain-based relief for wrongdoing, despite the operation of a different rationale, cause of action, and measure of relief.[66] The animating goal is not merely to reverse unwarranted transfers, but more broadly to strip ill-gotten enrichments. The operative cause of action is *never* the three-part action for unjust enrichment, but rather some species of private wrong.[67] And finally, while the remedy often is labelled "restitution", it requires more than merely reversing a transfer between the parties. The defendant must *give up*, or "disgorge", every benefit acquired from someone (possibly the claimant, but usually a third party) as a result of violating the claimant's rights. In Professor Birks' memorable image,[68] from a single wrong hang several remedial strings. The most prominent one leads to compensation, but there are others,[69] including

66. The purported unity of restitution for unjust enrichment and disgorgement for wrongdoing primarily stems from procedural concerns that existed prior to the reforms of the late nineteenth century. Because writs of action historically were few in number, they often were required to serve various purposes. The traditional claim for money had and received, a sub-species of the writ of *indebitatus assumpsit*, accommodated claims that today would be recognized as either restitution for unjust enrichment or disgorgement for wrongdoing. Indeed, the same claim also was used to enforce some claims that today would be pleaded as breach of contract.

    In terms of modern justifications, it sometimes is said that restitution and disgorgement are alike insofar as they both pertain (to some extent) to the defendant's gain. True enough. By the same token, however, compensation and restitution are similar insofar as they both pertain (to some extent) to the claimant's loss. Because restitution refers to a transfer between the parties, it necessarily partakes of both the defendant's enrichment and the claimant's deprivation. Consequently, it makes no more sense to conflate restitution and disgorgement than it does to unify compensation and restitution.

67. The list of relevant wrongs remains unsettled, but it is clear that a person may be compelled to hand over a benefit acquired by virtue of, say, trespass to land (*Penarth Dock Co. v. Pounds*, [1963] 1 Lloyds Rep. 359 (Q.B.); *Ministry of Defence v. Ashman* (1993) 2 E.G.L.R. 102 (C.A.)), breach of confidence (*International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574), breach of fiduciary duty (*Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.); *Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371, [1974] 1 S.C.R. 592), or "exceptional" breach of contract (*Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.); *cf. Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 at p. 393, [2002] 2 S.C.R. 601).

68. P. Birks, *An Introduction to the Law of Restitution*, revised ed. (Oxford, Clarendon Press, 1989) at p. 316.

disgorgement. Rather than focusing on the claimant's loss, the court may respond exclusively to the defendant's gain. There is nothing deeply mysterious in that analysis.[70]

Since *Garland* governs the availability of true restitution, it obviously is irrelevant in cases dealing with disgorgement for wrongdoing. More controversially, it also is irrelevant if the plaintiff seeks restitution of money paid pursuant to an *ultra vires* tax. That proposition, however, is a function of precedent, rather than principle. Until very recently, such claims indisputably fell within the scope of the generalized action for unjust enrichment.[71] Nevertheless, in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*,[72] Bastarache J. cryptically held, against the weight of authority, that since the "very complex" *Garland* test "requires that courts look only to *proper* policy considerations" (*i.e.* "those that have traditionally informed the development of restitutionary law"[73]), it was inappropriate to the resolution of claims against the government.

Should *Garland* be reduced any further? *Maddaugh & McCamus*, the Canadian leading text, answers in the affirmative. And that is the proposition to which this note primarily is directed.

(a) *Maddaugh & McCamus* — A Restrictive Approach

Maddaugh & McCamus favours a restrictive interpretation, under which *Garland*'s "new model is to apply in merely a limited range of cases". More specifically, the civilian approach to reversing unwarranted transfers purportedly is limited to "cases where it [is] necessary . . . to go beyond the existing law or the existing categories of recovery".[74] Familiar categories of claim, the authors say, should continue to be resolved, along traditional lines, by reference to unjust factors. Support for that view undoubtedly will be drawn from *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*.[75]

69. *E.g.* punitive damages, injunctive relief, orders for delivery up.
70. Unfortunately, the simplicity of the proposition continues to be obscured by the persistence of phrases like "waiver of tort": *cf. United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.).
71. *Air Canada v. British Columbia*, *supra*, footnote 51; *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193, [1997] 2 S.C.R. 581; *Eurig Estate (Re)*, *supra*, footnote 52; *Woolwich Equitable Building Society v. I.R.C.*, [1993] A.C. 70 (H.L.).
72. (2007), 276 D.L.R. (4th) 342, [2007] 1 S.C.R. 3. See also M. McInnes, "Restitution for *Ultra Vires* Taxes" (2007), 123 L.Q.R. 365.
73. *Kingstreet*, *ibid.*, at p. 359.
74. P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Toronto, Canada Law Book, looseleaf), § 3:200.40.

(b) *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*

The Supreme Court of Canada's decision in *B.M.P.* contains a number of notable passages (including one that momentously recognizes that the process of tracing supports only one set of rules). Within the current context, however, it is most important for what it does not say.

The underlying story is remarkable only for the defendants' naivety and the rogue's audacity. As part of a fraudulent scheme, a con artist named Newman agreed to pay more than a million dollars to the defendants in exchange for the right to distribute non-stick bakeware in the United States. The transaction was hopelessly ill-conceived from the outset. Neither party obtained financial information from the other; neither party developed any sort of business plan. The price was "pull[ed] out of thin air". The initial part of that payment took the form of a cheque for about $900,000. Although the details failed to excite the defendants' curiosity, that cheque was drawn by neither Newman nor his company, but rather on an account held at the Royal Bank of Canada (RBC) by an entity called First National Financial Corporation (First National). The payment, unaccompanied by a cover letter, was contained in an envelope that bore a return address of "E. Smith". The defendants had no prior knowledge of either First National or E. Smith. Nevertheless, delighted with the prospect of receiving such a large sum, they made no inquiries before depositing the cheque into their account with the claimant Bank of Nova Scotia.

After receiving payment from the drawee bank (RBC), the claimant released the funds to the defendants. The defendants immediately distributed substantial sums to various parties within its own corporate structure. Another disbursement for $20,000, however, was directed to a previously unknown person in New York City. That payee, it appears, was a front for the mysterious Newman, who, it soon became clear, had perpetrated a fraud. That scheme began to unravel when RBC, as the drawee bank, discovered that the original cheque was forged. That forgery prevented RBC from debiting the account of the ostensible drawer (First National), which meant that RBC had paid away its *own* funds. In an attempt to secure restitution of that mistaken payment, RBC agreed to indemnify the claimant bank in exchange for assistance in recovering the funds.

Of the initial $900,000, approximately $776,000 remained in accounts held by the defendants or closely associated volunteers. The

75. (2009), 304 D.L.R. (4th) 292, 386 N.R. 296 (S.C.C.).

claimant froze those accounts, debited the appropriate amounts, and forwarded the funds to RBC. *B.M.P.* reflects the defendants' strong objections to those steps.[76] Indeed, although they had given no consideration for the cheque, and although their windfall clearly corresponded to RBC's deprivation, the defendants insisted that, being innocent (albeit surely negligent) of the fraud, they were entitled to retain the proceeds of Newman's scheme! More astonishing still, the trial judge agreed with the defendants, despite recognizing that his decision led to an "absurd result".[77] The British Columbia Court of Appeal reversed that decision on the basis of some vague "equitable" power to ensure that the defendants did not retain a windfall against "conscience".[78]

On further appeal to the Supreme Court of Canada, the essential question was whether RBC, acting through the claimant bank, was entitled to restitution from the defendants. Without disagreeing with the lower court's "equitable" analysis, Deschamps J. found that "the same result can be obtained at common law".[79] That surely is correct. Worryingly, however, the court proceeded entirely in terms of the traditional "doctrine of mistake of fact".[80] There was no mention of "unjust enrichment", no reference to *Garland*, and certainly no discussion of the choice between unjust factors and juristic reasons.

(c) A Unitary Action in Unjust Enrichment

If *Maddaugh & McCamus* is correct, then *B.M.P.* neglected *Garland*'s civilian approach for the simple reason that the underlying claim was not novel. A mistaken payment, the text would argue, is a long-settled category of recovery — indeed, the paradigm of a restitutionary claim — and therefore governed by the traditional unjust factors. Adoption of that view, however, would constitute a serious error. While specific circumstances may trigger particular aspects of the general action, there is only one test of unjust enrichment and that test invariably turns on the absence of juristic reasons.

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76. The case does not involve the balance of the $900,000, which is the subject of a separate action by RBC against B.M.P.
77. *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2005), 8 B.L.R. (4th) 247 at p. 283 (B.C.S.C.).
78. *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2007), 278 D.L.R. (4th) 501 at p. 515, [2007] 3 W.W.R. 649 (B.C.C.A.).
79. *Supra*, footnote 20, at para. 93.
80. *Ibid.*, at para. 52.

(i) Unitary in Practice

Maddaugh & McCamus's view does not find any support in the case law. *Garland* says nothing to suggest that its reformulated conception of unjust enrichment is confined to novel circumstances. On the contrary, the first branch of Iacobucci J.'s test — dealing with "established categories" — expressly contemplates the resolution of routine claims by means of juristic reasons. *Garland* itself is illustrative. Iacobucci J. applied the "refined" conception of unjust enrichment even though, as previously explained,[81] the facts fell within several traditional heads of recovery.

Iacobucci J.'s colleagues subsequently followed suit. Between *Garland* and *B.M.P.*, the Supreme Court of Canada addressed the action in unjust enrichment on five occasions. In each instance, the new test was discussed in general terms and not once did the court suggest a need to identify novel claims.[82] In *Ermineskin Indian Band and Nation v. Canada*, for instance, Rothstein J. referred to earlier formulations of the principle and broadly said that the "test for unjust enrichment was recently restated by Iacobucci J. in *Garland*".[83] Major J. proceeded in similar terms in *Gladstone v. Canada (Attorney General)*[84] before invoking an established line of precedent in order to deny restitution of a transfer that had occurred by reason of statute.

Against that backdrop, *B.M.P.* is anomalous only insofar as Deschamps J. analyzed the bank's restitutionary rights in terms of the traditional language of mistake. There is not the slightest suggestion that that approach was dictated by a lack of novelty. Much more likely, the court simply followed the approach adopted by the parties, none of which, somewhat surprisingly, referred to either *Garland* or juristic reasons. Furthermore, while the analysis certainly should have been brought up to date, the outcome would have been the same in either event. In proving an unjust factor, the claimant also showed that the defendants' enrichment lacked juristic reason. The rogue's forgery both caused a mistake (*i.e.* the erroneous belief that the cheque was valid) and nullified the apparent basis of the transfer (*i.e.*

81. Section 3(b)(i).
82. In addition to the case discussed in the text, see *Pacific National Investments Ltd. v. Victoria (City)* (2004), 245 D.L.R. (4th) 211 at p. 221, [2004] 3 S.C.R. 575; *Kingstreet Investments Ltd., supra*, footnote 72, at p. 359; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate* (2007), 289 D.L.R. (4th) 385 at p. 394, [2007] 3 S.C.R. 679 *sub nom. Jedfro Investments (U.S.A.) Ltd. v. Jacyk.*
83. (2009), 302 D.L.R. (4th) 577 at p. 621, [2009] 1 S.C.R. 222.
84. (2005), 251 D.L.R. (4th) 1 at p. 8, [2005] 1 S.C.R. 325.

the drawee's contractual authority to transfer funds and debit the purported drawer's account).[85]

Nor have the lower courts adopted the approach proposed by *Maddaugh & McCamus*. Granted, old habits die hard and some members of the profession have failed to keep abreast of recent developments. For the most part, however, restitutionary claims since 2004 have been resolved by reference to *Garland*.[86] And once again, that is true even with respect to the most mundane situations. Three illustrations will suffice. (1) *TD Canada Trust v. Mosiondz*[87] arose from a simple mistaken payment. The court explained that the traditional case law remained "useful in outlining the history and development of the law of restitution", but insisted that "the analysis to be applied has been settled in the Supreme Court of Canada's decision in *Garland*". Liability therefore was imposed not because the claimant acted in error, but rather because the defendant's enrichment lacked juristic reason. (2) *Bond Development Corp. v. Esquimalt (Township)*[88] involved a routine demand for *quantum meruit* for services rendered. Although the parties were unable to reach a formal agreement, the defendant took advantage of architectural plans that it had asked the plaintiff to prepare. Huddart J.A. expressly declined to follow the principles that historically governed such claims, preferring instead to award relief on the ground that there was no juristic reason for the transfer.[89] (3)

85. Professor Birks explained that phenomenon in terms of a "pyramid of limited reconciliation": Birks, *Unjust Enrichment*, *supra*, footnote 32, at p. 116. The two models operate at different levels of abstraction. At the highest level, restitution is available because an enrichment is *unjust*. But *why*, it must be asked, is the particular transfer considered unjust? At an intermediate level, an enrichment is considered unjust because it *lacks juristic reason*. But *why*, it must be asked, does the particular transfer lack juristic reason? And in answering that question, it almost always is necessary to draw upon the traditional *unjust factors* in order to negate the purpose ostensibly underlying the claimant's transfer. For example, an apparent gift may be recoverable because the purported donor's donative intent was vitiated by mistake, or services may trigger a right to relief because they were rendered pursuant to a purported contract that was invalidated by duress.

86. In the only judgment that expressly refers to *Maddaugh & McCamus*' proposal, Cromwell J.A. observed that the parties had not addressed the issue and consequently declined to comment: *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local No. 1* (2006), 273 D.L.R. (4th) 86 at p. 105, 246 N.S.R. (2d) 330 (C.A.), leave to appeal to S.C.C. refused 275 D.L.R. (4th) vii.

87. (2005), 272 Sask. R. 100 at p. 107 (Q.B.).

88. (2006), 268 D.L.R. (4th) 69, [2006] 6 W.W.R. 473 (B.C.C.A.), leave to appeal to S.C.C. refused 269 D.L.R. (4th) vii. See also *Litemor Distributors (Edmonton) Ltd. v. Midwest Furnishings & Supplies Ltd.*, [2007] 5 W.W.R. 276, 70 Alta. L.R. (4th) 170 (Q.B.); *Skookum Ventures Ltd. v. Long Hoh Enterprises Canada Ltd.* (2005), 3 B.L.R. (4th) 191 (B.C.S.C.).

89. Because the parties had failed to reach an agreement, there was no contract;

And finally, *Fuller v. Matthews*[90] represents a new variation on perhaps the most common theme within the Canadian law of unjust enrichment: restitution for cohabitational services.[91] Arnold-Bailey J. referred to the debate between unjust factors and juristic reasons, but explained that the Supreme Court of Canada had "recently clarified this element of the test". She further observed that "Although Iacobucci J. was speaking in the commercial context, the principles of unjust enrichment apply equally to family law cases."[92]

(ii) Unitary in Principle

Turning from precedent to principle, it quickly becomes clear that the approach favoured by *Maddaugh & McCamus* is not only undesirable, but practically impossible. To begin, a test that applies juristic reasons to novel cases, but unjust factors to "existing categories of recovery", would entail uncertainty and inconsistency. Novelty is in the eye of the beholder. While every case is unique in some respect, the principle of unjust enrichment ensures that all restitutionary claims bear the same basic structure. Differences consequently arise at the margins, where they are most likely to engender disagreement for the purposes of *Maddaugh & McCamus*. With a slight shift in focus, essentially the same situation may be viewed as novel in one jurisdiction, but not another.

Even within a single jurisdiction, adoption of *Maddaugh & McCamus*'s thesis would create another problem. What is a court to do if a previously unprecedented set of circumstances arises twice in succession? Accepting that juristic reasons govern the first hearing, do unjust factors govern the second encounter? Or, contrary to the general premise, would *Maddaugh & McCamus* forever consign that situation to "novel" status, even after it has been repeatedly resolved?

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because the plaintiff's efforts went far beyond the sort of speculative work that architects habitually perform in the hope of securing a project, the plans were not delivered with a donative intent.

90. (2007), 156 A.C.W.S. (3d) 410 (B.C.S.C.). See also *Swaren v. Swaren*, [2007] 8 W.W.R. 151, 74 Alta. L.R. (4th) 143 (Q.B.), vard [2009] 1 W.W.R. 63, 438 W.A.C. 27 (C.A.); *Guziolek v. Guziolek*, [2006] O.J. No. 1361 (QL), 147 A.C.W.S. (3d) 451 (Ont. S.C.J.). *Cf. McCormick v. Doiron Estate* (2009), 176 A.C.W.S. (3d) 1076 (N.B.C.A.).

91. McLachlin J's opinion in *Peter v. Beblow*, one of the few pre-*Garland* precedents to actually employ the civilian analysis in both form and substance, was a precursor: *supra*, footnote 55, at p. 646. Whereas Cory J. followed *Pettkus v. Becker* in relying upon the unjust factor of free acceptance, McLachlin J. imposed liability because the claimant owed "no duty at common law, in equity or by statute to perform work or services for her partner".

92. *Supra*, footnote 90, at paras. 79-80.

If so, the action in unjust enrichment would encompass two lines of authority and the governing rule in any particular case would turn upon the existence or non-existence of precedent at the time of *Garland*. The outcome of a case might depend upon a consideration (*i.e.* the state of the law in 2004) entirely unrelated to the merits of the plaintiff's claim.[93]

Though telling, the preceding concerns are mere manifestations of a more fundamental problem. The issue most easily is understood by way of analogy. *Maddaugh & McCamus* effectively views *Garland* as the restitutionary equivalent of *Cooper v. Hobart*.[94] In that case, the Supreme Court of Canada re-formulated the test for recognizing a duty of care in negligence, but expressly confined that new approach to cases falling outside the scope of established precedent. *Cooper* accordingly has nothing to say if the courts already have decided that the circumstances of the plaintiff's claim do (or do not) entail a duty of care.[95]

The key to *Cooper v. Hobart* lies in the fact that, despite some differences in detail,[96] the essential question remains unchanged. The old approach and the new approach both ask whether the parties shared a relationship that positively supported the imposition of a duty of care. As a result, the *Cooper* test simply provides a new

93. English courts once held that punitive damages were available only if the claimant sued upon a tort for which such relief had been awarded prior to the decision in *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) in 1964: *A.B. v. South West Water Services Ltd.*, [1993] Q.B. 507 (C.A.). The rule never had any pretence to rationality. It was a naked attempt to restrict the growth of non-compensatory damages, without regard to principle or coherence. The House of Lords scotched that nonsense in *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2002] 2 A.C. 122 (H.L.).

94. (2001), 206 D.L.R. (4th) 193, [2001] 3 S.C.R. 537.

95. For example, since *Donoghue v. Stevenson* (*supra*, footnote 3) long ago decided that a bottler owes a duty of care to a consumer, there is no need to invoke *Cooper* merely because the offending creature is a fly, rather than a snail: *Mustapha v. Culligan of Canada Ltd.* (2008), 293 D.L.R. (4th) 29, [2008] 2 S.C.R. 114. In contrast, since the issue had not previously been addressed, a full *Cooper* inquiry was required to determine whether or not an investigating police officer owes a duty of care to a suspect: *Hill v. Hamilton-Wentworth Regional Police Services Board* (2007), 285 D.L.R. (4th) 620, [2007] 3 S.C.R. 129.

96. Canadian courts previously employed a two-part test in which *reasonable foreseeability* of harm *prima facie* triggered a duty of care which might be confined or eliminated by *policy* considerations: *Kamloops (City) v. Nielsen* (1984), 10 D.L.R. (4th) 641, [1984] 2 S.C.R. 2. *Cooper v. Hobart* now entails a three-part test in which the presumptive existence of a duty of care requires not only reasonable foreseeability of harm, but also *proximity* between the parties. The real importance of the decision, however, consists not in the precise formulation of the test, but rather in the fact that the Supreme Court of Canada signaled a desire to adopt a more restrictive approach.

mechanism for adding to the existing categories of liability and non-liability.

The same cannot be said with respect to *Maddaugh & McCamus*'s view of *Garland*. The crucial difference lies in the fact that "absence of basis is not another unjust factor".[97] The civilian approach cannot contribute to the common law categories of recovery and non-recovery. Juristic reasons and unjust factors operate in *opposite* directions. The former constitute reasons for *retaining* enrichments; the latter constitute grounds for *reversing* transfers. One model is *negative*; the other is *positive*. And since the two systems never intersect, neither one can generate results that can be integrated within the other.

To accept *Maddaugh & McCamus* is to commit the law governing restitutionary relief to incoherence. The danger cannot be overstated. Returning to the theme that opened this paper, like cases will not be treated alike, and deleterious consequences will follow. Historical accident and the vagaries of precedent will determine which of two fundamentally different regimes decides the reversibility of a particular transfer. Having long struggled to draw together the seemingly disparate parts of their subject, unjust enrichment specialists suddenly will see the process move in reverse. From the general practitioner's perspective, the situation will be even worse. The rules of restitutionary recovery, never well understood, will become more perplexing. A single subject will appear fractured. Most cases will follow traditional lines of analysis, but novel circumstances (rare by definition) will attract a civilian approach which, for lack of exposure, will seem like something from another world. Similarly for judges, the co-existence of diametrically opposed models will make it very difficult to appreciate that certain features (*e.g.* enrichment,[98] strict liability) are inherent in *every* case of unjust enrichment.

5. Conclusion

The one benefit of *Maddaugh & McCamus*'s approach is that the changes necessitated by *Garland* would be confined to a small number of novel claims. Going further, many hoped in 2004 that Iacobucci J.'s opinion somehow would be ignored or overruled. The time for such thoughts, however, has passed. There is no denying that *Garland* has fundamentally changed the Canadian law of unjust enrichment. Judges, lawyers and academics must adapt. Books must

97. Birks, *Unjust Enrichment*, *supra*, footnote 32, at pp. 114-16.

98. L. Smith, "Public Justice and Private Justice: Restitution after *Kingstreet*" (2008), 46 C.B.L.J. 11 at p. 27.

be rewritten to reflect the uniquely Canadian model, claims must invariably be framed in civilian terms, and disputes must always be resolved on the basis of juristic reasons. There can be no turning back.

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