THE EQUITABLE ACTION IN UNJUST ENRICHMENT: AMBIGUITY AND ERROR

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I. INTRODUCTION

Before moving to the University of Alberta from the University of Western Ontario, I had the good fortune and great honour of becoming a colleague and friend of J.G. McLeod, who passed away in 2005. Jay was a man of enormous energy. Among the various lives that he simultaneously lived was that of Canada's foremost family law practitioner. But even Jay wore down over time and he decided, some time before his death, to give up appellate work. His last case dealt, appropriately enough, with a cohabitant's claim for a division of assets. During the course of the hearing, a member of the bench referred to the "equitable action in unjust enrichment." Jay set aside his factum, extemporaneously traced the history of the action, and explained that the vast bulk of the subject exists at law — not equity. Satisfied that the issue had been resolved, he resumed his submissions. Two months later, he was greatly amused to read the first sentence of the Court of Appeal's judgment: "The primary issue on this appeal relates to the interrelation between the equitable doctrine of unjust enrichment and the *Family Law Act* . . .".[1]

Jay's experience was not unique. A remarkable number of Canadian judges firmly believe that unjust enrichment is an equitable action. The Supreme Court of Canada first expressed that view one hundred years ago,[2] and it has reiterated the proposition in virtually every major case since it formulated the modern principle of unjust enrichment in *Pettkus v. Becker*.[3]

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1. *Roseneck v. Gowling* (2004), 223 D.L.R. (4th) 210 at p. 214, 62 O.R. (3d) 789 (C.A.), addendums at 223 D.L.R. (4th) 210 at p. 229 and 38 R.F.L. (5th) 180.
2. *Dominion Bank v. Union Bank of Canada* (1908), 40 S.C.R. 366 at p. 381. See also *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1 at pp. 9-13, [1976] 2 S.C.R. 147 *per* Martland J.

Accordingly, while his recent judgment in *Garland v. Consumers' Gas Co.* profoundly changed the nature of restitutionary liability,[4] Iacobucci J. was firmly rooted in precedent when he stressed that he was dealing with "an equitable remedy that will necessarily involve discretion and questions of fairness."[5]

Statements of that sort create the two problems with which this article is concerned:

- *Ambiguity.* Such statements fail to identify clearly the sense in which unjust enrichment is thought to be "equitable." The operative term is notoriously ambiguous. For the purposes of discussion, the most significant possibilities can be organized under three headings. Unjust enrichment may be equitable in the sense that: (1) it historically developed in the ancient Courts of Chancery, (2) it allows judges to exercise an unusually large measure of discretion, and to resolve disputes on the basis of individual conscience, or (3) it plays a subsidiary role within the Canadian system of private law insofar as it fills gaps that lie between other areas of law (*e.g.* tort and contract).

- *Error.* The second problem with which this article is concerned is more profound. Contrary to judicial comment, the action in unjust enrichment is *not* inherently or primarily equitable — however that term is defined. (1) The core concepts were developed at law and the Chancellor's contributions are confined, as in tort and contract, to the periphery. (2) While Canadian judges often appear to resolve claims of unjust enrichment by means of *ad hoc* opinions, that approach is contrary to historical precedent and unnecessary for justice. It is possible to consistently achieve fair results on the basis of clearly defined rules. (3) Because the common law places a high value on personal autonomy, contract takes precedence over

3. (1980), 117 D.L.R. (4th) 257 at p. 274, [1980] 2 S.C.R. 834. The proposition occasionally was expressed in earlier judgments as well: *Dominion Bank, ibid.*, at p. 381; *Storthoaks, ibid.*, at pp. 9-13.

4. Despite being presented as a relatively minor exercise in "redefinition and reformulation," the effect of Iacobucci J.'s judgment was profound. The current Canadian principle of unjust enrichment truly is unique. There is nothing quite like it anywhere in the common law or civil law world. There are, of course, costs to be paid for turning one's back on history: M. McInnes, "Juristic Reasons and Unjust Factors in the Supreme Court of Canada" (2004), 120 L.Q.R. 554; M. McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment after *Garland v. Consumers' Gas Co.*" (2004), 42 Alberta L. Rev. 399; M. McInnes, "Restitution, Juristic Reasons and Palm Tree Justice" (2004), 40 C.B.L.J. 403.

5. (2004), 237 D.L.R. (4th) 385 at p. 401, [2004] 1 S.C.R. 629.

unjust enrichment, in much the same manner as it trumps tort. As long as a dispute is not governed by an enforceable agreement, however, restitutionary principles independently operate according to their own internal logic.

The ensuing discussion consists of four parts. Parts III, IV and V explain in detail why unjust enrichment ought not to be considered "equitable" in the sense of being (1) attributable to the Chancellor's jurisdiction, (2) based on broad discretion, or (3) confined to a subsidiary, gap-filling role. By way of preface, however, Part II will briefly explain how the principle erroneously came to be associated with equity.

II. LORD MANSFIELD'S EQUITABLE AMBITIONS

While no Canadian court has expressly commented on the matter, the purported connection between equity and unjust enrichment undoubtedly stems from Lord Mansfield, and in particular, his judgment in *Moses v. Macferlan*.[6]

1. Lord Mansfield

Lord Mansfield's approach to the subject is best understood within the context of his professional life. William Murray (as he was born) simultaneously attended Christ Church, Oxford, where he focused on the development of his oratorical gifts, and Lincoln's Inn, where he studied the rules of equity and the principles of Roman law. He was called to the Bar in 1730, and after a few lean years, became widely recognized as leading counsel in the Court of Chancery.[7] That success led in turn to the House of Commons, where he served with great distinction as the Member for Boroughbridge.[8] Murray nevertheless recognized that his talents rested not in politics (where he often felt stung by the invective of Parliamentary debates and constrained by the need for compromise), but rather law. He accordingly declined a series of political opportunities, including an

6. (1760), 2 Burr. 1005, 97 E.R. 676.

7. Holdsworth reports that, during his time at the Chancery bar, Murray was greatly impressed and influenced by the ability of Lord Hardwicke to expand and adapt equitable principles to modern needs, and that, upon his own appointment to the King's Bench, Lord Mansfield "considered that no greater service could be done to the law than to adopt and apply those principles in the courts of law": W.S. Holdsworth, "Blackstone's Treatment of Equity" (1929), 43 Harv. L. Rev. 1 at p. 8.

8. E. Foss, *A Biographical Dictionary of the Judges of England 1066-1870* (London, John Abermale, 1870), pp. 469-72.

invitation to succeed Henry Pelham as Prime Minister. Even more interestingly for present purposes, he also declined an invitation to join the Court of Chancery as Master of the Rolls. His sights were set elsewhere, and his patience eventually was rewarded in 1756, when he was appointed Chief Justice of the King's Bench (one of the ancient Courts of Law) and received letters patent as the first Baron of Mansfield.

The appointment perfectly fit with Lord Mansfield's ambitions. Politically cautious and temperamentally conservative, he nevertheless was, by nature and circumstance, a reformer. Though he revered the common law, he was intolerant of unnecessary technicalities and anxious to eliminate the excessive delays that plagued the administration of justice. As with procedure, so too with substance, he believed that disputes ought to be resolved with less formality and greater attention to facts. Not surprisingly, as he set out "to restore the due proportion between principle and practice which alone could satisfy the needs of an advancing society,"[9] he frequently drew upon his earlier experiences.

2. Money Had and Received

The action for money had and received (ancestor to much of the modern law of unjust enrichment) was a prime candidate for Lord Mansfield's agenda. The writ was a species of *indebitatus assumpsit* ("being indebted, he promised to pay"). Although the wording of the generic claim naturally suggested the enforcement of a promise, and hence an action in contract, a broad interpretation of *Slade's Case*[10] meant that it also could be used to enforce a debt whenever the court was willing to *imply a promise* (or, more accurately, *impose an obligation*) to pay. *Indebitatus assumpsit* accordingly extended not only to genuinely implied promises (as when the parties created a contract through actions rather than words), but also to cases in which the writ's requirements were deemed satisfied by the fictitious imputation of a promise to pay. Somewhat surprisingly, then, it applied if, *inter alia*,[11] the defendant was unjustly enriched by the receipt of money from the defendant. It was irrelevant that the defendant fully intended to retain the benefit and would not have considered promising otherwise.

9. C.H.S. Fifoot, *Lord Mansfield* (Oxford, Clarendon Press, 1936), p. 151.
10. (1602), 4 Co. Rep. 91a, 76 E.R. 1072.
11. So too, under the rubric of "waiver of tort," if the plaintiff sought disgorgement of a benefit that the defendant acquired by means of tortious conduct.

3. *Moses v. Macferlan*

Moses v. Macferlan[12] was such a case. Moses was indebted to Macferlan. In satisfaction of that debt, Moses endorsed and delivered promissory notes drafted by Jacobs. As a condition to doing so, he had received Macferlan's contractual promise that action would be taken on the notes, but not on the endorsements. After Jacobs refused payment, however, Macferlan broke his promise by suing Moses in a Court of Conscience.[13] That court refused, on technical grounds,[14] to receive evidence pertaining to Macferlan's promise to refrain from taking action on the endorsements. Moses had no other defence and consequently was found liable. Though understandably dissatisfied, his options were limited. Although he could have asked the Court of Chancery for an injunction to restrain Macferlan from enforcing the judgment, that possibility was closed once he complied with the court order and paid £6 to Macferlan. No writ of *certiorari* or error was available from a Court of Conscience to the Court of King's Bench. Moses did, nevertheless, find a course of action that brought him before Chief Justice Mansfield.

Moses sued Macferlan in the Court of King's Bench under the writ of *indebitatus assumpsit*. At that stage of the episode, there was, of course, no genuine promise to pay. As Lord Mansfield recognized, "it is impossible to presume any contract to refund money, which the defendant recovered by an adverse suit." But that was beside the point. "If the defendant be under an obligation, from the ties of *natural justice*, to refund; the law implies a debt, and gives this action, founded in the *equity* of the plaintiff's case, as it were upon a contract ('*quasi ex contractu*,' as the Roman law expresses it)."[15] That was true in "numberless instances," of which the present case was one.[16] The

12. *Supra*, footnote 6. For the story behind the case, see W. Swain, "*Moses v Macferlan*" in C. Mitchell and P. Mitchell, eds., *Landmark Cases in the Law of Restitution* (Oxford, Hart, 2006), p. 19.
13. A Court of Conscience was a small claims court, staffed by aldermen and commoners, with jurisdiction to resolve cases dealing with matters valued at 40 shillings or less. Despite their name, and despite the fact that they were directed to make such orders as were "just and agreeable to Equity and Conscience," they were not concerned with equity in the proper jurisdictional sense: B. Kremer, "The Action for Money Had and Received" (2001), 17 J. of Contract L. 93 at p. 97.
14. The Court of Conscience was concerned that the evidence would raise matters that exceeded the limits of its monetary jurisdiction.
15. *Supra*, footnote 6, at p. 1012 (emphasis added).
16. The action for money had and received was said to also lie 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

court therefore confirmed the jury's decision to compel Macferlan to provide restitution of the £6 that he had received from Moses.

For present purposes, the interesting aspect of the judgment lies in Lord Mansfield's explanation of the basis upon which liability is imposed. He reiterated his earlier references to "natural justice" and "equity."

> This kind of *equitable action*, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund . . . In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the *ties of natural justice and equity* to refund the money.[17]

4. An Equitable Action

Though those passages easily confuse the modern reader, the original intention would have been clear to contemporaries. The references to "natural justice" and "equity" involved two lines of thought.

(a) Natural Justice and Roman Law

The influence of Lord Mansfield's education in Roman law runs throughout his judgment in *Moses v. Macferlan*. He begins by likening the action for money had and received to the concept of *quasi ex contractu*. As Professor Birks explained, the Romans saw four sources of obligations in private law: *ex contractu*, *ex delictu*, *quasi ex contractu*, and *quasi ex delictu*.[18] The first two categories broadly translate into the common law concepts of contract and tort. The fourth category ("as though upon a tort") never amounted to much. The third category proved problematic — not for the Romans or Lord Mansfield, but rather for modern lawyers. The Latin phrase was corrupted into *quasi*-contract, which tended to be translated into "a sort of contract," and thence into the "implied contract" theory of restitutionary liability that reached its peak in *Sinclair v. Brougham*[19] and for many years inhibited recognition of an independent principle of unjust enrichment. Lord Mansfield, of course, avoided that error. As he went on to explain, restitution arises *quasi ex contractu* — not in the sense that it is triggered by "a sort of contract" — but in the sense

advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances": *ibid.*, at p. 1012.

17. *Ibid.*, at p. 1012 (emphasis added).
18. P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford, OUP, 2005), pp. 268-70.
19. [1914] A.C. 398 (H.L.).

that, while similar to a contract insofar as it does not presume any wrongdoing, it is distinct from contract insofar as the operative obligation is legally imposed rather than voluntarily assumed.

The civilian theme reappears in references to "*ex aequo et bono*," "natural justice and equity." Several years after *Moses v. Macferlan*, Lord Mansfield rephrased the proposition in terms of "principles of eternal justice."[20] Occasional doubts notwithstanding,[21] it is clear that he was referring to the *jus naturale* of Roman law.[22] Sir William Evans, writing shortly after Lord Mansfield's tenure in the King's Bench, observed that the analysis appearing in *Moses v. Macferlan* "coincide[s] in effect with the institutes of civil law," and in particular, the "maxim of civil law, that it is naturally just that one man shall not be enriched to the detriment of the other."[23] A century later, Farwell L.J. similarly attributed Lord Mansfield's "equity" to the *jus naturale*.[24] More recently still, Professor Birks further explained that the Romans defined "nature" and "natural justice" not in terms of either natural instinct or moral discretion, but rather reason.[25] "*Aequum* [*i.e.* justice] is what is fair when weighed up by reason: reasonable." And that principle applied not to individual cases — so as to "invite the courts to consider every enrichment anew from the standpoint of fairness",[26] but rather to the action as a whole — so as to demonstrate why, in a certain class of cases, enrichments must be reversed. In the words of Pomponius, "[T]his is by nature fair, that no man should be enriched at the expense of another."[27]

20. *Towers v. Barrett* (1786), 1 T.R. 133 at p. 134, 99 E.R. 1014 at p. 1015.
21. J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston, Little Brown & Co., 1951), p. 12; *Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001), 208 C.L.R. 516 at p. 548 *per* Gummow J. (H.C.A.).
22. Lord Mansfield's Roman law references were not confined to *Moses v. Macferlan*. In *Price v. Neal*, he likened the action for money had and received to "the *condictio indebitii* in the Roman law; the most liberal species of actions on the case": (1746-1779), 1 Black W. 390 at p. 391, 96 E.R. 221 at p. 221.
23. "An Essay on the Action for Money Had and Received" (1802), reprinted in [1998] Restitution L. Rev. 1 at p. 4.
24. *Bradford Corp. v. Ferrand*, [1902] 2 Ch. 655 at p. 662 (C.A.); *Baylis v. Bishop of London*, [1913] 1 Ch. 127 at p. 137 (C.A.).
25. P. Birks, "English and Roman Learning in *Moses v. Macferlan*", [1984] Curr. Leg. Prob. 1 at pp. 20-22. See also R.A. Samek, "Unjust Enrichment, Quasi-Contract and Restitution" (1969), 47 Can. Bar Rev. 1 at p. 15-17; J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston, Little Brown & Co., 1951), p. 14.
26. Birks, "English and Roman Learning", *ibid.*, at p. 21.
27. D.12.6.14, quoted by Birks, "English and Roman Learning", *ibid.*, at p. 21.

(b) Equitable Procedure

References in *Moses v. Macferlan* to "equity" in fact served double duty. Aside from situating the source of Lord Mansfield's theory of unjust enrichment within Roman law, they also point to the reason why he favoured the action for money had and received. From a procedural perspective, the writ would have been far more at home in a Court of Chancery than in a Court of Law. While the point may be somewhat obscure in *Moses v. Macferlan* itself, other judgments put the proposition beyond doubt. In *Clarke v. Shee*, Lord Mansfield explained that money had and received "is a liberal action in the nature of a bill in equity."[28] Again, in *Jestons v. Brooke*, he said that "the action for money had and received . . . is analogous to a bill in equity."[29] And in *Longchamp v. Kenny*[30] and *Stevenson v. Mortimer*,[31] he expressly tied the "equity" of the action to the procedural benefits that it held for both parties.[32] (Such statements undoubtedly engendered the belief that Lord Mansfield "never liked Law so well as when it was like Equity."[33])

At the time of *Moses v. Macferlan*, procedure in law was far more complex, and far less conducive to justice, than its counterpart in Chancery. Baker's description brings to mind a diabolically difficult game of Simon Says, all too often resulting in defeat on technical grounds.[34] The plaintiff was required to express his complaint through the medium of one of the notoriously prolix and obscure writs of action. There followed a flurry of paperwork, written at great

28. (1774), 1 Cowp. 197 at p. 199-200, 98 E.R. 1041 at p. 1042.
29. (1778), 2 Cowp. 793 at p. 795, 98 E.R. 1365 at p. 1366.
30. (1779) 1 Dougl. 137 at p. 138, 99 E.R. 91 at p. 91.
31. (1778), 2 Cowp. 806 at p. 807, 98 E.R. 1372 at p. 1373. On Lord Mansfield's views as to the procedural liberality of the action, see also *Dale v. Sollet* (1767), 4 Burr. 2133, 98 E.R. 112; *Roberts v. Hartley* (1780), 1 Dougl. 311, 99 E.R. 201; *Lindon v. Hooper* (1776), 1 Cowp. 414 at p. 419, 98 E.R. 1160 at p. 1163; *Sadler v. Evans* (1766), 4 Burr. 1984 at p. 1986, 98 E.R. 34 at p. 35; *Hotley v. Scot*, (1790), 6 Lofft. 316 at p. 320, 98 E.R. 670 at p. 672; *Price, supra,* footnote 22, at p. 872.
32. Interestingly, Chancery sometimes proceeded by analogy to the action for money had and received: *Jacobs v. Morris*, [1901] 1 Ch. 261; *Bradford Corp., supra,* footnote 24, at pp. 662-63 *per* Farwell J.; *cf. Baylis, supra,* footnote 24, at p. 137 *per* Farwell L.J. (C.A.); G.B. Klippert, *Unjust Enrichment* (Toronto, Butterworths, 1983), p. 15-17.
33. *Dursley v. Fitzhardinge Berkeley* (1801), 6 Ves. 251 at p. 260, 31 E.R. 1036 at p. 1041 *per* Lord Eldon. The proposition also finds support in the long list of substantive equitable doctrines that Lord Mansfield introduced into the King's Bench (*e.g.* estoppel by conduct, stoppage *in transitu*, certain limitations on the principle of *in pari delicto potior est condition defendentis*): W.S. Holdsworth, *A History of English Law* (London, Sweet & Maxwell, 1932), vol. XII, p. 548.
34. J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (London, Butterworths, 1990), pp. 101-107.

length and in formulaic terms, aimed at resolving issues of law by way of demurrer and arriving at trial with questions of fact for the jury.[35] A case might be lost, anywhere along the way, through an infelicitous phrase or a slip of the pen. For Lord Mansfield, however, the far more modest purpose of pleading was to "bring the point of dispute to the court in the most simple way, to attain justice."[36] Bills in Chancery served that function. They merely disclosed the gist of the plaintiff's complaint and provided a means by which the defendant might be brought before a judge to answer the allegations put against him. The details were addressed at trial.[37] Likewise with the action for money had and received. Substantive arguments were far less likely to be lost to technicalities. "[N]either party is allowed to entrap the other in form."[38] Nor were cases contested largely on the pleadings. The plaintiff merely needed to allege that the defendant was indebted in such and such an amount, had promised to repay that amount, but had failed to do so. "And with this slender machinery may be recovered any sum of money, however large, which *ex aequo et bono* the defendant ought to refund."[39] The liberality of the action also benefited the other side. With a mere denial, the defendant put into issue both the alleged receipt of money and the facts underlying the purported debt. Moreover, he could prove a release without pleading it, establish a set-off or counterclaim, and so on. "[I]n short, he may defend himself by everything which shows that the plaintiff, *ex aequo et bono*, is not entitled to the whole of his demand, or any part of it."[40]

5. Aftermath

While it has been said that *Moses v. Macferlan* excited little attention among its contemporaries,[41] that is not quite true. Lord

35. R.P. Meagher, J.D. Lehane and M.J. Leeming, eds., *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 4th ed. (Sydney, Butterworths, 2002), p. 75.
36. M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford, Clarendon Press, 1991), p. 101.
37. On the nature of pleadings in Chancery, see F.W. Maitland, *Equity: A Course of Lectures* (Cambridge, Cambridge University Press, 1936), p. 5; D. Browne, *Ashburner's Principles of Equity*, 2nd ed. (London, Butterworths, 1933), pp. 22-23; F.F. Heard, *A Concise Treatise on the Principles of Equity Pleadings* (Boston, Soule & Bugbee, 1882), pp. 1-8.
38. *Stevenson, supra*, footnote 31, at p. 807.
39. S. Warren, *Introduction to Law Studies*, 2nd ed. (London, Maxwell & Son, 1845), pp. 320-21.
40. *Moses, supra*, footnote 6, at p. 1010.
41. *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at p. 242, 54 N.B.R. (2d) 293 (C.A.); S. Stoljar, *The Law of Quasi-Contract*, 2nd ed. (Sydney, Lawbook, 1989), p. 15.

Mansfield's decision was overruled four years after his death.[42] And even within his own lifetime, he was alive to the controversial nature of its underlying analysis. He was at pains to ensure that the generality of the pleadings did not become a source of unfair surprise at trial, and therefore explained that while he was "a great friend to the action for money had and received," he was "not for stretching, lest [he] should endanger it."[43] Others were more circumspect. Fifoot reports that the "enthusiasm of litigants for a remedy so strangely akin to common sense threatened the ascendancy of the older writs."[44] More substantively, difficulties arose from the disjunction between the equitable theory of liability and "the mode of proof, the mode of trial, and the mode of relief"[45] that applied in the King's Bench.[46] So much so, in fact, that litigants occasionally sought the Chancellor's protection against the overzealous extension of equitable principles in courts of law.[47]

III. THE CHANCELLOR'S JURISDICTION

It would be impossible to overstate Lord Mansfield's impact on the Canadian law of unjust enrichment. *Moses v. Macferlan* itself has been cited at least 150 times (a remarkable number for a decision approaching its sesquibicentennial), beginning in 1876 when the Ontario Court of Queen's Bench endorsed the "equitable" action.[48] In 1908, Duff J. introduced that same proposition into the Supreme

42. *Marriot v. Hampton* (1797), 7 T.R. 269, 101 E.R. 969 ("I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest."). See also *Phillips v. Hunter* (1795), 2 H. Bl. 402 at p. 414, 126 E.R. 618 at p. 624 ("I cannot subscribe to the authority of that case").

43. *Weston v. Downes* (1778), 1 Dougl. 23 at p. 24, 99 E.R. 19 at p. 20 (insisting that if the plaintiff took action on a special contract, the defendant was entitled to know before trial). See also *Longchamp v. Kenny* (1779), 1 Dougl. 137 at p. 138, 99 E.R. 91 at p. 91; *Towers, supra,* footnote 20, at p. 134.

44. Fifoot, *supra,* footnote 9, at p. 151.

45. W. Blackstone, *Commentaries on the Laws of England,* 4th ed. (London, John Murray, 1876), vol. III, p. 227. The influence of *Moses v. Macferlan, supra,* footnote 6, and of Lord Mansfield's approach to restitutionary liability, is attributable in large part to Blackstone's proselytizing efforts: P. Birks, *An Introduction to the Law of Restitution,* revd ed. (Oxford, Clarendon Press, 1989), pp. 36-38; Holdsworth, "Blackstone's Treatment", *supra,* footnote 7.

46. Lord Eldon stated that, given the differences in machinery, it was impossible for courts of law to implement equitable principles, and further suggested that the greatest source of injury to the legal system stems from the neglect of that proposition: *Cooth v. Jackson* (1801), 6 Ves. Jun. at 12 at p. 39, 31 E.R. 913 at p. 927.

47. W.S. Holdsworth, *A History of English Law* (London, Sweet & Maxwell, 1932), vol. XII, p. 597.

48. *Wilson v. Mason* (1876), 38 U.C.Q.B. 14 at p. 26.

Court of Canada when he stated that the "action for money had and received is an equitable action."[49] Undoubtedly the most significant invocation, however, occurred in *Pettkus v. Becker*. In formulating the modern principle of unjust enrichment, Dickson J. adopted Lord Mansfield's statement that "the gist of this kind of action is that the defendant . . . is obliged by the ties of natural justice and equity to refund the money."[50] That aspect of *Pettkus v. Becker* has become a ritualized incantation for judges presented with restitutionary claims. Consequently, directly and indirectly, Lord Mansfield's ruminations on the "equitable" nature of unjust enrichment have become a fixed feature of Canadian law. They have, however, been misunderstood.

1. Jurisdictional Error

Lord Mansfield knew, of course, where to find his office. Though he previously had practiced in Chancery, he was, by the time of *Moses v. Macferlan*, Chief Justice of the King's Bench, one of the ancient courts of law. The claim in that case was based on the action for money had and received, a writ that was returnable only in a court of law.[51] Insofar as the law of unjust enrichment derives from *Moses v. Macferlan* , it lies in law, not equity. Nothing could be clearer.

Outside of Canada, courts have long recognized that fact.[52] In 1849, Baron Pollock said that the myth of equitable birth had been "exploded" and explained that money had and received "is a perfectly legal action, and no good can result from calling it an equitable one."[53] In 1890, the New York Court of Appeals observed that while "the action may be generally described as one of an equitable character" in terms of procedure, "it never was in any aspect a suit in

49. *Dominion Bank, supra,* footnote 2, at p. 381. Duff J.'s opinion subsequently was adopted by Martland J. in *Storthoaks, supra,* footnote 2.

50. *Supra,* footnote 3, at p. 274. The interpretation of Dickson J.'s repeated references to "general principles of equity that have been fashioned by the Courts for centuries" is complicated by the fact that he also discusses, within the same passages, the constructive trust, which undeniably is a product of Chancery. The exercise is further complicated by his observation that "[t]he common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another": at p. 274. Nevertheless, it is tolerably clear, from the judgment as a whole, that he attributed not only the remedy, but also the cause of action, to the ancient courts of equity. That certainly is how Canadian courts subsequently read his judgment. His reference to "the common law" therefore must pertain to the system of rules derived from England, rather than to the oldest set of courts within that system.

51. Explicit precedent for a self-evident proposition: *Lamb v. Cranfield* (1874), 43 L.J. Ch. 408 at p. 409 *per* Jessel M.R. (C.A.).

52. *Cf.* Gummow J.'s lengthy discussion in *Roxborough, supra,* footnote 21.

53. *Miller v. Atlee* (1841), 13 Jur. 431.

equity."[54] And in 1913, Farwell L.J. clearly stated that when Lord Mansfield referred to "equity . . . he was not referring to 'an equity' in the sense in which it was used in the Court of Chancery."[55]

And yet, Canadian courts habitually commit the mistake of locating the whole of unjust enrichment within the Chancellor's jurisdiction.[56] Granted, references to the "equitable" nature of the subject tend to be ambiguous. It frequently is difficult to determine whether a judge intended to signify only (1) that the dispute will be resolved, to an unusual degree, by way of discretion rather than rules (as discussed below), or also (2) that the authority to proceed in that manner stems from the fact that the claim historically developed in Chancery. There nevertheless is ample proof that Canadian courts subscribe to both propositions.

Judges sometimes are explicit. For example, in *Pacific National Investments Ltd. v. Victoria (No. 2)*, Binnie J. openly stated that the plaintiff had "alleged causes of action at common law (breach of contract) and equity (unjust enrichment)."[57] Other times, the same point can be drawn on the basis of obvious inference. Binnie J., for instance, subsequently invoked one of the Chancellor's traditional maxims in asserting that unjust enrichment is "an equitable cause of action, and equity looks to substance rather than to form."[58]

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54. *Chapman v. Forbes* (1890), 26 N.E. 3 at p. 4 (N.Y. C.A.).
55. *Baylis, supra,* footnote 24, at p. 137.
56. There are exceptions: *Communities Economic Development Fund v. Canadian Pickles Corp.* (1991), 85 D.L.R. (4th) 88 at p. 107, [1991] 3 S.C.R. 388 *per* Iacobucci J.; *Peel (Regional Municipality) v. Ontario* (1998), 98 D.L.R. (4th) 140 at p. 153-54, [1992] 3 S.C.R. 762 *per* McLachlin J. Curiously, however, both Iacobucci and McLachlin J. have subscribed to the prevailing Canadian view on other occasions. The former's comments in *Garland v. Consumers' Gas Co.* were quoted at the beginning of this article. Likewise, in *Peter v. Beblow*, McLachlin J. repeatedly referred to the "equitable" action in unjust enrichment. The jurisdictional nature of those references is confirmed by her explanation for the availability of restitutionary relief. Invoking the historical basis of the Chancellor's authority, she said that it is "precisely where an injustice arises without a legal remedy that equity finds a role": (1993), 101 D.L.R. (4th) 621 at p. 648, [1993] 1 S.C.R. 980. Even more curiously, while McLachlin J. took the opportunity in *Peel* to correctly locate the roots of the modern principle of unjust enrichment in the various species of the ancient writ of *indebitatus assumpsit* (*e.g.* money had and received, *quantum meruit, quantum valebat*) that were returnable only in courts of law, her opinion in *Peter* classified *quantum meruit, quantum valebat*, along with the constructive trust, as remedies for "'unjust enrichment' in equity": *ibid.*, at p. 643; 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), p. 37 at p. 47.
57. (2004), 245 D.L.R. (4th) 211 at p. 217, [2004] 3 S.C.R. 575, motion for rehearing dismissed [2005] 1 S.C.R. 286.

Even when an "equitable" reference is ambiguous in English, the court's specific intention may be revealed through translation. Professor Klinck has explained that while "equity" does double duty in English, a distinction is drawn in French between "l'équité" (referring, in a general sense, to fairness) and "l'equity" (referring, in a technical sense, to the ancient Court of Chancery).[59] Accordingly, in *Pettkus v. Becker*, when Dickson J. adopted Lord Mansfield's statement that the defendant is "obliged by the ties of natural justice and equity to refund," the operative term appears as "l'equity" (*i.e.* Chancery) in the official French version of the judgment.[60] The Supreme Court of Canada recently reiterated that view. When Iacobucci J. stated in *Garland v. Consumers' Gas Co.* that restitution "is an *equitable* remedy that will necessarily involve discretion and questions of fairness," the operative word was rendered as (technical) "equity."[61] Likewise, when Binnie J. said in *Pacific National Investments Ltd. v. Victoria (City) (No. 2)* that "unjust enrichment provides an *equitable* cause of action that retains a large measure of remedial flexibility," the translation referred (in a technical sense) to "une cause d'action en equity."[62] Again, when LeBel J. referred in *British Columbia v. Canadian Forest Products Ltd.* to the "equitable analysis, omnipresent in the restitution law context," the passage was translated to read "analyse basée sur l'equity."[63]

Finally, the belief that unjust enrichment is equitable in a jurisdictional sense occasionally is offered as a *reason* for judgment. Leaving aside the inference that Canadian judges typically draw (*i.e.*, that liability ought to be determined as a matter of "conscience"), the

58. *Ibid.*, at p. 224.

59. D. Klinck, "*Nous sumus a arguer la consciens icy et nemy law ley': Equity in the Supreme Court of Canada* in P.-A. Crepeau, ed., *Mélange Bofferts par ses collègues de McGill à Paul-Andrè Crépeau* (Cowansville Que., Yvon Blais, 1997), p. 535 at pp. 538-39. As Klinck notes, however, the Supreme Court of Canada's translation service is not infallible and occasionally confuses the two meanings of "equity."

60. *Supra,* footnote 3, at p. 273 D.L.R. and pp. 847-48 S.C.R.

61. *Supra,* footnote 5, at p. 401.

62. *Supra,* footnote 57, at p. 218.

63. (2004), 240 D.L.R. (4th) 1 at p. 67, [2004] 2 S.C.R. 74 at p. 165. Examples are easily multiplied. See, for example, *Peter, supra,* footnote 56, at p. 642 ("the equitable concept of unjust enrichment" translated as "le concept de l'enrichissement sans cause reconnu en *equity*"); *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 at p. 167, [1989] 1 S.C.R. 1161 at p. 1213 ("the equitable doctrine of unjust enrichment" translated as "la doctrine d'*equity* de l'enrichissement illégitime ou enrichissement sans cause"); *Sorochan v. Sorochan* (1986), 29 D.L.R. (3d) 1 at p. 5, [1986] 2 S.C.R. 38 at p. 43 ("ancient principles of equity" translated as "des principes anciens d'*equity*").

error itself may be dispositive of an action.[64] As creations of statute, small claims courts typically have limited jurisdiction insofar as they are incapable of awarding equitable relief (*i.e.*, remedies historically developed in the Court of Chancery). In several instances, restitutionary claims have been dismissed peremptorily on the basis that it "seems to be no longer questioned that unjust enrichment grew out of fairness principles in equity and is not a part of the common law."[65] Interestingly, the jurisdictional error may also cut the other way on an issue of justiciability. It has been suggested that since claims in unjust enrichment originated with the Chancellor, they may not be amenable to statutory limitation periods that govern actions at law.[66]

2. Equitable Contributions to Unjust Enrichment

The prevailing view within Canadian courts is that unjust enrichment is equitable in a jurisdictional sense. Not true. The vast bulk of the subject was developed not in Chancery, but rather in the courts of law.[67] The point is incontestable.

That is not to say, however, that equity plays no role in the modern law of restitution. Equity contributes to unjust enrichment in much the same way that it contributes to, say, contract and tort. If legal damages are inadequate, a court may exercise its equitable jurisdiction to impose an injunction upon a tortfeasor. Regardless of the position at law, a court may invoke the equitable doctrine of promissory estoppel in order to enforce a gratuitous promise that affects an existing contract. Likewise, equitable principles occasionally supplement the general restitutionary rules that were developed in law.

Depending upon the circumstances, equity may affect various aspects of a claim in unjust enrichment. It may underlie the *cause of action*. That is true if a transaction is impugned on the basis of a doctrine (*e.g.* undue influence[68]) that is recognized only in equity, or if

64. Similarly in the United States: E.T. Bishop, "Money Had and Received, An Equitable Action" (1934), 7 S. Calif. L. Rev. 41.

65. *Prtenjaca v. Fox* (2001), 9 C.L.R. (3d) 141 at p. 144 (Ont. S.C.J.); *Caranci v. Ford Credit Canada Leasing Ltd.* (unreported, November 14, 2002, London, Ont. Docket No. 1280 Ont. Div. Ct.) at para. 1; *cf. 936464 Ontario Ltd. v. Mungo Bear Ltd.* (2003), 258 D.L.R. (4th) 754, 74 O.R. (3d) 45 (Ont. Div. Ct.).

66. *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698, 14 C.C.E.L. (3d) 85 (Ont. S.C.J.).

67. "These things cannot really be quantified, but the right impression will be given if we say that two thirds or more of the law of restitution is accounted for by quasi-contract": Birks, *An Introduction, supra*, footnote 45, at p. 29.

the relevant transaction occurred within the context of an existing equitable relationship (*e.g.* knowing receipt of trust property[69]). So too, while the *measure of relief* invariably is restitution,[70] equity may affect the *form of relief*. In Canada, that most obviously is true of the constructive trust,[71] but equity may also respond to an unjust enrichment by means of, *inter alia*, a lien[72] or subrogation.[73] Finally, aside from causes of action and forms of relief, equity may affect *evidentiary* or *procedural* matters. That is true, for instance, if the plaintiff passes over the supposedly distinct common law rules of tracing in favour of equity's more flexible approach.[74]

IV. DISCRETIONARY DECISION-MAKING

In itself, the jurisdictional error is unfortunate, though generally not fatal. That first mistake, however, usually leads to a second, which *is* harmful. From the premise that unjust enrichment originated in Chancery, Canadian judges typically conclude that restitutionary claims ought to be resolved on the basis of broad discretion.

The Supreme Court of Canada has often reasoned along those lines.[75] In *Pettkus v. Becker*, Dickson J. said, with reference to the action in unjust enrichment, that the "great advantage of ancient principles of equity is their flexibility," which allows judges to "shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."[76] In *Garland v. Consumers' Gas Co.*, Iacobucci J. explained that the "equitable action" of unjust enrichment "necessarily involve[s] discretion and questions of fairness" and is flexible enough to "deny recovery where to allow it would be inequitable."[77] In *British Columbia v. Canadian*

68. *McKay v. Clow*, [1941] 4 D.L.R. 273, [1941] 1 S.C.R. 643; *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353.
69. *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411, [1997] 3 S.C.R. 805.
70. M. McInnes, "The Measure of Restitution" (2002), 52 U.T.L.J. 163.
71. *Pettkus, supra*, footnote 3; *Peter, supra*, footnote 56.
72. *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14 at p. 53, [1989] 2 S.C.R. 574 (on counter-claim).
73. *Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1999] 1 A.C. 221 (H.L.).
74. L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997); *Boscawen v. Bajwa*, [1996] 1 W.L.R. 328 at p. 334 (C.A.); *Foskett v. McKeown*, [2001] 1 A.C. 102 *per* Lord Millet (H.L.).
75. See, for example, *Carleton (County) v. Ottawa (City)* (1965), 52 D.L.R. (2d) 220 at p. 224-25, [1965] S.C.R. 663; *Air Canada, supra*, footnote 63, at p. 167; *Peter, supra*, footnote 56, at pp. 642-43.
76. *Supra*, footnote 3, at p. 273.
77. *Supra*, footnote 5, at p. 401.

Forest Products Ltd., LeBel J. said that an "equitable analysis [is] omnipresent in the restitution law context."[78] And in *Pacific National Investments v. Victoria (City) (No. 2)*, Binnie J. held that "unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience."[79] Turning to the lower courts, examples are easily multiplied. The Ontario Court of Appeal, for instance, once held that that the crucial question under "the venerable equitable principle of unjust enrichment" is "whether it would be just and fair to the parties considering all of relevant circumstances, to permit the recipient of the benefit to retain it without compensation to those who provided it."[80] And so on.

Given the context, those comments are more than just a little ironic. The modern principle of unjust enrichment was long denied recognition. In Canada it dates from 1954[81] and 1980.[82] Australian courts did not take the same step until 1986[83] and the House of Lords waited until 1991.[84] The reasons for that delay are complicated. Part of the explanation lies in the phrase "*quasi*-contract," which encouraged the view that unjust enrichment merely was a sub-species of contract, rather than an independent head of liability. Far more damaging, however, was the belief, fostered by Lord Mansfield's references to "natural justice and equity," that the principle of unjust enrichment substantially turned on individualized perceptions of fairness. That belief predictably engendered hostile reactions at the beginning of the twentieth century, when courts began to place a greater emphasis on the values of certainty and predictability. Scrutton L.J. castigated Lord Mansfield's legacy as "a history of well-meaning sloppiness of thought."[85] Hamilton agreed a few years later, albeit somewhat more politely. He noted the imprecision inherent in a test of "*ex aequo et bono*" and said that,

78. *Supra*, footnote 63, at p. 67.
79. *Supra*, footnote 57, at p. 219.
80. *Campbell v. Campbell* (1999), 173 D.L.R. (4th) 270 at pp. 277 and 281, 43 O.R. (3d) 783 (C.A.). See also *Toronto-Dominion Bank v. Bank of Montreal* (1995), 22 O.R. (3d) 362 at p. 375, 18 B.L.R. (2d) 248 (Gen. Div.); *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 at p. 234 and 237-41, 114 Nfld. & P.E.I.R. 187 (Nfld C.A.); *Credit Union Atlantic Ltd. v. MacLean* (1996), 152 N.S.R. (2d) 314, 13 C.C.P.B. 193 (S.C.).
81. *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725.
82. *Pettkus*, *supra*, footnote 3.
83. *Pavey & Matthews Pty. Ltd. v. Paul* (1986), 162 C.L.R. 221 (H.C.A.).
84. *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.).
85. *Holt v. Markham*, [1923] 1 K.B. 504 at p. 513 (C.A.).

"[w]hatever may have been the case 146 years ago" (*i.e.* at the time of *Moses v. Macferlan*), he was not free "to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"[86]

Canadian judges occasionally have expressed similar concerns. In *Pettkus v. Becker*, Martland J. opposed the majority's use of unjust enrichment on the ground that it:[87]

> . . . would clothe Judges with a very wide power to apply what has been described as "palm-tree" justice without the benefit of any guide-lines. By what test is a Judge to determine what constitutes an unjust enrichment? The only test would be his individual perception of what he considers to be unjust.

Unlike Martland J., the current Chief Justice is a great friend to the action. But she too is alert to the risk of *ad hoc* justice. She has denied that "recovery can be awarded on the basis of justice and fairness alone"[88] and cautioned against the "tendency . . . to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties."[89] Likewise, while reformulating the principle of unjust enrichment in *Garland v. Consumers' Gas Co.*, Iacobucci J. attempted to strike a balance between allowing sufficient flexibility to "meet the changing perceptions of justice" and establishing "guidelines that offer . . . some indication of . . . the boundaries of the cause of action." The goal, he said, is to "avoid guidelines that are so general and subjective that uniformity becomes unattainable."[90]

Unfortunately, it does not appear that Canadian courts have achieved that goal. They have taken seriously the idea of equitable discretion, and anyone who has studied their recent decisions will agree that "[i]t is now surprisingly difficult to predict the outcome of cases of unjust enrichment in Canada."[91] In the circumstances, two questions become important: (1) Why have Canadian courts adopted

86. *Baylis, supra,* footnote 24, at p. 140.
87. *Supra,* footnote 3, at p. 262.
88. *Peel, supra,* footnote 56, at p. 164.
89. *Peter, supra,* footnote 56, at pp. 643-44. Likewise in the High Court of Australia, Deane J. disavowed any suggestion that unjust enrichment entails a "judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate": *Pavey, supra,* footnote 83. And in the House of Lords, Lord Goff stressed that "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 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": *Lipkin, supra,* footnote 84, at p. 578.
90. *Supra,* footnote 5, at p. 401.
91. R. Chambers, "Regional Digest: Canada", [2005] Restitution L. Rev. 142 at p. 143.

a discretionary approach to restitutionary liability? (2) Is such a discretion necessary?

1. The Chancellor's Foot

Canadian judges typically justify their *ad hoc* approach to restitutionary liability by pointing to the subject's purported origins in Chancery. Indeed, Iacobucci J. went so far as to say that the "equitable action" of unjust enrichment "*necessarily* involve[s] discretion and questions of fairness."[92]

Even if the roots of the action in unjust enrichment did primarily lie in equity, it would be difficult to know, from a historical perspective, what to make of that proposition. True, as the repository of the monarch's residuum of justice, the Chancellor initially enjoyed a generous discretion to resolve bills in equity on the basis of conscience where the rigidity of the common law writs worked injustice. But the days when equity varied with the length of the Chancellor's foot[93] eventually passed and the jurisdiction settled into a system of precedents and rules largely indistinguishable in form and structure from those encountered at law.[94] Indeed, by the nineteenth century, the Courts of Chancery under Lord Eldon had become notoriously afflicted by *rigour æquitatis*.[95] To Dickens' unhappy litigants in *Jarndyce v. Jarndyce*,[96] talk of flexibility, malleability and justice would have seemed cruel irony.

The situation obviously has changed. But the change is not along jurisdictional lines. In modern Canadian law, rules may be flexible or rigid as the context dictates, without regard to historical origin. It is, for instance, difficult to think of a concept that is more expansive or malleable than the common law action in negligence, or a rule that is

92. *Supra*, footnote 5, at p. 401 (emphasis added).

93. "Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience": J. Selden, *Table Talk*, 3rd ed. (London, J. Russell Smith, 1860), pp. 148-49. The circumstances surrounding the quotation are discussed in D. Klinck and L. Mirella, "Tracing the Imprint of the Chancellor's Foot" (1998), 13 Cdn. J. Law & Society 63 at pp. 67-81.

94. Even with respect to equitable rules that are commonly said to be "discretionary" (*e.g.* specific performance), the courts' discretion is exercised on the basis of established principles rather than personal intuition, such that results are easy to predict.

95. Baker, *supra*, footnote 34, at pp. 101-111.

96. C. Dickens, *Bleak House* (1853).

less flexible or forgiving than the one that equity applies with respect to benefits received through breach of fiduciary duty.[97]

2. Discretion and Rules

While nothing in its *origin* requires a continuing discretion, it may be that unjust enrichment, by its very *nature*, resists the consistent application of clear rules. Indeed, it has been suggested (for the sake of argument) that "individualized justice" is necessary and appropriate because (1) restitutionary claims arise in a wide variety of situations and therefore cannot universally be accommodated within a single set of rules, (2) liability merely rectifies past transactions and therefore need not be amenable to future planning, (3) perceptions of value differ from one person to the next and therefore resist standardized quantification, and (4) transfers often arise through innocent error and therefore create situations in which it is desirable to sensitively allocate benefits and burdens between the parties.[98]

As a whole, those arguments suggest that because the action in unjust enrichment applies across a wide spectrum of situations, it cannot be reduced to a small set of clear-cut rules. Restitutionary liability must instead be a function of *ad hoc*, fact-sensitive assessments of individual claims. Many Canadian judges undoubtedly share that opinion. And it is indeed true that a sensitive balance must be struck between the parties' competing interests. But much the same can be said of any area of private law. The action in unjust enrichment is not inherently susceptible to discretionary treatment. An appropriate compromise can be achieved on a principled and predictable basis, without recourse to *ad hoc* judgments.

The central risk of restitution is that, despite the absence of any wrongdoing, the recipient may be held liable without truly being enriched. There are two strategies for dealing with that problem. The first (commonly endorsed in Canada) is to award relief only when it seems fair in the circumstances. The judge exercises a broad discretion to apportion the benefits and burdens as seems appropriate. That approach holds the promise of substantive justice, but it fails miserably in terms of certainty and legitimacy. The second strategy,

97. *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.); *Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (2d) 371, [1974] 1 S.C.R. 592; *cf. Peso Silver Mines Ltd. v. Cropper* (1966), 58 D.L.R. (2d) 1, [1966] S.C.R. 673.

98. E. Sherwin, "Restitution and Equity: An Analysis of the Principle of Unjust Enrichment" (2001), 79 Texas L. Rev. 2083 at pp. 2096-101.

always latent in the law of unjust enrichment, has been clearly articulated over the past quarter century.[99] The key lies in freedom of choice. Liability is available only to the extent that it is consistent with the defendant's autonomy. The details of that scheme lie beyond the scope of this article.[100] Suffice it to say that, as a result of the element of *enrichment* and the defence of *change of position*, restitution should be ordered only insofar as (1) at the moment of enrichment, the defendant received either money (or the equivalent of money) or a benefit which he had chosen to pay, and (2) at the moment of judgment, the defendant either continues to be so enriched or has incurred an expenditure for which he freely accepted responsibility.[101] Having adequately protected the recipient, the courts are then free to generously formulate wide grounds of recovery, secure in the knowledge that by helping the plaintiff, they will not hurt the defendant.[102] Restitution, at most, will restore the *status quo ante*.

3. The Costs of Discretion

Within a system committed to the rule of law, discretion must never be anything other than a necessary evil — a means of resolving disputes when all else fails. The circumstances amenable to that approach are rare and unjust enrichment is not among them. As explained in the preceding section, it is possible to achieve fair results in restitutionary claims by consistently applying fixed rules.

Canadian courts unfortunately have eschewed those rules in favour of an "equitable discretion." The costs associated with that choice are substantial.

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99. See especially Birks, *An Introduction, supra,* footnote 45; Birks, *Unjust Enrichment, supra,* footnote 18. *Cf. Citadel General Assurance, supra,* footnote 69, *per* LaForest J. (considering, but failing to accept, Birks' analysis).

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

101. Change of position protects freedom of choice *pro tanto* — it reduces liability to the extent that the defendant incurred an exceptional disenrichment in good faith. The defence of *bona fide* purchase provides greater protection, albeit less often. If the defendant acquired the impugned enrichment for value and without notice of the plaintiff's underlying rights, liability may be defeated altogether.

102. Interestingly, English courts did not consider it possible to recognize a generalized principle of unjust enrichment until they had protected the defendant's position through the adoption of the change of position defence: *Lipkin, supra,* footnote 84. Also interestingly, the Privy Council rejected, as "hopelessly unstable," a model of that defence that operates on the basis of a discretionary balancing of the equities. The board insisted that a sensitive balance can be struck by rules rather than intuition: *Dextra Bank & Trust Co. Ltd v. Bank of Jamaica*, [2002] All E.R. (Comm.) 193 (P.C.).

- *Litigation Costs.* The Canadian law of unjust enrichment has become notoriously unpredictable. That lack of predictability, harmful in itself, creates further costs. Claims that otherwise might be settled are forced into court, thereby increasing litigation costs. So too, the hope of receiving more favourable opinions encourages appeals. Conversely, risk-averse litigants are dissuaded from vindicating their rights in court, fearful that the judge's discretion may cut against them.

- *Intellectual Isolation.* In treating the restitutionary claim as an "equitable" action, Canadian courts have distanced themselves from their brethren abroad, making it more difficult to borrow from other jurisdictions. At a time when English courts finally have recognized that the rules of restitutionary liability "can never be made to draw upon an unknowable justice in the sky," but must instead be "downward-looking to the cases,"[103] Canadian courts are retreating to an era when success depended upon attracting the Chancellor's sympathies.

- *Loss of Legitimacy.* Most significantly, by deciding cases based on "conscience," Canadian courts jeopardize their own legitimacy. Gone are the days when the Chancellor might plausibly draw upon shared values and beliefs. The Canadian judiciary, like the wider community that it serves, grows ever more diverse. And Canada's official policy of multiculturalism encourages each individual to maintain traditional values and perspectives.[104] In such circumstances, it is more important than ever to adhere to clearly defined and objectively justified rules. A party should never be expected to accept, as a reason for judgment, that a claim was allowed or disallowed as a matter of intuitive "fairness."[105] Nor should she be left to wonder if, beneath the inscrutable face of "conscience" and "equity," liability was determined by some characteristic or experience that she did not share with the judge. Every time that a case is resolved by means of a broad discretion, the courtroom looks less like a forum for the dispassionate resolution of disputes, and more like a political exercise in kinship. At stake is nothing less than the rule of law.

103. Birks, *An Introduction, supra,* footnote 45, at p. 19.
104. On the inherent subjectivity of judging, see *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193, [1997] 3 S.C.R. 484.
105. *Nowell v. Town Estate* (1997), 35 O.R. (3d) 415, 30 R.F.L. (4th) 107 (Ont. C.A.); *Moyes v. Ollerich Estate,* [2005] B.C.J. No. 2232 (QL), 362 W.A.C. 81 (C.A.).

4. The Nature of Equity

It has been argued that (1) neither unjust enrichment nor equity necessitates the exercise of a broad discretion, and (2) a discretionary model of unjust enrichment comes at a high cost. Going even further, it must be asked whether Canadian courts are even capable of sensibly proceeding on the basis of conscience. (That question obviously arises if judges continue to insist upon the myth of equitable origin and the need to "balance the equities." But it also calls for a response if, regardless of pedigree, restitutionary liability is thought to turn substantially upon an *ad hoc* assessment of the justice of the parties' respective positions.)

Despite its recent fascination with specific doctrines (especially fiduciary obligations and constructive trusts),[106] the Canadian legal community generally is not much interested in equity. This country certainly produces nothing to match the intellectual energy and rigour with which the subject is studied in England and Australia. Equity rarely is taught in our law schools, and even courses on trusts appear to be in decline. Relatively few scholars devote themselves to equitable doctrines; fewer still examine the jurisdiction as a whole. The most prominent exception is Professor Klinck of McGill University. Over the past 20 years, he has produced an exceptional series of papers dealing with various aspects of Canadian courts' attitudes toward equity.[107] In the present context, unfortunately, his findings and conclusions are not encouraging.

Klinck's research focuses on the manner in which judges have invoked and applied the concept of "equity" (as well as various cognates, such as "conscience," "fairness" and "justice"). As he explains, the Chancellor initially was concerned with the

106. Australians have been particularly harsh in their assessments of Canadian equity. The leading text justifies its general disregard of Canadian authorities by rhetorically asking, "[W]hy should Australian courts bring third rate foreign cases into account when they have plenty of second rate cases of their own to consider?": Meagher, Lehane and Leeming, *supra,* footnote 35, at pp. 217-18. And in *Breen v. Williams*, Dawson and Toohey JJ. suggested that the Canadian law of fiduciary obligations is "achieved by assertion rather than analysis and, whilst it may effectuate a preference for a particular result, it does not involve the development or elucidation of any accepted doctrine": (1996), 186 C.L.R. 71 at p. 95 (H.C.A.).

107. Among the papers relevant to the current discussion are Klinck, "*Nous sumus*", *supra,* footnote 59; D. Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001), 46 McGill L.J. 571; D. Klinck, "Imaging Equity in Early Modern England" (2005), 84 Can. Bar Rev. 217; D. Klinck, "The Nebulous Equitable Duty of Conscience" (2005), 31 Queen's L.J. 206; D. Klinck and L. Mirella, "Tracing the Imprint of the Chancellor's Foot" (1998), 13 Cdn. J. Law & Society 63; D. Klinck, "Lord Eldon on 'Equity'" (1999), 20 J. of Leg. Hist. 51.

respondent's "spiritual health", and proceedings in Chancery very much resembled the confessional in tone and purpose.[108] In determining the proper course of action, the Chancellor, as a "man of singular wysdom and good conscience,"[109] was directed by the laws of God, an objective standard of reasoned truth to which he enjoyed privileged access. Little need be said of that model. If it ever reflected actual practice, the day has long since passed. As early as the sixteenth century, the purportedly objective nature of the exercise was questioned. Obviously it would be untenable to maintain, as a matter of modern Canadian law, that cases ought to be decided by reference to the immutable truths of a Christian God.

The problem, of course, is that without recourse to the higher power, decisions rendered pursuant to equitable discretion risk the appearance of personal opinion. It might yet be possible to formulate a justification along the lines of, say, Ronald Dworkin's theory of Herculean adjudicating. That would be a monumental undertaking, requiring considerable sophistication and detailed exposition. Klinck's research reveals, however, that Canadian judges seldom betray any recognition, let alone resolution, of the problem. They continue to draw upon the ancient language of "equity," "almost completely failing to acknowledge the problematics of 'conscience,' and displaying virtually no historical consciousness."[110] The Supreme Court of Canada habitually resolves restitutionary claims (among others) on an "equitable" basis, but it has never explained what that standard entails, or how it is formulated. Aside from highlighting specific facts in particular cases, the court has provided little guidance as to when restitutionary liability will be imposed or withheld. Merely to say that "courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations,"[111] essentially is to give trial judges free rein. Indeed, while Klinck respectfully refrains from explicitly drawing any such conclusion,[112] his work strongly suggests that, in exercising an

108. Klinck, "The Unexamined 'Conscience'", *ibid.*, at p. 578.

109. J.A. Guy, ed., *Christopher St. German on Chancery and Statute* (London, Selden Society, 1985), p. 124.

110. Klinck, "The Unexamined 'Conscience'", *supra,* footnote 107, at p. 576.

111. *Garland, supra,* footnote 5, at p. 402.

112. He does say that the Supreme Court of Canada's "explicit attitude" towards equity is a "combination of clichés and confusion," that the "discourse of conscience is 'merely rhetorical,'" and that current difficulties reflect "the continuing attractiveness of including moral criteria in the law" despite the fact that judges today act "in an age of moral relativism": Klinck, "*Nous sumus*", *supra,* footnote 59, at p. 577 and Klinck, "The Unexamined 'Conscience'", *supra,* footnote 107, at p. 614.

equitable discretion, Canadian judges typically act on the basis of little more than intuition and opinion. Thoughtful and informed opinion, presumably, but mere opinion nevertheless.

The situation does not improve with the common Canadian practice of referring to "commercial conscience."[113] The addition of the business-oriented adjective may seem to add an air of hard-nosed respectability to an otherwise naked assertion of subjective fairness. But in truth, while the phrase may exclude notions of purely private morality, it still leaves the judge with a broad discretion to proceed on the basis of unreasoned intuition. As Professor Birks argued, conscience can never be an acceptable ground for judgment because, depending upon the judge, it is broad enough to "embrac[e] every position in the controversy."[114] In that respect, experience elsewhere in the Commonwealth has been discouraging.[115]

V. GAP-FILLING

While agreeing that unjust enrichment is not equitable in the sense that it either (1) originated in Chancery, or (2) necessarily entails a broad discretion, several commentators insist that unjust enrichment, while not equitable *per se*, is *like* equity insofar as it serves a gap-filling role. The proposition certainly is true of equity, which was never intended to be a self-sufficient system of rules.[116] By

113. The proposition that the reversibility of a transfer ought to be a function of "commercial conscience" primarily stems from the British Columbia Court of Appeal's decision in *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, 45 B.C.L.R. (2d) 99 (B.C.C.A.). Some courts subsequently have invoked the concept of "commercial conscience" while actually deciding liability by other means: *Bancorp Mortgage Ltd. v. Sicon Group Inc.*, [1990] B.C.J. No. 1477 (QL), 2 B.L.R. (2d) 161 (S.C.) (free acceptance); *L.O.M. Western Securities Ltd. v. Whitehorn Industries Inc.*, [1991] B.C.J. No. 2034 (QL), 28 A.C.W.S. (3d) 656 (S.C.) (free acceptance); *Minardi Team S.p.A. v. Clearly Canadian Beverage Corp.*, [2001] B.C.J. No. 81 (QL), 102 A.C.W.S. (3d) 317 (S.C.) (special relationship); see also *Beller Carreau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd.* (1999), 232 A.R. 250, 195 W.A.C. 250 (C.A.), supp. reasons 209 W.A.C. 349. Far more worrisome, however, some courts have interpreted the concept of "good conscience" as a licence to resolve restitutionary claims on the basis of *ad hoc* assessments of fairness: *Toronto-Dominion, supra*, footnote 80; *Porta-Flex Products (P.E.I.) Ltd. v. Bank of Montreal* (1993), 108 Nfld. & P.E.I.R. 221 (P.E.I. S.C. T.D.).

114. P. Birks, "Receipt" in P. Birks and A. Pretto, eds., *Breach of Trust* (Oxford, Hart, 2002), p. 213 at p. 226.

115. P. Birks, "Equity, Conscience, and Unjust Enrichment" (1999), 23 Melbourne U. L. Rev. 1 at pp. 20-22.

116. Maitland, *supra*, footnote 37, at p. 19:

> We ought not to think of common law and equity as of two rival systems.

nature and design, it merely supplements and softens where the law is intolerably harsh or insensitive.[117] So too, the argument runs, "the function of the principle of unjust enrichment is to modify and ameliorate other parts of the private law . . . and to undo transfers of wealth that would [otherwise] remain valid and efficacious."[118]

The specific arguments in favour of characterizing unjust enrichment as subsidiary and supplemental vary from one commentator to the next.[119] Professor Grantham's position is illustrative.[120] As he sees it, the principle is triggered only if (1) there is a transfer of wealth sufficient to shift not only possession, but also rights, (2) that transfer is an expression of objective consent, but (3) the transaction actually is produced by a defect in the transferor's subjective intention. Because they are designed largely to promote certainty and efficiency, contract and property law operate on the basis of objective intention. If there is no outward appearance of consent, then wealth cannot be transferred, and hence there is no possible call for restitution. Conversely, if a conveyance of wealth

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> Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying 'Equity is hereby abolished,' we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been enforced. On the other hand had the legislature said, 'Common law is hereby abolished,' this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of the common law.

117. For instance, prior to the creation of a trust, the affected property generally is subject to legal, but not equitable, rights. True to history, an equitable interest comes into existence only once property administratively is held by one person on behalf of another, so as to create a vulnerability that draws the Chancellor's attention: *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, [1996] A.C. 669 at p. 705 (H.L.). Likewise, specific performance for a contract of sale is available only if monetary damages are inadequate: *Semelhago v. Paramadevan* (1996), 136 D.L.R. (4th) 1, [1996] 2 S.C.R. 415.

118. R.B. Grantham, "The Equitable Basis of the Law of Restitution" in S. Degeling and J. Edelman, eds., *Equity in Commercial Law* (Sydney, Lawbook Co., 2005), p. 349 at p. 365.

119. See, for example, *Roxborough, supra,* footnote 21, at p. 545 *per* Gummow J. (H.C.A.); C.E.F. Rickett and R.B. Grantham, "On the Subsidiarity of Unjust Enrichment" (2001), 117 L.Q.R. 273; R.B. Grantham and C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford, Hart, 2000), c. 2; D. Laycock, "The Scope and Significance of Restitution" (1989), 67 Texas L. Rev. 1277; *cf.* L. Smith, "Property, Subsidiarity and Unjust Enrichment" in D. Johnston and R. Zimmermann, eds., *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002), p. 588.

120. See especially Grantham, "The Equitable Basis", *supra,* footnote 118, at pp. 365-71.

does satisfy the objective criterion, but is not truly a function of free choice (*e.g.* because it was induced by mistake or illegitimate pressure), then there are grounds for intervention. Unless private law is to countenance that sort of injustice, it needs supplementary rules. Unjust enrichment therefore picks up where the other substantive doctrines leave off. It secures appropriate results by reaching beyond the rules of contract and property.

A detailed consideration of that analysis falls far beyond the scope of this paper. For present purposes, three comments will suffice:

- *Off Target.* From a Canadian perspective, the argument is, in a sense, off-target. When Canadian judges characterize the action in unjust enrichment as "equitable," they are not suggesting that it fills a supplementary role. The quotations appearing throughout this article make that abundantly clear. That does not necessarily mean, however, that unjust enrichment is not analogous to equity in being subsidiary.

- *Premises.* Grantham may eventually prove right. In the meantime, however, the premises upon which he proceeds are open to debate. They may, for instance, be drawn too narrowly. While enrichment certainly will occur if title is passed, mere possession of property may also satisfy the need for a benefit.[121] (Regardless of the owner's subsisting title, a car thief certainly is enriched by the use of the vehicle.) Likewise, while an impaired subjective intention undoubtedly may trigger relief, restitution may also be appropriate even if a transfer is not supported by the appearance of objective intention.[122] (In terms of impaired intention, ignorance is *a fortiori* a mistake, such that a thief is unjustly enriched by the possession of a car that he stole from an unsuspecting victim.)

- *Primacy of Autonomy.* To a large extent, the claim that unjust enrichment is subsidiary stems from the fact that restitution is not available with respect to an enrichment that arose pursuant

121. W. Swadling, "A Claim in Restitution?", [1998] L.M.C.L.Q. 63; R.B. Grantham and C.E.F. Rickett, "Restitution, Property and Ignorance — A Reply to Mr. Swadling", [1998] L.M.C.L.Q. 463 (accepting that the defendant is enriched but arguing that the claim in unjust enrichment is subverted to a claim in property); McInnes, "Enrichments and Reasons", *supra,* footnote 100, at pp. 444-45; M. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] Restitution L. Rev. 118 at pp. 123-127.

122. P. Birks, "Property and Unjust Enrichment: Categorical Truths", [1997] N.Z.L. R. 623; R.B. Grantham and C.E.F. Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?", [1997] N.Z.L.R. 668-685.

to an enforceable contract.[123] However, the same observation could be made with respect to torts. An effective exclusion clause may preclude or limit the availability of compensatory damages for tortiously inflicted injuries.[124] However, it has not been suggested that tort is confined to a supplementary role. Subject to the overriding importance attached to personal autonomy, tort law occupies substantially the whole territory suggested by its underlying principles. So too, perhaps, with unjust enrichment.

VI. CONCLUSION

To outside observers, the Canadian law of unjust enrichment is an often puzzling enterprise. For many years, they were misled by repeated references to the "absence of juristic reason." It seemed that this country had turned its back on the common law and adopted an essentially civilian model of restitutionary liability. Whatever its merits otherwise,[125] *Garland v. Consumers' Gas Co.* at least put that issue to rest. The new Canadian principle is *sui generis*, but certainly closer to the civilian model than to its common law counterpart. At the same time, however, *Garland* further entrenched the distinctly Canadian practice of referring to unjust enrichment as an "equitable" action. It is very difficult to understand why the courts persist in a characterization that is inaccurate, unnecessary and imprudent. There may be little harm in analogizing between unjust enrichment and equity by suggesting that both serve a supplementary function. It is, however, simply wrong to suggest that the roots of liability lie primarily in the Court of Chancery. And given that consistently appropriate results can be achieved through clearly stated rules, there is no justification for resolving restitutionary claims by means of a broad discretion. That approach inevitably leads to a host of problems, not least of which is a loss of legitimacy.

In trying to come to terms with the Canadian law of unjust enrichment, Jay McLeod and I once agreed that the key may lie in *Chinatown*, Roman Polanski's *film noir* masterpiece. The picture ends with the lead character, Jake Gittes (Jack Nicholson), a hard-nosed

123. J. Beatson, "Restitution and Contract: Non-Cumul?", [2000] 1 Theoretical Inquiries in L. 83 at p. 94; P. Birks, "Failure of Consideration and Its Place on the Map" (2002), 2 Oxford U. Commonwealth L.J. 1 at p. 5; *cf. Roxborough, supra*, footnote 21; *Orphanos v. Queen Mary College*, [1985] A.C. 761 (H.L.).

124. *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1993), 99 D.L.R. (4th) 577, [1993] 1 S.C.R. 12.

125. *Ibid.*, at note 4.

private detective, standing in the middle of a street, beaten and bewildered, trying to make sense of the devastation around him. The case was not supposed to end that way. Jake had done his time and he knew the angles. He thought he had everything worked out. Instead, the villain in the piece (John Huston) is driving away, unrepentant and unpunished. The final line goes to Gittes' associate, who consoles him by saying, "Forget it, Jake. It's Chinatown." That line works on a number of levels, but it most obviously refers to the sense of being wrong-footed, of being caught off-guard in an impenetrable situation where the usual rules do not apply. It is difficult to read the Canadian law of unjust enrichment and not feel that way occasionally. For anyone who has carefully traced restitution's historical development or meticulously formulated a coherent set of rules, the subject is apt to prove unsettling: It's Chinatown.