GAIN-BASED RELIEF FOR BREACH OF CONTRACT: *ATTORNEY GENERAL V. BLAKE*

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I. INTRODUCTION

Orthodox analysis holds that, subject to orders for specific enforcement,[1] the remedy for breach of contract is compensation for loss. To quote a classical statement, "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed".[2] As a corollary, orthodox analysis also holds that the plaintiff in a contractual action is not entitled to claim gain-based relief as an alternative to loss-based relief. "The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff."[3] In *Attorney General v. Blake*,[4] however, the House of Lords recently accepted that contractual relief exceptionally may be calculated with reference either to what the plaintiff lost or what the defendant gained.

Although that issue has so far received relatively little attention in Canada, the House of Lords' decision will undoubtedly also encourage Canadian claimants to ask for disgorgement. Such relief will prove tempting any time a breach generates a gain for the defendant that is larger than the loss (if any) suffered by the plaintiff. The twofold purpose of this brief article is to introduce

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1. An order for specific performance technically responds not to a breach of contract, but rather to the contract itself: P.V. Baker and P. St. J. Langan, *Snell's Equity*, 29th ed. (London, Sweet & Maxwell, 1990), p. 585. In practice, however, a plaintiff will seek an order for specific enforcement only if the defendant has committed a breach or has threatened to do so.
2. *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C.) at p. 307. See also *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 at p. 645, 89 D.L.R. (3d) 1 at p. 8; *Robinson v. Harman* (1848), 1 Ex. 850 at p. 855, 154 E.R. 363 at p. 365.
3. *Tito v. Waddell*, [1977] Ch. 106 at p. 332.
4. [2000] 3 W.L.R. 625.

Attorney General v. Blake to a Canadian audience and to outline a few of the fundamental issues courts in this country ought to address before deciding whether or not to follow the House of Lords' lead. As a preface, however, it is necessary to delineate the relevant cause of action and measure of relief.

II. CAUSES OF ACTION AND MEASURE OF RELIEF

The rational development of the law in this area has been inhibited by poor terminology. Specifically, difficulties arise from ambiguous use of the terms "unjust enrichment" and "restitution".

Properly defined, the cause of action in unjust enrichment requires proof of three elements: (i) an enrichment to the defendant, (ii) a corresponding deprivation to the plaintiff, and (iii) an absence of juristic reason for the enrichment.[5] The action is independent or autonomous in the sense that it is not parasitic upon another cause of action, such as a tort or breach of contract. Consequently, for example, the recipient of a mistaken payment *prima facie* is liable regardless of the fact that he neither committed a civil wrong nor promised repayment.[6] If the plaintiff succeeds in her claim, she is invariably entitled to restitution.[7] Having received an unjust enrichment from the plaintiff, the defendant must give (the value of) it back to her. Significantly, because of the nature of the underlying action, restitution is limited to the highest amount common to both the defendant's ultimate enrichment and the plaintiff's ultimate deprivation.[8] The defendant cannot be held liable for more than he

5. *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 at pp. 273-74 (hereafter cited to D.L.R.).
6. *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, 148 D.L.R. (4th) 193. Although liability under the cause of action in unjust enrichment generally is strict, certain species of the claim are fault-based and in that sense entail some conception of wrongdoing: see *e.g. Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 385; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411 ("knowing receipt").
7. Depending upon the circumstances, restitutionary relief may be awarded in either personal or proprietary form: R. Chambers, "Constructive Trusts in Canada" (1999), 37 Alta. L. Rev. 173 and "Resulting Trusts in Canada" (2000), 38 Alta. L. Rev. 378.
8. The relief awarded pursuant to a cohabitational property dispute consequently is controversial insofar as it often is measured by reference to the claimant's reasonable expectations, rather than to her loss and the defendant's gain: *Pettkus v. Becker, supra*, footnote 5; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1; M. McInnes, "Reflections on the Canadian Law of Unjust Enrichment: Lessons From Abroad" (1999), 78 Can. Bar Rev. 416 at p. 430.

actually gained[9] and the plaintiff cannot recover more than she actually lost.[10]

In the context of the present discussion, however, the claim described in the preceding paragraph is irrelevant. Granted, the issue of liability for benefits acquired through a breach of contract is frequently discussed in terms of "restitution" for "unjust enrichment by wrongdoing". That terminology nevertheless is misleading. The operative cause of action is not unjust enrichment, but rather breach of contract. The plaintiff does not allege that the defendant received an enrichment that was subtracted from her in the absence of any juristic reason. Rather, she simply proves, under an action for breach of contract, that he failed to fulfil an enforceable undertaking that he owed to her.[11] The concept of "unjust enrichment by wrongdoing" therefore contributes nothing to the formulation of the substantive claim.[12]

The situation is much the same at the remedial stage of analysis. True, the phrase "unjust enrichment by wrongdoing" may signal that the plaintiff exceptionally seeks, as a remedy for breach of contract, relief measured by reference to the defendant's gain rather than her own loss. The phrase "unjust enrichment" nevertheless is dangerous insofar as it suggests that the attendant relief is

9. *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*, [1976] 2 S.C.R. 147, 55 D.L.R. (3d) 1. The change of position defence limits liability insofar as it reveals that, contrary to initial appearances, the defendant was not truly enriched: P. Birks, "Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences" in M. McInnes, ed., *Restitution: Developments in Unjust Enrichment* (North Ryde, N.S.W., LBC Information Services, 1996), c. 3.

10. *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161. The passing on defence limits liability insofar as it reveals that, contrary to initial appearances, the plaintiff did not truly suffer a deprivation: M. McInnes, "Passing On in the Law of Restitution: A Reconsideration" (1997), 19 Sydney L. Rev. 179.

11. Although there are few cases directly on point, it is clear from other contexts that the operative action in a claim for "unjust enrichment by wrongdoing" is something other than the autonomous action in unjust enrichment: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (breach of fiduciary duty); *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (breach of fiduciary duty); *cf. Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (breach of confidence).

12. Confusingly, a claim for restitutionary relief under the cause of action in unjust enrichment commonly arises in a contractual context. Significantly, however, the operative claim in such circumstances is *not* breach of contract. Indeed, the action in unjust enrichment is available only if it can be shown that the parties' relationship no longer is (or never truly was) governed by contract. For instance, in the leading case of *Deglman v. Guaranty Trust Co. of Canada*, the plaintiff was awarded restitutionary relief with respect to services rendered pursuant to an unenforceable agreement: [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

"restitution". That term means "to give *back*" and therefore is uniquely suited to a claim under the action in unjust enrichment, which requires proof that the defendant's benefit was subtracted from the plaintiff. Significantly, however, the cause of action in breach of contract might be used to compel the defendant to divest himself of an ill-gotten gain, regardless of its material source. And because the plaintiff consequently would be entitled to demand payment of a benefit that the defendant acquired from a third party, rather than from the plaintiff, the operative remedy does not invariably entail a giving *back*. It therefore should be labelled "disgorgement", which more broadly means "to give *up*".

This last point warrants further discussion. It is occasionally suggested that gain-based relief awarded under the rubric of "unjust enrichment by wrongdoing" ought to be termed "restitution" because, in practice, it frequently compels the defendant to return to the plaintiff the (value of) a benefit that he received from her.[13] And true enough, gain-based relief does have that effect whenever the defendant's ill-gotten benefit fortuitously came from the plaintiff as opposed to a third party. Nevertheless, it is important to classify legal responses by reference to their purposes, rather than their effects.[14] If a remedy is intended to provide reparation for the plaintiff's loss, regardless of any gain to the defendant, it invariably should be labelled "compensation"; if it is intended to reverse an enrichment that the defendant received from the plaintiff, it invariably should be labelled "restitution"; if it is intended to divest the defendant of a benefit, regardless of its material source, it invariably should be labelled "disgorgement"; and so on.[15]

To do otherwise invites confusion on a number of fronts. First, it renders the task of determining the type of relief awarded in a

13. P. Birks, "Misnomer" in W. Cornish *et al.*, eds., *Restitution: Past, Present & Future: Essays in Honour of Gareth Jones* (Oxford, Hart Publishing, 1998), p. 1.
14. M. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis", [1999] Restitution L. Rev. 118; M. McInnes, "Disgorgement for Wrongdoing: An Experiment in Alignment", [2000] Restitution L. Rev. 516.
15. The same analysis extends to nominal damages, which are intended to signify the violation of a right, regardless of any gain or loss to the parties, and to punitive damages, which are intended to punish the defendant for outrageous conduct. Significantly, while punitive damages sometimes are defended on the ground that they may be used to compel a wrongdoer to divest himself of an ill-gotten gain, the courts have recognized that disgorgement merely is an effect, rather than the purpose, of such relief. As the House of Lords explained in *Broome v. Cassell & Co.*, exemplary damages must be quantified in excess of the defendant's enrichment if he truly is to be punished: [1972] A.C. 1027 (H.L.) at p. 1130.

particular case unnecessarily difficult. Second, it encourages the misalignment of actions and remedies by improperly suggesting that a particular cause of action is required to achieve a specific result. For instance, references to "restitution" in situations dealing with disgorgement for wrongdoing foster the false assumption that the plaintiff must prove not only the constituent elements of a wrong, but also the constituent elements of the cause of action in unjust enrichment.[16] And third, the practice of referring to responses on the basis of effects encourages the misalignment of actions and remedies by improperly suggesting that a particular cause of action is capable of serving a specific purpose. For instance, while restitutionary relief invariably provides reparation for loss to the extent that it (partially) responds to the plaintiff's deprivation, it is dangerous to refer to it in compensatory terms. Such a practice incorrectly suggests that the cause of action in unjust enrichment is capable of supporting loss-based relief in the absence of any gain to the defendant.[17]

For the reasons outlined in the preceding paragraph, it is important to emphasize that while disgorgement fortuitously may consist of a giving *back*, it need never do so. The gist of such relief more broadly is that the defendant must give *up* to the plaintiff a benefit, regardless of its material source. It therefore should be classified as "disgorgement" and not as "restitution".

III. DISGORGEMENT IN A CONTRACTUAL CONTEXT

It is exceedingly difficult to find a case in which disgorgement has been awarded pursuant to the cause of action in breach of

16. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 11, the plaintiff sought to compel the defendant to disgorge a benefit acquired through breach of confidence. La Forest J. agreed that such relief was available, but because he characterized it as "restitutionary", he assumed that the plaintiff accordingly was required to satisfy the three-part cause of action in unjust enrichment, as well as the cause of action in breach of confidence: *supra*, footnote 11. In fact, while true restitution invariably presumes proof of the action in unjust enrichment, disgorgement invariably responds to some other type of claim.

17. Anglo-Canadian courts already have courted that danger by using "restitution" and "compensation" synonymously: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at p. 440, 117 D.L.R. (4th) 161 at p. 199; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at p. 556, 85 D.L.R. (4th) 129 at p. 163; *Nowell v. Town Estate* (1997), 35 O.R. (3d) 415 at p. 416 (Ont. C.A.); *Peter v. Beblow*, [1993] 1 S.C.R. 980 at pp. 995, 1014, 101 D.L.R. (4th) 621 at pp. 633, 649; *Swindle v. Harrison*, [1997] 4 All E.R. 705 (C.A.) at pp. 713-14, 733; *Target Holdings Ltd. v. Redferns*, [1996] 1 A.C. 421 (H.L.) at pp. 438-39; McInnes, "Reflections on the Canadian Law of Unjust Enrichment", *supra*, footnote 8, at pp. 423-24.

contract.[18] Unfortunately, that proposition is obscured by the fact that Anglo-Canadian courts occasionally impose relief in contractual contexts that cause wrongfully acquired benefits to be given up. In such circumstances, however, the operative cause of action usually is something other than breach of contract, and the purpose of the applicable remedy often is something other than disgorgement. Three illustrations will suffice.

The leading example is provided by *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*[19] The defendant constructed 14 houses on a parcel of land in violation of a restrictive covenant to which it was a successor in title. The plaintiffs unsuccessfully applied for a mandatory injunction requiring the defendant to remove the buildings. Brightman J. refused that order on the basis that it would be "an unpardonable waste of much needed houses to direct that they now be pulled down".[20] Nevertheless, he further held that in lieu of injunctive relief, the plaintiffs were entitled to five per cent of the £50,000 profit that the defendant earned from its breach. That award is commonly interpreted as disgorgement for breach of contract. Indeed, in *Attorney General v. Blake*,[21] Lord Nicholls referred to it as "a solitary beacon" showing that contractual relief may be measured by the defendant's gain. On that view, £2,500 represented an amount that was acquired by means of the broken promise.

There are, however, grounds for doubt. First, the plaintiffs' action technically arose not in breach of contract, but rather on the basis of the restrictive covenant as a right *in rem*. Consequently, although the defendant's primary obligation arose from a contract, the case does not directly provide support for the type of claim with which this article is concerned.[22] Second, while the remedy that the plaintiffs received incidentally compelled the defendant to disgorge part of its ill-gotten gain, it actually was awarded for a different purpose. Brightman J. expressly applied the "general rule"

18. In exceptional circumstances, other jurisdictions have allowed disgorgement for breach of contract: see *e.g. Adras Ltd. v. Harlow & Jones GmbH* (1988), 42 (i) P.D. 221 (Israeli S.C.), [1995] Restitution L. Rev. 235 (translation); *Hickey & Co. Ltd. v. Roche Stores (Dublin) Ltd. (No. 1)* (1975), No. 1007P (Irish H.C.), [1993] Restitution L. Rev. 196.
19. [1974] 1 W.L.R. 798 (Ch. D.).
20. *Ibid.*, at p. 811.
21. *Supra*, footnote 4, at p. 637.
22. P. Birks, *An Introduction to the Law of Restitution*, revised ed. (Oxford, Clarendon Press, 1989), p. 335; *cf.* R. Nolan, "Remedies for Breach of Contract: Specific Performance and Restitution" in F. Rose, ed., *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Oxford, Hart Publishing, 1997), p. 34 at p. 44.

that "measur[ed] damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken".[23] The award therefore was calculated to reflect the price that the plaintiffs reasonably could have charged in exchange for relaxing the covenant. They were awarded compensation of £2,500 as a "substitute" for their lost opportunity to bargain.[24] It is, of course, possible to argue that compensation should not be calculated in that manner or that it would have been preferable if the judge had disregarded the plaintiffs' loss and focused exclusively on the defendant's gain.[25] Disagreement does not, however, provide a warrant for re-interpretation. *Wrotham Park* simply did not involve disgorgement for breach of contract.[26]

A more recent example is found in the British Columbia Court of Appeal's decision in *Jostens Canada Ltd. v. Gibsons Studio Ltd.*[27] The parties entered into an agency agreement under which the defendant arranged bookings and took school photographs on behalf

23. *Supra*, footnote 19, at p. 815. Brightman J. admittedly referred to several decisions that often are said to represent disgorgement for wrongdoing: *Whitwham v. Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538; *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, [1952] 2 Q.B. 246 (C.A.); *Penarth Dock Engineering Co. Ltd. v. Pounds*, [1963] 1 Lloyd's Rep. 359 (Q.B.). The first and second of those cases, however, arguably involved compensatory relief. And in any event, having discussed the three cases, Brightman J. noted that they were "a long way from the facts [before him]" (at p. 814).
24. *Ibid.* at p. 815. It is irrelevant that the plaintiffs actually never would have agreed, at any price, to relax the restrictive covenant, just as it is irrelevant that the former owner of expropriated property actually never would have agreed, at any price, to sell her ancestral home to the state. In either event, having permitted the taking, the court must attempt to accurately assess the value of the claimant's loss: *Jaggard v. Sawyer*, [1995] 1 W.L.R. 269, Millet L.J. (C.A.); R.J. Sharpe and S.A. Waddams, "Damages for Lost Opportunity to Bargain" (1982), 2 Ox. J.L. Stud. 290 at p. 292. Admittedly, however, there is a substantial danger in such circumstances that the plaintiff ultimately will be undercompensated if she indeed would not have bargained away her rights at any price. That surely would have been true on the facts of *Attorney General v. Blake*, *supra*, footnote 4, if the House of Lords had followed a compensatory approach.
25. In that respect, it is instructive to consider *Arbutus Park Estates Ltd. v. Fuller* (1976), 74 D.L.R. (3d) 257, [1977] 1 W.W.R. 729 (B.C.S.C.). The defendants, successors in title to a restrictive covenant, knowingly completed construction of a garage in violation of a building scheme. The trial judge refused to order its demolition by way of a mandatory injunction. However, although the plaintiff had not requested damages in lieu, Toy J. stated in *dicta* that he would have been willing to compel the defendants to disgorge the amount of the fee that they saved by not retaining an architect as required by the covenant. Significantly, the judge stressed that compensation for loss would not have been the purpose of such relief. See also *Trawick v. Mastromonaco* (1983), 24 Alta. L.R. (2d) 389 (Q.B.).
26. *Attorney General v. Blake*, *supra*, footnote 4, at p. 652, Lord Hobhouse (dissenting).
27. (1999), 174 D.L.R. (4th) 351, 69 B.C.L.R. (3d) 83. I thank Mysty Clapton for drawing this decision to my attention.

of the plaintiff. That contract contained a clause that required the agent to "devote its full time and best efforts . . . to the promotion of the [principal's] business". In violation of that obligation, the defendant usurped the plaintiff's market and booked business for itself. In doing so, it breached not only its contract, but also a fiduciary duty arising from that agreement. When assessing relief, Lambert J.A. focused on the latter and held that the plaintiff was entitled to receive, as an "equitable remedy for the equitable wrong",[28] the benefit that the defendant acquired through its actions. In doing so, he emphasized that he was concerned not with the principal's loss but rather with the agent's gain.[29] Consequently, while gain-based relief undoubtedly was imposed in a contractual context, it actually attended upon the breach of a fiduciary duty, for which disgorgement uncontroversially is available.[30]

The final illustration involves a similar analysis. A contract of sale that is amenable to specific performance raises a constructive trust that immediately confers upon the purchaser a beneficial interest in the property pending execution of the transaction. Thus, in *Lake v. Bayliss*,[31] the defendant held a parcel of land on trust for the plaintiff once she agreed to sell it to him. When she subsequently transferred that property to a *bona fide* purchaser for value, she frustrated the plaintiff's ability to compel specific performance of their agreement. The court nevertheless held that she was required to disgorge the profit that she wrongfully earned through the second

28. *Ibid.*, at p. 360.
29. *Ibid.* Unfortunately, Lambert J.A. repeatedly referred to such relief as "compensation", which misleadingly suggests a focus on loss, rather than gain. It was not the first time that a Canadian judge used terminology appropriate to one measure of relief when awarding another: *supra*, footnote 17. Even more troubling is the fact that Justice Lambert stated that he did not disagree with anything in Justice Huddart's concurring opinion. However, while arriving at the same quantum of relief, Huddart J.A. held that the purpose of the appropriate remedy was compensatory because it was aimed at restoring to the claimant the loss that it suffered as a result of the defendant's breach. On that view, it was mere coincidence that the defendant had gained the same amount that the plaintiff had lost.
30. *Canadian Aero Service Ltd. v. O'Malley*, *supra*, footnote 11; *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.). In *Snepp v. United States*, the United States Supreme Court imposed a constructive trust as a means of compelling a CIA agent to disgorge profits that he earned by publishing a book in violation of a term of his employment contract. Once again, that relief was awarded on the basis of an action for breach of fiduciary duty, rather than on the basis of a breach of contract: 444 U.S. 507 (1980).
31. [1974] 1 W.L.R. 1073 (Ch. D.). See also *Webb v. Dipenta*, [1925] S.C.R. 565, [1925] 1 D.L.R. 216 (relief measured to achieve specific performance *cy-près*); *Reid-Newfoundland Co. v. Anglo-American Telegraph Co. Ltd.*, [1912] A.C. 555 (P.C.) (account of profits for breach of trust established pursuant to a contract).

sale. Significantly, while somewhat equivocal, Walton J. appeared to analyze the triggering event not as breach of contract, but rather as breach of the fiduciary duty that arose by virtue of the constructive trust that created under the parties' agreement.[32]

IV. *ATTORNEY GENERAL V. BLAKE*

Against that backdrop, *Attorney General v. Blake*[33] emerges as a truly remarkable development: the House of Lords undeniably awarded disgorgement as a response to the cause of action in breach of contract.

As befits the occasion, the facts of *Blake* are extraordinary. In 1944 George Blake joined the British secret service. While on a posting to North Korea, he was captured and held prisoner for three years. During that time, he became convinced that communism offered the best prospect for humanity and consequently agreed to work as a double agent for the KGB beginning in 1951. His treasonous activities eventually were discovered and he was sentenced in 1961 to a term of 42 years at Wormwood Scrubs in London. Five years later, however, he escaped and fled, first to Berlin and then to Moscow. While still in exile, he entered into a contract in 1989 for the release in England of his memoirs, *No Other Choice*.[34] The Crown had advance notice of that publication, but chose not to seek a prohibitory injunction on the ground that, although the book was based on information that Blake had acquired by virtue of his position with the Secret Intelligence Service, it contained nothing that was still confidential or that threatened national security. The Crown's attitude changed following publication, however, when it discovered that the author was to be paid advances amounting to £150,000. Accordingly, it commenced proceedings in 1991 in an attempt to prevent Blake, who already had received £60,000, from benefiting further.

Given the circumstances, and in particular Blake's notoriety, it would have been surprising if he had been permitted to profit from his wrong. It was, however, difficult to find an appropriate cause

32. To the extent that the availability of disgorgement is a function of the constructive trust that arises under a specifically performable contract of sale, the Supreme Court of Canada's decision in *Semelhago v. Paramadevan* to restrict the availability of specific performance may entail an unexpected consequence: [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 (hereafter cited to D.L.R.).
33. *Supra*, footnote 4.
34. G. Blake, *No Other Choice* (London, Jonathan Cape, 1990).

of action upon which to base relief.[35] Since the information in question no longer was secret, the Crown could not claim for breach of confidence.[36] Furthermore, as the Crown conceded in the House of Lords, after unsuccessfully arguing the point at trial[37] and before the Court of Appeal,[38] the publication of *No Other Choice* did not constitute a breach of fiduciary duty. Although such an obligation was imposed upon Blake when he joined the secret service, it was an incident of his employment and consequently ceased to exist when he was dismissed from his post. The Crown's claim therefore ultimately turned entirely on breach of contract. In 1944, as a condition to being employed with the SIS, Blake signed an agreement that contained the following provision:

> I undertake not to divulge any official information gained by me as a result of my employment, either in the press or in book form. I also understand that these provisions apply not only during the period of service but also after employment has ceased.[39]

In submitting his memoirs for publication, Blake undoubtedly breached that undertaking.

Somewhat curiously, the Crown did not pursue a contractual claim in the lower courts. Nevertheless, in the Court of Appeal Lord Woolf M.R. indicated in *dicta* that if it had done so it would have been entitled to an order compelling disgorgement of the profits made from the book. He accepted that damages normally are measured by reference to the plaintiff's loss and observed that, in the circumstances, the Crown had not suffered as a result of the breach. However, he also believed that the law of contract would

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35. The Court of Appeal held, as a matter of public law, that the Attorney General was entitled to invoke private law rules as a means of vindicating the criminal law. In that respect, it observed that if Blake returned to England, he could be prosecuted under the *Official Secrets Act 1989* (or its predecessor), which prohibits a former member of the SIS from disclosing official information, regardless of any issue of confidentiality. It further observed that if convicted, Blake could be subject to a statutory confiscation order. The Court of Appeal accordingly imposed an interlocutory "freezing order" with a view to preserving the property pending further proceedings. The House of Lords overturned that decision. Because there was no realistic prospect that Blake would ever return to England to face criminal charges, the preservation order amounted to confiscation in practice, if not in name. There was, however, no statutory authority for such an order and, moreover, the courts do not possess an inherent jurisdiction to confiscate the proceeds of crime: *Malone v. Metropolitan Police Commissioner*, [1980] Q.B. 49 (C.A.).
36. *Attorney General v. Guardian Newspapers (No. 2)*, [1990] A.C. 109 (H.L.).
37. [1997] Ch. 84.
38. [1998] Ch. 439.
39. Quoted in *Attorney General v. Blake*, *supra*, footnote 4, at p. 631.

be "seriously defective" if gain-based relief could not be awarded in exceptional circumstances. "The difficult question", he believed, "was not whether [disgorgement] should ever be available for breach of contract, but in what circumstances [it] should be available".[40] He tentatively offered five criteria: three negative and two positive. Gain-based relief should not be awarded merely because the defendant's breach: (i) was deliberate and cynical, (ii) enabled him to enter into a more profitable contract with a third party, or (iii) precluded him from fulfilling his undertaking to the plaintiff. In contrast, disgorgement should be available if the defendant either: (i) "skimped performance" by failing to provide the full extent of services for which the plaintiff had paid,[41] or (ii) wrongfully obtained a benefit by doing the very thing that he had promised that he would not do. According to Lord Woolf, the facts of *Blake* fell within the scope of that last criterion. The defendant "promised not to disclose official information and he did so for profit".[42] The plaintiff therefore could have demanded disgorgement of the ill-gotten gains.

On further appeal, the Crown revised its approach and successfully argued the case on the basis of breach of contract. The House of Lords agreed with the Court of Appeal that gain-based relief[43] was available, but it did so on substantially different grounds. Lord

40. *Supra*, footnote 38, at p. 457.
41. *City of New Orleans v. Fireman's Charitable Association* was offered by way of illustration: 9 So. 486 (1891, La. S.C.). The parties entered into a contract for the provision of firefighting services during a limited term. The plaintiff paid a set price and the defendant promised to provide men, horses and equipment in certain quantities. After the term expired, the plaintiff discovered that the defendant had not provided resources as agreed. Despite that breach of contract, however, the court held that substantive relief was not available. The plaintiff was unable to prove a loss, presumably because the defendant's skimped performance fortuitously had not prevented it from effectively fighting fires. Moreover, the court rejected the submission that the defendant should be compelled to hand over the amount of money that it saved by skimping on performance.
42. *Supra*, footnote 38, at p. 458.
43. As a matter of terminology, Lord Nicholls chose to "avoid the unhappy expression 'restitutionary damages' " and settled instead on "account of profits": *supra*, footnote 4, at p. 638. He undoubtedly selected the lesser of two evils, but it would have been best, for reasons discussed in Section II of this article, if he had followed Lord Steyn's practice of speaking directly of "disgorgement". While an account of profits is associated with a species of disgorgement, there is no obvious benefit to employing language historically linked to gain-based remedies for equitable wrongs (*e.g.* copyright infringement and breach of confidence).

Nicholls, writing for the majority, endorsed the three negative criteria proposed by Lord Woolf, but rejected the suggestion that disgorgement could be justified on the basis of either: (i) skimped performance, or (ii) the profitable commission of a contractually prohibited act. The former situation, he believed, properly was remedied through an expanded notion of compensation for loss,[44] rather than through disgorgement of gain. Under an action for breach of contract, a vendor of goods must provide a partial refund to the extent that he provides insufficient or inferior goods, even if the materials supplied served their intended purpose. A similar principle should apply if incomplete or shoddy services are rendered.[45] That is an attractive proposition. As noted elsewhere, the gist of the plaintiff's complaint in such circumstances is that she did not receive that for which she paid. The fact that the defendant coincidentally saved himself an expense may exacerbate her sense of injustice, but conceptually it is superfluous to her claim. An action equally should lie even if the party in breach did not realize a benefit from his wrongdoing.[46] Lord Nicholls also denied that gain-based relief could turn on the mere fact that a contractual party earned a profit by doing the very thing that he promised not to do. That proposal simply is too wide; it "is apt to embrace all negative obligations".[47]

Although Lord Nicholls may have convincingly refuted Lord Woolf's theses, his own reasons for stripping Blake of the profits generated by *No Other Choice* are far less satisfying. Undoubtedly it is true, as Lord Steyn said in a concurring opinion, that the precise scope of disgorgement for breach of contract is "best hammered out on the anvil of concrete cases".[48] It is in the common law's nature to develop incrementally and by analogy. But at the same time, it also is true that the role of an appellate court largely is to provide guidance for the resolution of future disputes. And in that regard, Lord Nicholls frustratingly, if understandably, offered very little help. He stressed that gain-based relief "will be appropriate

44. *Ruxley Electronics & Construction Ltd. v. Forsyth*, [1996] A.C. 344 (H.L.); *McAlpine Construction Ltd. v. Panatown*, [2000] 3 W.L.R. 946 (H.L.), *per* Lord Millet.
45. *Supra*, footnote 4, at pp. 639-40.
46. J. O'Sullivan, "Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations" in *Comparative Unjustified Enrichment* (Cambridge, Cambridge University Press, forthcoming).
47. *Supra*, footnote 4, at p. 640. See also G. Treitel, *The Law of Contract*, 10th ed. (London, Sweet & Maxwell, 1999), pp. 868-69.
48. *Ibid.*, at p. 645.

only in exceptional circumstances," but also insisted that "[n]o fixed rules can be prescribed".

> The court will have regard to all of the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach has occurred, the consequences of the breach and the circumstances in which relief is being sought.[49]

His most concrete suggestion was that lower courts should ask, as a "general guide . . . whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit".[50]

Turning to the facts before him, Lord Nicholls justified disgorgement on two grounds. First, he held that the Crown had a "legitimate interest" in seeking disgorgement as a means of deterring members of the secret service from violating their obligation of non-disclosure. That undoubtedly is a goal worth pursuing. Nevertheless, it must be recognized that, in the circumstances, the deterrent impact of such relief is questionable. If an intelligence officer's fidelity is not secured by the threat of severe criminal sanctions, it is unlikely to be affected by the prospect of civil liability. Furthermore, while disgorgement occasionally is likened to a penalty,[51] it actually has relatively little capacity to dissuade. In contrast to exemplary and compensatory damages, it cannot worsen the defendant's *status quo ante* because, at most, it requires that an ill-gotten gain be given up. And, as George Blake discovered, even that possibility can be discounted to reflect the chance of timely prosecution. Although the Crown was entitled to the £90,000 still owing between the publisher and the author, it was unable to recover the £60,000 that already had been sent to Blake's safe home in Moscow.[52] Finally, while the disclosure of official information may be motivated by greed, it also may be driven by ideology. If so, it probably will not be deterred by the threat of disgorgement.

Lord Nicholls also defended the imposition of gain-based relief on the ground that while Blake's contractual undertaking did not

49. *Ibid.*, at p. 639.
50. *Ibid.*
51. See *e.g.* P. Jaffey, *The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement* (Oxford, Hart Publishing, 2000), p. 12.
52. It also should be noted that *amici curiae* appeared in the lower courts and that Blake was represented *pro bono* in the House of Lords. The profitability of his breach therefore was not affected by the costs of litigation.

constitute a fiduciary obligation (for which disgorgement uncontroversially is available), it was "closely akin" to one. On that view, the Crown was entitled to succeed because: (i) Blake undoubtedly would have been liable as a fiduciary if the information that he disclosed had remained confidential at the time of publication, and (ii) disgorgement was a "just" remedy given the reprehensible nature of his conduct.[53] That argument is difficult to accept. A member of the secret service admittedly is subject to two forms of fiduciary duty. As an employee, he owes an obligation of loyalty to the Crown as his employer, and as the recipient of secrets, he owes an obligation of non-disclosure to the Crown as his confider. Significantly, however, the former comes to an end when the employment relationship is terminated and the latter comes to an end when the information ceases to be confidential. Consequently, as the Court of Appeal explained,[54] and as the House of Lords accepted, Blake did not owe a fiduciary duty to the Crown by the time that he delivered his manuscript to his publisher. To nevertheless impose relief in a contractual context on the basis of an undefined notion of *quasi*-fiduciary duty dangerously ignores Justice Sopinka's warning that such obligations "should not be imposed . . . simply to improve the nature or extent of the remedy".[55] It is not merely that Lord Nicholls' approach fails to reveal a sound basis for liability; it also implicitly invites lower courts to similarly manipulate equitable doctrine for instrumental purposes. Such an exercise is inimical to the development of coherent principle.

V. OUTSTANDING ISSUES FOR CANADIAN COURTS

Attorney General v. Blake raises an interesting question for Canadian law: when, if ever, should disgorgement be available in response to a simple breach of contract? While a complete answer cannot be provided in this brief comment, it is possible to offer observations on two fundamental issues.

1. Practical Issues and Doctrinal Flexibility

Although the House of Lords attempted to find a principled basis for the imposition of gain-based relief, its decision essentially

53. *Supra*, footnote 4, at p. 641. Lord Steyn reasoned along the same line: at pp. 645-46.
54. *Supra*, footnote 38, at pp. 453-55.
55. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at p. 312, 92 D.L.R. (4th) 449 at p. 481.

was an *ad hoc* exercise in public policy. George Blake was characterized, quite understandably, as a bad man whose treachery had frustrated efforts to undermine communism and whose duplicity had resulted in the deaths of several British agents. To allow him to profit from such behaviour accordingly would constitute an affront to justice.[56] The court therefore was prepared to bend the rules if necessary.[57] Lord Steyn, for example, stated that "practical justice strongly militates in favour of granting an order for disgorgement" and frankly admitted that he was willing to "subordinat[e] conceptual difficulties" to achieve that end.[58] Lord Nicholls' inability to articulate a clear rationale for liability strongly suggests that he too was motivated by policy rather than principle.

It would not be surprising to find Canadian courts engaging in a similar exercise. They have in the past been willing to elide doctrinal issues in order to secure "practical justice". For instance, when devising a means of achieving fair property distributions upon the dissolution of cohabitational relationships,[59] the Supreme Court of Canada gave little attention to difficult structural questions regarding the action in unjust enrichment and the remedy of the constructive trust.[60] Likewise, it has been suggested that the Canadian tendency to invoke the fiduciary concept as a means of avoiding traditional limitations on the availability of relief[61] constitutes a form of "assertion rather than analysis" which, while capable of "effectuat[ing] a preference for a particular result . . . does not involve the development or elucidation of any particular doctrine".[62] And again, in the context of damage assessments, there undoubtedly

56. While it is highly unlikely that *No Other Choice* would have been published (at least under the same terms) if Blake had not been a notorious double agent, it remains true that the specific wrong underlying the Crown's cause of action was not treason, but rather a simple breach of contract: S. Hedley, "Very Much the Wrong People: The House of Lords and the Publication of Spy Memoirs (*A-G v Blake*)", [2000] 4 Web J.C.L.I. It is not clear that relief for breach of contract should be quantified by reference to the defendant's life history.
57. In dissent, Lord Hobhouse warned his colleagues "against being drawn into making bad law in order to enable an intuitively just decision to be given against a traitor": *supra*, footnote 4, at p. 647.
58. *Ibid.*, at p. 646.
59. See *e.g. Pettkus v. Becker*, *supra*, footnote 5; *Sorochan v. Sorochan*, *supra*, footnote 8.
60. Chambers, "Constructive Trusts in Canada", *supra*, footnote 7, at pp. 197-207; McInnes, "Reflections on the Canadian Law of Unjust Enrichment", *supra*, footnote 8, at pp. 426-31.
61. See *e.g. M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 (fiduciary duty instrumentally invoked to avoid limitation periods and secure higher measures of relief).
62. *Breen v. Williams* (1996), 186 C.L.R. 71 at p. 95 (H.C.A.).

is an intuitive appeal to using actuarial evidence that disregards the discriminatory forces that systemically depress income levels for members of disadvantaged groups. Nevertheless, the growing practice[63] of allowing female plaintiffs to quantify relief for loss of future earnings on the basis of male income tables has occurred without sufficient regard to legal principle.[64]

If Canadian courts choose to follow the House of Lords' lead in allowing disgorgement for breach of contract, it is hoped that they will do so on a more principled basis. As society becomes increasingly pluralistic, there is less justification for leaving questions of liability to judicial discretion.[65] It is no longer possible (if it ever was) to assume that the entire community subscribes to a single set of values[66] and that any judge is therefore capable of arriving at a proper conclusion as a matter of intuitive fairness. Diversity demands that the rule of law be respected assiduously, not only for the purpose of resolving individual cases but also to protect the legitimacy of the system as a whole. There is no obvious reason why citizens should feel obliged to accept what amount to personal opinions from individuals with whom, culturally or philosophically, they may share little. Consequently, while legal rules perhaps inevitably contain some measure of flexibility, the availability of gain-based relief should not turn broadly on an individual judge's assessment of "all of the circumstances". Much more is required in the way of transparent rationality. It should generally be possible, in explaining a judgment to a disgruntled litigant, to point to a set of rules that objectively compelled the result.

63. *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114, 102 D.L.R. (4th) 518; *MacCabe v. Westlock Roman Catholic School District No. 110* (1996), 226 A.R. 1, [1999] 8 W.W.R. 1 (Q.B.).

64. M. McInnes, "The Gendered Earnings Proposal in Tort Law" (1998), 77 Can. Bar Rev. 152.

65. P. Birks, "Rights, Wrongs, and Remedies" (2000), 20 Oxf. J.L. Stud. 1. Admittedly, there is a growing body of literature that, to the contrary, advocates judicial discretion in the selection of relief. And interestingly, much of it is written by leading members of the judiciary: see *e.g.* Justice Finn, "Equitable Doctrine and Discretion in Remedies", in W. Cornish *et al.*, eds., *Restitution: Past, Present & Future*, *supra*, footnote 13, p. 251 at pp. 273-74; Justice Thomas, "An Endorsement of a More Flexible Law of Civil Remedies" (1999), 7 Waikato L. Rev 23. See also *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577, Binnie J.; *Butler v. Countrywide Finance Ltd.*, [1993] N.Z.L.R. 623, Hammond J.

66. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193.

2. The Nature of Contractual Obligations

A cause of action and its associated responses form a coherent whole. The constituent elements of the claim determine the acceptable range of remedies.[67] And by the same token, the nature of the relief that may be awarded in a particular type of case reveals the essence of the triggering action. For that reason, the introduction of a new form of relief may necessitate a reconceptualization of the parties' underlying rights and obligations.[68] That certainly is true with respect to the availability of disgorgement for breach of contract.

The law might conceptualize the rights and obligations created by an enforceable agreement in at least three different ways.

(1) It might take the view that each party is entitled to insist upon the actual fulfilment of a contractually contemplated event. On that model, the legal institution of contract would exist to secure performance *per se*.

(2) Alternatively, the law might take the view that, in the event of breach, the innocent party is entitled to substitutive performance, in the form of damages, insofar as a contemplated event would have affected her position. On that model, the institution of contract would exist to protect the plaintiff's positive expectations under the agreement. The law would be willing to realize, by way of monetary proxy, an anticipated occurrence to the extent that it would have benefited the claimant.

(3) Finally, the law might take the view that, in the event of breach, the innocent party is entitled to relief insofar as the wrongdoer was enriched as a result of the non-fulfilment of a contemplated event. On that model, the institution of contract would exist to allow the plaintiff to enforce the defendant's negative expectations under the agreement.

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67. McInnes, "Disgorgement for Wrongdoing: An Experiment in Alignment", *supra*, footnote 14.

68. The discussion in the text proceeds on the basis of a simplification. Stated more precisely, the relationship in question generally involves three, rather than two, sets of concepts: (i) the parties' primary rights and obligations, (ii) the cause of action that may be used to vindicate those rights and obligations, and (iii) the legal responses that may be triggered by that cause of action. For the purposes of the present discussion, however, the first and second sets of concepts can be treated as one.

> The law would be willing to reflect, by way of monetary proxy, an anticipated occurrence to the extent that it would have precluded the wrongdoer from acquiring a benefit.

Canadian law currently endorses the first and second views, but not the third.

In exceptional circumstances, a contractual party can obtain direct enforcement of an undertaking by way of either specific performance or injunctive relief. Significantly, however, such relief is available only if breach would impose upon the innocent party a loss that could not be adequately compensated through damages. Consequently, while the availability of such relief may appear to indicate that the legal system occasionally is concerned to secure performance *in specie*, the better view may be that it simply is concerned to protect, by way of specific performance if necessary, the plaintiff's positive expectations under the agreement.[69]

The proposition that the essence of a contractual right lies in the protection of positive expectations[70] finds further support in the fact that, to borrow Lord Nicholls' language in *Blake*, one party generally is entitled to "expropriate" another's right to performance.[71] Leaving aside exceptional circumstances in which specific enforcement is available, a contractual party holds an option as to whether or not he will fulfil an undertaking.[72] He is free to renege, but he must be prepared to pay a price if he does so. Depending upon the circumstances, Canadian courts may calculate that price in various ways but, significantly, those possibilities almost invariably reflect

69. *Semelhago v. Paramadevan*, *supra*, footnote 32, at pp. 9-10.
70. *Cf.* L.L. Fuller and W.R. Perdue, "The Reliance Interest in Contract" (1936), 46 Yale L.J. 52; P. Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford, Oxford University Press, 1979).
71. *Supra*, footnote 4, at p. 637, adopting the language of L.D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995), 24 C.B.L.J. 121. See also O.W. Holmes, *The Common Law* (Cambridge, Belknap Press, 1963), pp. 235-36.
72. Technically, a contractual party may enjoy a unilateral right of expropriation even if an agreement is amenable to specific enforcement. In such circumstances, however, he must be prepared to pay a different sort of price if he violates the court's order and does not perform as promised — *i.e.* he may be punished for contempt. Even more clearly, the unilateral right of expropriation would still exist even if disgorgement generally was available. While gain-based relief undoubtedly would render breach less attractive in many situations, at a fundamental level it would merely affect the manner in which the defendant's price was calculated.

the innocent party's position.[73] If the plaintiff did not suffer a recognizable loss as a result of the breach, the defendant's cost is measured simply for symbolic purposes and he need pay nominal damages only.[74] Alternatively, if the breach disappointed the plaintiff's justifiable belief that she would obtain a benefit from the agreement, the defendant must provide compensation by way of expectation damages.[75] Finally, if the plaintiff expended resources or opportunities in the belief that the contract would be performed, the defendant may be required to pay compensation by way of reliance damages. Once again, however, that form of relief is available only to the extent that the plaintiff had not entered into a bad bargain.[76]

The conclusion to be drawn from the preceding discussion is clear. As revealed by the nature of the relief that traditionally has been awarded with respect to an enforceable agreement, a party enjoys rights under a contract only in the sense that the law will vindicate, either directly or indirectly, the manner in which the contemplated event would have affected her. While she is obviously entitled to complain about the defendant's non-performance, the plaintiff effectively must mind her own business for remedial purposes.

Viewed against that backdrop, the availability of disgorgement undoubtedly would require a fundamental reconceptualization of contractual rights. While the law generally still would not be willing to realize an anticipated event *per se*, it would allow the plaintiff to assert, in the alternative, an interest in her own position *or* in the defendant's position. Upon breach, she could claim either the positive fulfilment of her expectation or the negative fulfilment of his. She could receive either what she should have had, or what he should not have had, given the terms of their agreement.[77]

73. Exceptionally, damages are calculated to punish and deter the defendant and others like him: *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, 178 D.L.R. (4th) 385.

74. *Marzetti v. Williams* (1830), 1 B. & Ad. 415, 109 E.R. 842.

75. *Sally Wertheim v. Chicoutimi Pulp Co.*, *supra*, footnote 2. Compensatory damages are, of course, limited by the concepts of remoteness of damage, mitigation of loss and so on.

76. *Bowlay Logging Ltd. v. Domtar Ltd.* (1982), 37 B.C.L.R. 195, 135 D.L.R. (3d) 179.

77. As Stephen Waddams notes, the availability of gain-based relief could subvert a number of well-established rules: see, *e.g.*, "Profits Derived from Breach of Contract: Damages or Restitution" (1997), 11 J.C.L. 115 at pp. 118-19. For example, to the extent that a plaintiff is permitted to focus on the defendant's gain, rather than her own loss, she presumably would be relieved of the need to mitigate. So too she might be permitted to avoid the traditional rule that generally denies non-compensatory damages in "cost of cure" cases.

It may be that the institution of contract ultimately should be reconceptualized such that, at least in some circumstances, each party is recognized as having an enforceable interest in the other's anticipated condition. The justification for doing so, however, is not immediately obvious. Private law generally is oriented toward compensatory relief for the very good reason that a loss *prima facie* is a bad thing that, if possible, should be remedied. Moreover, given the plaintiff's inherent interest in her own wellbeing, she is the appropriate party to press that complaint. Proceeding along similar lines, the case for restitutionary relief, if anything, is even stronger in that it pertains to something that one party has lost to the other.[78] As part of the underlying action, the plaintiff points not only to her own deprivation, but also to an enrichment with which the defendant can achieve restoration.[79] Disgorgement, in contrast, is relatively difficult to justify. A benefit unaccompanied by a loss typically is thought to be a good thing — a basis for celebration, or at worst indifference, but not a call for redress. Granted, *wrongful* gains usually are not perceived positively. Nevertheless, even in those instances, it is not clear why the law should be moved beyond indifference to intervention. And it is less clear still why an enrichment that should not have arisen at all within a contractual relationship should be taken from the defendant and given to the plaintiff.[80]

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78. Canadian courts have recognized in other contexts that legal intervention more easily is triggered toward restitution than toward compensation. For instance, restitutionary relief under an action for "knowing receipt", which is based on the acquisition of trust property, is imposed if the defendant had at least *constructive* knowledge that he was receiving something to which the plaintiff beneficially was entitled: *Citadel General Assurance Co. v. Lloyds Bank Canada, supra,* footnote 6. In contrast, compensatory relief under an action for "knowing assistance", which is based on the loss suffered by a trust beneficiary, is possible only if the defendant had *actual* knowledge that he was participating in a dishonest breach of trust: *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592.
79. In a case of unjust enrichment, the requirement of a corresponding deprivation and the defence of passing on prevent the plaintiff from recovering more than she actually lost. Likewise, the requirement of an enrichment and the defence of change of position protect the defendant from losing more than he actually gained: *supra,* footnotes 9 and 10. Restitutionary relief therefore allows the defendant to (substantially) restore the plaintiff to her prior position without incurring a detriment to himself. In contrast, while compensatory relief provides restoration for the plaintiff, it usually creates a loss for the defendant insofar as most wrongs inflict injury without concomitant gain.
80. As Glidewell L.J. stated in *Halifax Building Society v. Thomas*, [1996] Ch. 217 at p. 229, "The proposition that a wrongdoer should not be allowed to profit from his wrongs has an obvious attraction. The further proposition that the victim or intended victim of the wrongdoing, who has in the event suffered no loss, is entitled to retain or recover the amount of the profit is less obviously persuasive."

He may not be positively deserving of it, but neither is she. And a chronically over-burdened legal system certainly should not incur the cost of redistributing an unexpected windfall from one party to another without a compelling justification.

Likewise, in deciding whether or not to award gain-based relief, Canadian courts must assess the extent to which it is appropriate to discourage contractual parties from economically efficient behaviour.[81] In some circumstances at least, it may be desirable to allow an undertaking to be broken if the resulting gains will exceed the resulting losses. So long as the plaintiff's personal expectations are fulfilled through the proxy of damages, the defendant should perhaps be entitled to retain the surplus that he generated through breach. In a world of scarce resources, the law arguably should permit, if not encourage, wealth maximization. However, if an innocent party is permitted to assert an interest in a wrongdoer's position and thereby to strip him of his gain, there will be relatively less incentive *ex ante* to act in a wealth maximizing manner.[82] Breach becomes less attractive to the extent that it entails the possibility of loss, without the possibility of enrichment.

To the contrary, it might be argued that the availability of disgorgement merely would affect the distribution, rather than the existence, of gains. Presented with an opportunity for efficient breach, the parties might negotiate a new agreement that allows the controversial surplus to be generated and then split.[83] Overall wealth would be increased and each party would be better off than anticipated by the original contract. Very often, however, such an arrangement will prove impossible. The size of the surplus may be insufficient to both cover the expense of negotiations and still leave each party with a net gain. So too, negotiations may break down for economically irrational reasons, such as indignation or obstinacy. Consequently, while Canadian courts may well reject either the basic premise underlying the economic argument (*i.e.* that legal rules should be formulated so as to maximize wealth) or the application of

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81. P. Birks, "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity", [1997] Lloyds' Mar. & Comm. L.Q. 421; G. Jones, "The Recovery of Benefits Gained From Breach of Contract" (1983), 99 L.Q.R. 443; I.R. Macneil, "Efficient Breach of Contract: Circles in the Sky" (1982), 68 Va. L. Rev. 947; R. O'Dair, "Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections" (1993), 46 Current Legal Probs. 113; Smith, "Disgorgement of the Profits of Breach of Contract", *supra*, footnote 71.
82. *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361 at p. 1371 (C.A.).
83. R.H. Coase, "The Problem of Social Cost" (1960), 3 J. of Law & Econ. 1.

that argument to the contractual context, they at least should consider the matter before deciding on the availability of gain-based relief.

VI. CONCLUSION

Nothing in the preceding analysis denies that disgorgement may occasionally be warranted as a response to breach of contract. The purpose of this article, however, has been to sound several notes of caution.

(1) Even accepting that disgorgement is desirable in the abstract, it is needed less often than commonly thought. Within the contractual context, the interests of practical justice often are served, in a principled manner, by way of other causes of action or other measures of relief. Depending on the circumstances, for example, the plaintiff may be entitled to gain-based relief under an action for breach of fiduciary duty,[84] or she may recover compensation for the loss of an opportunity to bargain.[85] So too, she should be able to claim restitution under the action in unjust enrichment with respect to "skimped performance".[86]

(2) As demonstrated by *Attorney General v. Blake*, the facts giving rise to a claim for disgorgement usually reveal an unsympathetic defendant in receipt of an unanticipated windfall. Indeed, while the suggestion necessarily is speculative, it may be that in the absence of loss, contractual parties seldom are motivated to seek gain-based relief unless they suffer not merely breach, but outrageous breach. Of course, it is precisely that type of situation that also most tempts judges to disregard doctrine in the pursuit of justice.

(3) The issue of disgorgement for breach of contract has proven diabolically difficult. Despite having access to a

84. *Jostens Canada Ltd. v. Gibsons Studio Ltd., supra*, footnote 27; *Lake v. Bayliss, supra*, footnote 31.

85. *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd., supra*, footnote 19.

86. *Attorney General v. Blake, supra*, footnote 4.

wealth of academic literature[87] and a number of recent decisions,[88] the House of Lords in *Blake* was unable to formulate a practical set of guidelines. It proceeded instead in an *ad hoc* manner on the basis of public policy. Canadian courts, however, should resist any inclination to follow suit. The changing nature of society increasingly demands that disputes be resolved by reference to accepted rules, rather than individual conceptions of fairness.

(4) Finally, in deciding whether to allow disgorgement for breach of contract, the courts must appreciate that the introduction of such relief would do more than merely create a new remedial possibility. It would also necessitate a reconceptualization of the institution of contract. To say that a person has rights under a contract would mean not only that she can insist upon the positive fulfilment of her own expectations, but also upon the negative fulfilment of the defendant's expectations. To the extent that disgorgement was allowed, a contract no longer would be restricted to the function of securing benefits for onself; it would also be a mechanism for denying benefits to another.

87. See, *e.g.*, Birks, "Restitutionary Damages for Breach of Contract" *supra*, footnote 81; P. Birks, "Profits for Breach of Contract" (1993), 109 L.Q.R. 518; W. Goodhart, "Restitutionary Damages for Breach of Contract: The Remedy That Dare Not Speak Its Name", [1995] Restitution L. Rev. 3; Jones, "The Recovery of Benefits Gained From Breach of Contract", *supra*, footnote 81; O'Dair, "Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach", *supra*, footnote 81; S.M. Waddams, "Restitution as Part of Contract Law" in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford, Oxford University Press, 1991), p. 205.

88. *Attorney General v. Blake*, *supra*, footnote 38 (C.A.); *Surrey County Council v. Bredero Homes Ltd.*, *supra*, footnote 82; *Jaggard v. Sawyer*, *supra*, footnote 24.