

2011

# The Restatement (Third) of Restitution and Unjust Enrichment

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## Recommended Citation

McCamus, John D. "The Restatement (Third) of Restitution and Unjust Enrichment." *Canadian Bar Review* 90.2 (2011): 439-467.

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# **THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT**

John D McCamus\*

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*Alone among the great restatements of the common law published by the American Law Institute in the 1930s and 1940s, the 1937 Restatement of Restitution boldly asserted the existence of a new third branch of the common law of obligations to stand alongside contract and tort. The organizing thesis of the Restatement was that hitherto ignored bodies of common law, known then as the law of quasi-contract, and of equity, centring on the use of the constructive trust, could be unified and restated as a coherent legal subject resting on an underlying principle against unjust enrichment. The new Restatement (Third), of Restitution and Unjust Enrichment builds on the foundation of the 1937 Restatement and offers an up-to-date account of American law on this subject which is equivalent both in its essentials and in most of its details to the restitutionary law of the Canadian common law provinces. The Restatement (Third) follows the basic analytical structure of the subject adopted in 1937 in terms of the scope of the subject, and the relationship between the underlying general principle and the detailed substantive liability rules. The Restatement (Third) includes modernized and integrated treatments of restitutionary remedies and defences. Throughout, it achieves a more effective integration of common law and equitable doctrines than was accomplished by its 1937 predecessor.*

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*Seule parmi les principales « reformulations » de la common law publiée par l'American Law Institute durant les années 30 et 40, le « 1937 Restatement of Restitution » a soutenu audacieusement l'existence d'un troisième volet du droit des obligations relevant de la common law et se rapportant aux contrats et aux délits. La thèse de cette reformulation soulignait que les sujets ignorés jusqu'à cette époque, connus alors sous les expressions de « quasi-contrat » et d'« equity », centrés sur l'usage de la fiducie par interprétation, pourraient être fusionnés et reformulés en un sujet cohérent de droit portant sur le principe sous-jacent contre l'enrichissement injustifié. La plus récente reformulation intitulée « Restatement (Third), of Restitution and Unjust Enrichment » s'appuie sur le fondement du « 1937 Restatement of Restitution » tout en offrant un compte-rendu à jour du droit américain sur ce sujet lequel équivaut, à la fois dans ses grandes lignes et dans plusieurs de ses détails, au droit relatif à la restitution dans les provinces de common law au Canada.*

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*Cette récente reformulation du droit suit la composition analytique du sujet adopté par la version de 1937 en ce qui concerne la portée du sujet et la relation entre les principes généraux du droit et les règlements de fond portant sur la responsabilité. L'ouvrage « Restatement (Third) » contient des analyses modernes et intégrées de solutions de restitution et de moyens de défense. Dans l'ensemble, le texte réussit à intégrer la common law et les doctrines en equity avec une plus grande efficacité que la version antérieure de 1937.*

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### 1. Introduction

Publication by the American Law Institute of the new *Restatement of Restitution* under the title, *Restatement of the Law Third, Restitution and Unjust Enrichment* (R3RUE)<sup>1</sup> is an event of great significance for the private law jurisprudence of the common law countries, as was the case with its predecessor, the 1937 *Restatement of Restitution: Quasi-Contracts and Constructive Trust*.<sup>2</sup> The new *Restatement* is very likely to have a profound influence on the continued evolution and study of restitutionary doctrine, that large body of jurisprudence now generally considered within the common law world to constitute a third branch of the private law of obligations, in addition to contract and tort. The purpose of this article is to provide the reader with an overview of the structure and contents of the new *Restatement* and to highlight some of the innovations and strengths of R3RUE.

### 2. The Restatements of Restitution: A Brief History

The American Law Institute was established in 1923 under the leadership of a prominent group of judges, lawyers and legal academics of the day.<sup>3</sup> The Institute was created in response to a professional concern that the jurisprudence of the States of the Union was not only dramatically increasing in volume but, as well, in its diversity, thereby jeopardizing uniformity or consistency in American law across state boundaries. The method chosen by the Institute to address this problem was that of producing “an orderly restatement of the law,” authoritative but unofficial summaries of the substance of American jurisprudence in various subject areas or branches of the law.<sup>4</sup> Shortly thereafter, the Institute developed a plan for writing these Restatements of American law by appointing

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<sup>1</sup> (St Paul, Minn: American Law Institute Publishers, 2011) [R3RUE].

<sup>2</sup> (St Paul, Minn: American Law Institute Publishers, 1937).

<sup>3</sup> See John P Frank, “The American Law Institute, 1923 – 1998” (1998) 26 Hofstra L Rev 615.

<sup>4</sup> *Ibid* at 616.

“Reporters,” who were typically leading academics in the field of law to be restated and, to support their work, panels of “Advisers” drawn from all three branches of the profession. The Restatements were to be drawn up in the form of propositions of law accompanied by explanatory commentary and a series of illustrations drawn from the reported case law. Although the Restatements were intended to be exercises in restating the existing law, it was initially conceived that, as well, the Restatements could “promote those changes which will tend better to adapt the law to the needs of life”<sup>5</sup> providing that such modification should be restricted to those that are “generally accepted as desirable.”<sup>6</sup> Nonetheless, the predominating objective of the Restatements was restatement rather than reform of the existing law and it is on this basis, presumably, that the Restatements have generally enjoyed recognition in the United States as authoritative expositions of the existing law. They are frequently cited with approval in American jurisprudence.

The first series of Restatements appeared throughout the 1930s and 1940s and included such well known restatements as those on Contract in 1932, Conflicts in 1934, Trusts in 1935, Torts in 1939, and Property in 1944. Alone among the first series of first Restatements, however, the 1937 *Restatement of Restitution* essentially invented a new subject of the law by drawing together two large but not very well understood bodies of legal doctrine, the common law doctrines then usually referred to as the law of “quasi-contract” and various equitable doctrines including but not limited to the various strands of authority leading to the imposition of a constructive trust. The basic animating idea of this Restatement was that these two bodies of doctrine had languished in obscurity at the margins of contract and trust. Quasi-contract had been misdescribed and misunderstood as a body rules resting on “implied” contracts of some kind and received scant treatment, if any, in the treatises on contract law. Doctrines relating to the constructive trust were similarly obscured by a false connection with the law of express trusts on the basis that although not express, they were nonetheless real or “implied” trusts in some sense.

The basic organizing principle or thesis of the *Restatement of Restitution*, then, was to pry quasi-contracts and constructive trusts away from their false and misleading homes in contract and trust and integrate them into a new branch of the law resting on an underlying principle against unjust enrichment. Quasi-contracts were not implied-in-fact contracts but rather obligations imposed by law to prevent unjust enrichment. The constructive trust was not a substantive trust but merely a remedy imposed to prevent unjust enrichment. Thus, the first section of the

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<sup>5</sup> *Ibid* at 617.

<sup>6</sup> *Ibid* at 618.

1937 *Restatement* famously articulated the underlying principle in the following terms:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.<sup>7</sup>

In the pages that follow, the *Restatement's* Co-Reporters, Harvard professors Warren A Seavey and Austin W Scott set out Seavey's restatement of the law of quasi-contract (in Part I) and Scott's restatement of the law relating to constructive trusts and "Analogous Equitable Remedies" (in Part II). Although the *Restatement* thus brought together, within the confines of a single Restatement, the common law and equitable doctrines restated therein, they were not in any other sense integrated in the account of the existing law provided in the 1937 *Restatement*.

The basic idea of grounding the law of both quasi-contract and constructive trust on the basis of a principle against unjust enrichment was neither original to the Institute nor to its Co-Reporters. Indeed, the Institute had initially determined to include a chapter on constructive trusts in the *Restatement of Trusts*, to be written by Austin W Scott as its Reporter and to include a separate "Restatement of Quasi-Contracts" within this first series of restatements.<sup>8</sup> The problematic nature of the conceptual foundations of both quasi-contract and constructive trust and the potential fruitfulness of unjust enrichment as an explanatory ground had, however, been mooted in the law reviews by two other Harvard luminaries, James Barr Ames<sup>9</sup> and Roscoe Pound.<sup>10</sup> Under the influence of these ideas, the Institute changed course in the early 1930s and determined to include in the restatement program a restatement of quasi-contract and constructive trusts, tentatively to be titled the "Restatement of Restitution and Unjust Enrichment."<sup>11</sup> The new *Restatement*, with its title perhaps unfortunately revised to a simple "*Restatement of Restitution*," was published in 1937.

This invention of a new branch of the law was apparently readily accepted by the profession as legitimate and, in the years following its publication, the *Restatement of Restitution* enjoyed increasing influence as

<sup>7</sup> *Supra* note 2 at 12.

<sup>8</sup> See Andrew Kull, "Three Restatements of Restitution" (2011) 68 Wash & Lee L Rev 867 at 868-69 [Kull, "Three Restatements"].

<sup>9</sup> James Barr Ames, "The History of Assumpsit" (1888) 2 Harv L Rev 53. For an account of the early history of the development of the conceptual framework of restitution, see Andrew Kull, "James Barr Ames and the Early Modern History of Unjust Enrichment" (2005) 25 Oxford J Legal Stud 297.

<sup>10</sup> Roscoe Pound, "The Progress of the Law in 1918-1919: Equity" (1920) 33 Harv L Rev 420.

<sup>11</sup> (1934) 11 American Law Institute Proceedings 335.

an authoritative restatement of the doctrines of quasi-contract and constructive trust, often being referred to in judicial opinions dealing with these matters. In due course, these ideas migrated to the other major common law jurisdictions and treatises on the law of “restitution” began to appear in the later part of the twentieth century in England, Canada,<sup>12</sup> Australia and New Zealand.

Notwithstanding the remarkable success of “restitution” as an idea, the Institute ultimately decided not to include Restitution in the second series of revised restatements it produced in the 1960s and 1970s. There is no *Restatement Second of Restitution*. The story behind this surprising omission is told elsewhere.<sup>13</sup> In brief, the Institute did make a start on a *Restatement Second of Restitution* and the first few Tentative Drafts were prepared and circulated for review at annual meetings of the Institute in 1983 and 1984. Those drafts tackled complex areas of the law of restitution in a fashion that proved to be controversial to members of the Institute. In due course, work was suspended on the *Restatement Second of Restitution* and, for a time, it appeared that the Institute might attempt to fold restitution into a new “Restatement of Remedies.” The fact that “Remedies” as a subject, including restitutionary remedies, had emerged in the curricula of many law schools and, indeed, in state bar exams, may have appeared to legitimate a move in this direction. Those who preferred a revival of the *Restatement Second of Restitution* pressed the Institute with the argument that “Restitution” was not simply another type of “remedy” but that it constituted a body of substantive doctrine creating sources of civil liability other than contract and tort that gave rise to the remedy of restitution.

After a period of internal deliberations and uncertainty as to the proper course to take, the Institute eventually decided in 1996 that it would return to the project of a new *Restatement of Restitution*.<sup>14</sup> Preliminary work on the project began in 1996. In 1997, the Institute appointed Andrew Kull, then of Emory University, later to move to the Boston University School

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<sup>12</sup> Although the reorganization of a body of doctrine into a branch of the law would not normally be thought to require a judicial *imprimatur* – where are the authorities approving the invention of contracts and torts in the nineteenth century? – it is of no little interest that the Supreme Court of Canada explicitly embraced the unjust enrichment thesis and the remedial theory of the constructive trust in a remarkable series of cases beginning in 1954. For a brief account see John D McCamus, “Forty Years of Restitution: A Retrospective” (2011) 50 Can Bus LJ 474.

<sup>13</sup> See Kull, “Three Restatements,” *supra* note 8 at 873-76.

<sup>14</sup> Professor Laycock was a prominent advocate of this position in the internal discussions. See Douglas Laycock, “The Scope and Significance of Restitution” (1989) 67 Tex L Rev 1277. See also Kull, “Three Restatements,” *supra* note 8 at 876-80.

of Law, as a Reporter, together with a group of Advisers to work on the new *Restatement of Restitution*. By this point in time, the Institute was well underway in its third series of Restatements, so the new *Restatement of Restitution* was to be called the “*Restatement Third of Restitution*.” Meetings of the Advisory Committee to review Preliminary Drafts and Tentative Drafts began in 1999<sup>15</sup> and continued into the fall of 2010. The final Council Draft was approved on May 12, 2010 and the final edited version of the entire *Restatement*, now renamed the *Restatement Third of Restitution and Unjust Enrichment*, was published by the Institute approximately a year later. From beginning to end, the entire process of creating R3RUE occupied fifteen years. For those who view the famous decision of Lord Mansfield in *Moses v Macferlan*<sup>16</sup> as the *fons et origo* of the modern unjust enrichment approach to restitutionary liability, the fact that May 12, 2010, the date on which the Institute approved the final Council Draft, is precisely the 250th anniversary of that decision – to the day – will no doubt cause a pleasurable frisson of historical connectedness.

### 3. *Scope and Structure of R3RUE*

The scope of the final subject matter covered by R3RUE continues, in its essential respects, the model developed for the new branch of the law described in the 1937 *Restatement*. Thus, R3RUE restates the common law rules arising from the common law once referred to as quasi-contract on such topics as moneys paid by mistake, under duress, pursuant to transactions rendered ineffective by various doctrines of common law, the recovery of benefits acquired through tortious wrongdoing or conferred under an emergency, and so on. From the equity side of the ledger are drawn doctrines relating to the conferral of other benefits by mistake, under undue influence, through crime or breach of fiduciary duty or breach of confidence and under transactions ineffective for equitable reasons such as unconscionability and mistake. The constructive trust is treated as one of the possible remedies to prevent unjust enrichment and is therefore not restricted, as it is in English law, essentially to fiduciary relations.

As the authors of the 1937 *Restatement* were well aware, this collection of common law and equitable doctrines imposes what might be referred to as “benefit-based” liability of two kinds. The first type, of which the recovery of moneys mistakenly paid by the plaintiff to the

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<sup>15</sup> I should disclose that I had the privilege of serving on the panel of Advisers for R3RUE. As I was to learn, however, the role of the Advisers is simply to meet and review drafts, offering helpful, if often conflicting, advice (no votes are taken) to the Reporter. The Reporter may or may not take some or all of the advice. R3RUE is, therefore, very much an exercise in authorship by the Reporter.

<sup>16</sup> (1760), 2 Burr 1005, 97 ER 676 [*Moses*].

defendant would be a simple illustration, involves the recovery of a benefit transferred by the plaintiff to the defendant. Where the case involves a mistaken transfer of money, for example, one can comfortably describe the restitutionary remedy as requiring the plaintiff to “give back” or “restore” an equivalent amount of money to the plaintiff. The language of giving back does not work as well with situations where the plaintiff has conferred services upon the defendant or in circumstances where the plaintiff has conferred value on the defendant by paying money to a third party which has the effect, say, of relieving the defendant of a tax liability. Nonetheless, the basic idea is a simple one. In this type of case, a benefit enjoyed by the defendant corresponds to an observable loss on the part of the plaintiff.

The second type of benefit may arise, for example, in the context of breach of fiduciary obligation. This type consists of benefits acquired not from the plaintiff directly but from third parties by means of a breach of a duty owed to the plaintiff. A fiduciary might abuse a duty owed to the plaintiff by engaging in profitable dealings with third parties. These profits are recoverable by the plaintiff. In recent decades, this particular type of benefit-based liability has been referred to by some as relief in the “disgorgement” measure. It is a form of relief that is available to a plaintiff who is, in some sense, the victim of wrongful conduct on the part of the defendant. Thus, a fiduciary in breach of a fiduciary obligation owed to the plaintiff will be liable to disgorge all profits secured through that wrongful conduct, in order to prevent, as R3RUE would say, the fiduciary’s unjust enrichment.

Three points should be noted with respect to these two forms or measures of restitutionary liability. First, neither measure is the exclusive preserve of either the old common law of quasi-contract or equitable doctrines like constructive trust. Thus, disgorgement relief for breach of fiduciary duty and breach of confidence is historically equitable in nature. Disgorgement of benefits secured through tortious wrongdoing, however, derives from the old common law of quasi-contract.

Second, the two measures are overlapping in the sense that there are some types of restitutionary claims in which both measures of relief may be available. In a fiduciary duty case, for example, the fiduciary may, in breach of duty, acquire assets from the plaintiff to whom the duty is owed. The plaintiff may seek literal restitution of the benefit that the plaintiff has transferred directly to the defendant through a decree of rescission. On the other hand, there are of course cases, noted above, in which the defendant fiduciary acquires benefits in breach of a fiduciary duty through dealings with third parties. Such profits, whether or not they could have in fact been enjoyed by the plaintiff in the absence of a breach of duty, are recoverable



in a disgorgement claim. Moreover, as the common law is dynamic and capable of change, it is noteworthy that the types of claims that historically gave rise only to benefit-based claims in the first sense may come to be recognized as capable of providing a basis for disgorgement relief. Thus, in recent years, we have learned that restitutionary liability for breach of contract may include not only restoration of benefits transferred by the plaintiff to the defendant but also the disgorgement of profits secured through a wrongful breach of contract.<sup>17</sup>

Third, the 1937 *Restatement* and R3RUE are structured on the basis of an assumption that both types of benefit-based liability – direct transfer and disgorgement – can be said to be grounded on the basis of the unjust enrichment principle to the effect that a person “who is unjustly enriched at the expense of another is subject to liability in restitution.” It is not immediately obvious, however, how a disgorgement claim in circumstances where the plaintiff could not have enjoyed the profits in question can be described as involving a situation which the benefit has been acquired “at the expense of another.”<sup>18</sup> R3RUE deals with this question head on in the opening paragraph of its discussion of section 1 in the following terms:

Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant. While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula ‘at the expense of another’ can also mean ‘in violation of the other’s legally protected rights,’ without the need to show that the claimant has suffered a loss.<sup>19</sup>

Cross reference is then made to section 3 of R3RUE which states the general principle underlying the disgorgement remedies in the following terms:

A person is not permitted to profit by his own wrong.<sup>20</sup>

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<sup>17</sup> *Attorney General v Blake*, [2001] UKHL 45, [2001] 1 AC 268, for discussion of which see Peter D Maddaugh and John D McCamus, *The Law of Restitution*, looseleaf (Toronto: Canada Law Book, 2011) c 25.

<sup>18</sup> Seavey and Scott, in an article introducing the 1937 *Restatement* to an English audience, acknowledged the difficulty but suggested that in such instances the emphasis shifts from “restitution” to “unjust enrichment” inasmuch as the plaintiff is able to recover more than he or she lost; see Warren A Seavey and Austin W Scott, “Restitution” (1938) 54 *Law Q Rev* 29 at 37.

<sup>19</sup> R3RUE, *supra* note 1, vol 1 at 3.

<sup>20</sup> *Ibid* at 22.

The Commentary to section 3 goes on to caution, however, that “[t]he statement of this Section identifies an outlook and an objective, not a cause of action. Working rules that authorize a claim to restitution of wrongful gain appear in other sections of this Restatement, describing more precisely the nature of the wrongdoing in a particular case.”<sup>21</sup> Cross reference is then made to sections dealing with such matters as fraud, duress, undue influence, breach of contract, profitable tort and other forms of wrongful activity.

For Canadian readers, it is useful to emphasize the manner in which the unjust enrichment principle is interpreted by the Restatements, so as to include both benefits directly transferred from plaintiff to defendant and disgorgement for benefits acquired through wrongdoing, as there is some risk that Canadian lawyers will, as a result of an influential *obiter dictum* in *Pettkus v Becker*<sup>22</sup> – in which Dickson J stated the unjust enrichment principle in terms requiring both “benefit” to the defendant and “corresponding deprivation” to the plaintiff – will not appreciate the scope or breadth of restitutionary doctrine. To some at least, the reference to “corresponding deprivation” may create even greater difficulty in connecting the unjust enrichment principle to liability rules involving disgorgement of profits obtained by wrongdoing. Some Canadian lawyers and judges have mistakenly concluded that, because of the language of “corresponding deprivation,” there can be no unjust enrichment or restitutionary liability in the absence of an observable and corresponding loss having been suffered by the plaintiff. To give this effect or interpretation to the language of Dickson J in *Pettkus* would, in my view, be a grave error. Surely, there was no intention on the part of Dickson J to simply overrule or abolish the existing black-letter rules that permit restitutionary recovery in cases not involving corresponding loss in that sense. Peter Maddaugh and I have suggested elsewhere<sup>23</sup> that in order to preserve the integrity and unity of restitution as a third branch of the law, the best interpretation of Dickson J’s language of “corresponding deprivation” is that it should be considered to include, in the manner of R3RUE, situations where a benefit has been acquired “‘in violation of the other’s legally protected rights’ without the need to show that the claimant has suffered a loss.”<sup>24</sup> Thus, in a fiduciary duty disgorgement case, the “corresponding deprivation” suffered by the plaintiff is that his rights as the beneficiary of the fiduciary obligation have been violated, whether or not an economic loss to the plaintiff has been sustained.

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<sup>21</sup> *Ibid.*

<sup>22</sup> [1980] 2 SCR 834, 117 DLR (3d) 257 [*Pettkus*].

<sup>23</sup> Maddaugh and McCamus, *supra* note 17 at 3-21 to 3-24.

<sup>24</sup> R3RUE, *supra* note 1, vol 1 at 3.

To the extent that misunderstanding or disagreement on the question of the scope of the unjust enrichment principle, and the correct interpretation of “at the expense of” or “corresponding deprivation” may persist, it is important to note that this is a disagreement about how to define terms and how broadly to conceive the subject matter of “restitution” or “unjust enrichment” rather than a dispute about how actual cases have been or should be decided. That is to say, the American and Commonwealth authorities allowing disgorgement remedies in the absence of corresponding economic loss are well established, and for good reason. It would be most unfortunate if confusion about terminology were to lead Canadian lawyers and judges to conclude that old and well established forms of liability have simply vanished from the fabric of the common law. There are, however, some scholars, in particular, the late Peter Birks and some of his followers, who favour a narrow interpretation of the concept of unjust enrichment that would exclude disgorgement for wrongful conduct. They do not propose that such cases would be considered to be overruled. It is their view that what is required is a separate fourth branch of the law to accommodate such cases.<sup>25</sup> My own view, however, is that a broader conception of the subject as initially conceived in the 1937 *Restatement* and as continued in R3RUE, embracing both forms of benefit-based liability creates a third branch of the law which is not only more comprehensive but more coherent, given the overlapping nature of the two forms of relief.

It is also important to note that this apparent awkwardness with the expression “at the expense of” is not exclusive to true disgorgement as opposed to direct transfer cases. Thus, where, as a result of fraudulent inducements, the plaintiff transferred property to the defendant, the plaintiff is entitled to rescission in restitution even if the transfer was effected at fair market value such that no economic loss was sustained by the plaintiff.<sup>26</sup> Similarly, where a fiduciary acquires property at the fair market value from a plaintiff through a breach of the fiduciary duty owed to the plaintiff, the plaintiff can seek rescission of the transaction or subject the defendant to a constructive trust, notwithstanding the absence of a “corresponding loss” by the plaintiff.<sup>27</sup> Consistently with this proposition, if the defendant, in breach of a fiduciary obligation owed to the plaintiff acquires property from a third party, that property will typically be subjected to a constructive trust in the plaintiff’s favour, regardless of

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<sup>25</sup> Peter BH Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) [Birks, *Unjust Enrichment*].

<sup>26</sup> For a series of illustrations of the point, see R3RUE, *supra* note 1, vol 1 at 169-70.

<sup>27</sup> See, generally, Maddaugh and McCamus, *supra* note 17 at 27-34 to 27-35.

whether the defendant acquired the property at a bargain price.<sup>28</sup> Unfortunately, in *Soulos v Korkontzilas*,<sup>29</sup> the Supreme Court of Canada lost sight of this proposition and wrote a decision holding that such a case does not constitute “unjust enrichment.” The Court seems to have been led astray by the “corresponding deprivation” language from *Pettkus*, with much resulting confusion in later cases.

Finally, as noted above, the 1937 *Restatement* stitched together between the covers of one volume what are essentially free-standing accounts of the law of quasi-contract, on the one hand, and, on the other, the law of equity relating to the constructive trust and other equitable remedies, without otherwise attempting an integration of these two bodies of doctrine. Thus, for example, the common law rules relating to the recovery of benefits transferred by mistake are set out in Part II on quasi-contract and the equitable rules relating to reversing transfers caused by mistake are set out in Part III. One of the signal achievements of R3RUE, then, is an attempt to more effectively integrate common law and equitable doctrine. Thus, continuing the illustration, all the rules dealing with mistaken transfers, be they common law or equitable in origin are brought together in the section on “Benefits Conferred By Mistake” in R3RUE. Further, the attempt at integration is visible throughout the two volumes of R3RUE in Part II setting out the liability rules, Part III setting out the remedies and Part IV providing an account of the defences to restitution claims, including, in each part, the black-letter rules arising from both common law and equity.

#### 4. *Substantive Grounds: the Liability Rules*

The black-letter rules setting out the substantive grounds for imposing restitutionary liability on a defendant are many in number and somewhat complex, both in the United States and in other common law jurisdictions, including Canada. Accordingly, it is no surprise that the majority of the sections of R3RUE – sections 5 to 48 of a total of 70 – are devoted to a restatement of these rules. These rules set out, in effect, the reasons why a plaintiff may be entitled to restitution as where the benefit has been conferred by mistake, under duress, in an emergency, and so on. These

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<sup>28</sup> This black-letter rule can be traced back at least as far as *Keech v Sandford* (1726), Sel Cas T King 61, 25 ER 223. And see Madaugh and McCamus, *supra* note 17 at 27-36 to 27-37.

<sup>29</sup> [1997] 2 SCR 217, 146 DLR (4th) 214. As Andrew Kull, the Reporter for R3RUE noted, “The problem in *Soulos*...[is that] the judges failed to see that a fiduciary’s misappropriation of an opportunity is one of the classic examples of unjust enrichment (usually remedied by a constructive trust) – without regard to how the venture turns out in the defendant’s hands;” see Andrew Kull, “Deconstructing the Constructive Trust” (2004) 40 Can Bus LJ 358 at 359-60.

rules of existing law were referred to by Birks<sup>30</sup> as the “unjust factors” and have been referred to on occasion by the Supreme Court of Canada<sup>31</sup> as the “existing categories” of restitutionary claims.

Some Canadian readers will be interested to know the relationship between the existing liability rules set out in sections 5 to 48 and the general principle set out in section 1. R3RUE takes the view that section 1 may provide a basis for a type of claim that falls outside the existing liability rules. In other words, the general principle provides a basis for modifying or extending the law in new directions not covered by the existing liability rules. In my view, this approach is quite consistent with the Supreme Court of Canada jurisprudence that states, with respect to the role of the general principle that “[b]y *retaining the existing categories*, while recognizing *other claims* that fall within the principles *underlying* unjust enrichment, the law is able ‘to develop in a flexible way as required to meet changing perceptions of justice.’”<sup>32</sup> R3RUE refused to be drawn into academic debates concerning the precise status of the principle and its relationship with the existing liability rules. Having stated that virtually all of the existing rules could be considered to be applications of section 1, the Commentary to that section then observes as follows:

It is by no means obvious ... how “unjust enrichment” should best be defined; whether it constitutes a rule of decision, a unifying theme or something in between; or what role the principle would ideally play in our legal system. Such questions preoccupy much academic writing on this subject. This Restatement has been written on the assumption that the law of restitution and unjust enrichment can be usefully described without answering any of them.<sup>33</sup>

At a practical level, it is apparent that the underlying premise of R3RUE is that “unjust enrichment” as a concept is so flexible and vague that it cannot “yield a reliable indication of the nature and scope of liability imposed”<sup>34</sup> by restitutionary doctrine. Hence the need for more specific rules. At the same time the general principle can serve as a basis for modifying and extending the existing law.

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<sup>30</sup> Peter BH Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 99 *et seq* [Birks, *An Introduction*].

<sup>31</sup> See e.g. *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 784, 98 DLR (4th) 140 [Peel]; *Kerr v Baranow*, 2011 SCC 10 at para 31, [2011] 1 SCR 269, 328 DLR (4th) 577 [Kerr].

<sup>32</sup> *Kerr*, *ibid* at para 32 [emphasis added], quoting McLachlin J in *Peel*, *ibid* at 788-89.

<sup>33</sup> R3RUE, *supra* note 1, vol 1 at 4.

<sup>34</sup> *Ibid*.

A major achievement of R3RUE is to group the black-letter rules relating to the unjust factors under a series of headings that should be readily recognizable to members of the profession thereby making a large body of substantive doctrine readily accessible to them. The liability rules are subdivided into five chapters; Chapter 2 (“Transfers Subject to Avoidance”), Chapter 3 (“Unrequested Intervention”), Chapter 4 (“Restitution and Contract”), Chapter 5 (“Restitution for Wrongs”) and Chapter 6 (“Benefits Conferred by a Third Person”). A summary list of the contents of each chapter will give an impression, at least, of the broad scope of the substantive law covered.

Chapter 2 (“Transfers Subject to Avoidance”) includes as sub-topics, “Benefits Conferred by Mistake,” “Defective Consent or Authority” (including fraud, misrepresentation, duress, undue influence, incapacity and lack of authority) and “Transfers Under Legal Compulsion” (including payment under judgments subsequently reversed and recovery of tax payments).

Chapter 3 (“Unrequested Intervention”) includes as sub-topics “Emergency Intervention,” “Performance Rendered to a Third Person” (including indemnity and contribution, equitable subrogation and uncompensated performance under a contract with a third person), and “Self-Interested Intervention” (including benefits conferred in the context of divided ownership of property or under an expectation of ownership rights, by unmarried co-habitants upon separation of their relationship and “common fund” cases). Chapter 4, “Restitution and Contract” includes two sub-topics. The first is “Restitution to a Performing Party with No Claim on the Contract” (including benefits conferred under agreements that fail for indefiniteness, informality, illegality, incapacity of recipient, on the basis of mistake or frustration, under compulsion and finally, restitutionary remedies of the party in default). Topic two, “Alternative Remedies for Breach of an Enforceable Contract” includes rescission for breach, restitution of benefits conferred by the party not in breach and claims for the profits secured through opportunistic breach.

Chapter 5, “Restitution for Wrongs” includes as the first sub-topic, “Benefits Acquired by Tort or Other Breach of Duty” (including trespass, conversion and comparable wrongs, misappropriation of financial assets, interference with an intellectual property and similar rights, breach of fiduciary duty or duties of confidence and a basket rule relating to “interference with other protected interests”). The second sub-topic covers the law relating to “Diversion of Property Rights at Death” (including the Slayer Rule and wrongful interference with donative transfers). Finally, Chapter 6 deals with an interesting topic to which we will return, “Benefits Conferred by a Third Person.”

Broadly speaking, then, R3RUE covers much the same ground as the 1937 *Restatement*. The Reporter did not hesitate, however, to clarify well-established doctrines in light of more modern developments and, indeed, to add sections dealing with such topics as property division between co-habitants and three-party cases which were barely touched upon in the 1937 *Restatement*. For Canadian readers, it will be of interest that the new Restatement rule concerning property division between co-habitants is remarkably similar to the rule recently articulated by the Supreme Court of Canada in the leading case of *Kerr v Baranow*.<sup>35</sup>

Extended comment on any of the substantive rules restated in these chapters of R3RUE obviously cannot be attempted here. Hopefully, it will suffice to identify two attractive features of the R3RUE treatment of these topics. First – and for this all credit goes to the Reporter, Andrew Kull – the various sections restating the substantive rules are models of elegance and clarity. The Reporter has a remarkable capacity for analysis and synthesis of large and complex bodies of doctrine and an ability to restate the fundamentals of the rules thereby developed in concise and accessible propositional form. Two examples may usefully illustrate this feature of R3RUE.

The rules relating to the recovery of moneys mistakenly paid to the defendant by the plaintiff are, when compared to other aspects of restitutionary law, relatively straightforward in their content. The rules relating to the recovery of non-monetary benefits conferred by mistake are, however, quite another matter. They consist of a welter of rules dealing with various types of benefits that are consistent, to varying degrees, with the unjust enrichment principle. R3RUE provides a generalized black-letter rule to cover all such cases in the following terms in section 9:

9 Benefits Other Than Money

A person who confers on another, by mistake, a benefit other than money has a claim in restitution as necessary to prevent the unjust enrichment of the recipient. Such a transaction ordinarily results in the unjust enrichment of the recipient only to the extent that:

- (a) specific restitution is feasible;
- (b) the benefit is subsequently realized in money or its equivalent;
- (c) the recipient has revealed a willingness to pay for the benefit; or
- (d) the recipient has been spared an otherwise necessary expense.<sup>36</sup>

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<sup>35</sup> *Supra* note 31, for discussion of which see Maddaugh and McCamus, *supra* note 17, c 34.

<sup>36</sup> R3RUE, *supra* note 1, vol 1 at 98-99.

The difficulty confronted, not always successfully, in the existing law in this area is that, for obvious reasons, the law is reluctant to impose liability for a non-monetary benefit where the benefit in question was neither requested nor wanted by its recipient. The defendant ought not be forced to invest assets, in effect, in a benefit that he or she would not freely have chosen. On the other hand, the authorities tend to grant recovery in circumstances, broadly speaking, where the problem of forced investment is not truly present.

Section 9 picks up on those signals in the case law and restates a rule that coherently and simply captures the real reasons for granting recovery in such cases. Thus, the problem of forced investment is not present where specific restitution is feasible, where the benefit has been realized in monetary value through, for example, sale of a mistakenly improved asset, where the recipient has already indicated a desire to acquire and pay for the benefit in question or the benefit constitutes an otherwise necessary expense. The rule is consistent with the results in many decided cases,<sup>37</sup> though not necessarily with the reasoning in such cases. Section 9 offers an elegant and clear rule that offers a key to unlocking these difficulties and allowing recovery in the context of non-monetary benefits which precisely parallels the policies underlying the rule allowing recovery of mistaken payments. Section 9 is an exquisite exercise in restatement. In my view, Canadian courts could do no better than to simply adopt it as an accurate expression of Canadian common law on this point.

The existing Anglo-Canadian law relating to the recovery of benefits conferred under illegal contracts is also rather complex and unsatisfactory. The principal barrier to a modernization of these rules is the traditional policy of the common law that a party to an illegal agreement who is a party to the criminality or illegality should never be allowed to recover in a restitution claim for benefits conferred on the other party. Such a rule can plainly be too harsh in cases where the plaintiff has contravened a prohibition unintentionally or the illegality and/or its consequences are not particularly grave. As a result, Anglo-Canadian doctrine on this point has developed an impressively complex array of diversionary routes around the traditional principle which have the effect of allowing restitutionary recovery of some kind to a guilty party. American law has a similar history but, in the modern era, has made a more direct assault on the problem and recognizes more openly the potential claims of a guilty party.

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<sup>37</sup> See e.g. *Greenwood v Bennett*, [1973] QB 195 (CA); and see Maddaugh and McCamus, *supra* note 17, c 12.



Section 32 restates this rather complex body of common law doctrine in the following fashion:

32 Illegality

A person who renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy may obtain restitution from the recipient in accordance with the following rules:

- (1) Restitution will be allowed, whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition.
- (2) Restitution will also be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition. There is no unjust enrichment if the claimant receives the counterperformance specified by the parties' unenforceable agreement.
- (3) Restitution will be denied, notwithstanding the enrichment of the defendant at the claimant's expense, if a claim under subsection (2) is foreclosed by the claimant's inequitable conduct (§ 63).<sup>38</sup>

In three simple propositions, section 32 states the substance and the underlying rationales for what might otherwise seem a bewildering body of jurisprudence. Subsection (1) makes it clear that where the claimant who has conferred value is a party who is intended to be protected by the policy underlying the prohibition, restitution will be granted. Much of the existing Anglo-Canadian law on point rests on the foundation of this proposition. Subsection (2) allows recovery to a party, whether a guilty party or not, if the policy underlying the rule that renders the transaction unenforceable will not be defeated or frustrated by the granting of recovery. The most recent English, Canadian and Australian jurisprudence can be seen to be consistent with this proposition.<sup>39</sup> Finally, subsection (3) states, in effect, that in circumstances where the plaintiff's wrongdoing is especially grievous in nature, relief will in any event be denied. This too is consistent with the results of decided cases both in the United States and in other common law jurisdictions. The important point for present purposes, however, is that section 32 concisely and elegantly restates these three propositions in such fashion as to communicate the rationale underlying each of them in a manner that elegantly and accurately summarizes the thrust of modern restitutionary law on this complex issue. Again, Canadian courts could do no better than to align Canadian law on this point with this section. These illustrations of the excellence of the

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<sup>38</sup> R3RUE, *supra* note 1, vol 1 at 505-506.

<sup>39</sup> See Maddaugh and McCamus, *supra* note 17 at 15-29 to 15-41.

drafting of the substantive liability rules in R3RUE could easily be multiplied.

Finally, the thorough research underlying R3RUE and the capacity of the Reporter to capture the essence of case law not previously restated, can find no better illustration, in my view, than section 48 dealing with “Payment to Defendant to Which Claimant Has a Better Right.” A Canadian example nicely illustrates the problem addressed by this section. In *James More & Sons Ltd v University of Ottawa*,<sup>40</sup> the plaintiff builder had undertaken a project for the defendant university under an agreement that required the builder to pay taxes on building materials exigible at the time of contracting and, further, with respect to any changes in the applicable taxes, to absorb the cost of any increases but allow the benefit of any decreases to the defendant university. In the unusual circumstances of this case, the federal and provincial governments traded tax points with respect to such taxes with the result that there was a 3 per cent increase in federal tax and a withdrawal of a corresponding 3 per cent provincial tax. Application of the contract to these facts resulted in the defendant university enjoying a decrease in the contract price to reflect the lower tax, notwithstanding the fact that the total tax burden on the builder remained constant. Subsequently, it was determined that the new federal taxes were refundable to various institutions, including universities. In effect, the building contractor continued to absorb the full cost of the taxes even though the university had received credit for them twice, once by reduction in the contract price and secondly by the rebate from the taxing government. Morden J held that the university had been unjustly enriched by the refund and that it ought to be credited to the plaintiff.

The result in *James More* has always seemed sensible to me, but I confess that I have never had a clear view as to how one should explain this result. The claim does not fit easily within any of the existing categories of liability nor is it easy to generalize a principle emerging from such unusual facts. The case seemed *sui generis* to me as I could find no similar authorities elsewhere in the Commonwealth jurisprudence. Compare section 48 of the R3RUE which provides as follows:

48 Payment to Defendant to Which Claimant Has a Better Right

If a third person makes a payment to the defendant to which (as between claimant and defendant) the claimant has a better legal or equitable right, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.<sup>41</sup>

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<sup>40</sup> (1974), 5 OR (2d) 162, 49 DLR (3d) 666 (H Ct J) [*James More*].

<sup>41</sup> R3RUE, *supra* note 1, vol 2 at 144.

In the commentary following section 48, the Reporter gathers together many cases drawn from American jurisprudence, including one which is quite similar to *James More*<sup>42</sup> in which relief is granted for reasons of this kind. The precise explanation given in the Commentary for relief in this particular sub-category of cases is that the “claimant has furnished the value for which the defendant is compensated or reimbursed.”<sup>43</sup> Surely, this is precisely the problem in the *James More* case. Section 48 leads us directly to the rationale for the granting of relief. Detailed study of R3RUE has, for me at least, produced many similarly “eye-popping” moments.

### 5. Remedies

Part 3 of the Restatement draws together all of the rules relating to the plethora of remedies (and names for them) available in the context of restitution claims. Restitutionary remedies, as a subject, is rather complex. Much of the terminology is arcane. One important source of complexity arises from the structural feature described above – that restitutionary relief is available, depending on the circumstances, in either one of two measures of relief: recovery of the value of benefits transferred from plaintiff to defendant; or disgorgement of profits secured by wrongful conduct. A further complexity arises from the fact that restitutionary remedies may be either personal or proprietary in their effect. The latter is normally the case, for example, with the constructive trust. What one might hope for from a modern restatement of these rules, accordingly, would be some simplification in the terminology used to describe the personal and proprietary remedies in each measure and further, a clearer sense than emerges from the earlier case law of when it is appropriate to grant proprietary rather than merely personal relief. R3RUE does not disappoint in either respect.

The two sub-topics of this Part are structured around the distinction between personal and proprietary relief. The first sub-topic deals with restitution in the form of a money judgment and sets out the rules relating to the calculation of restitutionary relief in either measure, where the resulting award is to be an *in personam* obligation to pay a monetary award. In terms of simplification, the archaic language of money had and received – *quantum meruit*, *quantum valebat* and so on – cannot be found. For those who hope that this arcane terminology may ultimately disappear from the face of restitution law, these sections of R3RUE show the way.

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<sup>42</sup> *Wayne County Produce Co v Duffy-Mott Co* (1927), 244 NY 351, 155 NE 669 per Cardozo J.

<sup>43</sup> R3RUE, *supra* note 1, vol 2 at 148.

The second remedial sub-topic on proprietary remedies provides accounts of the black-letter rules relating to rescission, constructive trust, equitable lien, subrogation and the tracing rules that permit tracing property into its product or tracing into or through a commingled fund. The discussion of each remedy in R3RUE is illuminating. The principal insight concerning the appropriate scope for proprietary relief is that one should distinguish between situations where the plaintiff is seeking proprietary relief in a “two-party contest” as opposed to a “three-party contest.” For R3RUE, a two-party contest is one where the claimant is seeking restitution against a solvent defendant. A three-party contest is one in which “the defendant’s assets are insufficient to satisfy the defendant’s obligations both to the claimant and to the defendant’s general creditors.”<sup>44</sup> In a two-party contest, the awarding of proprietary relief “is a flexible means of achieving specific relief in restitution, justified by remedial economy and convenience to the claimant.”<sup>45</sup> In such a case, “specific restitution will be more attractive than a money judgment when the property in question has special value for the claimant; when it has appreciated in value; when its value might be difficult to establish; or when recovery of the specific thing is merely less costly than proof and recovery of its value.”<sup>46</sup> In all such cases, the claimant must be able to identify the asset constituting the target of relief. Of interest to Canadian readers is the fact that the guidelines provided by R3RUE with respect to the availability of proprietary relief in two-party contests are remarkably similar to those guidelines offered by La Forest J in the famous case of *International Corona Resources Ltd v Lac Minerals Ltd*.<sup>47</sup>

In a three-party case, on the other hand, the contest is in effect a contest for priority upon the defendant’s insolvency as between the plaintiff and the defendant’s general creditors. In a three-party case, the question becomes whether the claimant deserves priority over the general creditors of the immediate party and here R3RUE holds that proprietary relief should be more sparingly available. At the risk of over-simplification, R3RUE does not grant priority over the interests of third parties who are *bona fide* purchasers or payees of the target property<sup>48</sup> and, even where priority is available against third parties, it may be restricted in certain circumstances to the amount of the claimant’s loss, in order to protect the interests of the initial recipient’s creditors or a deceased recipient’s dependents.<sup>49</sup>

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<sup>44</sup> *Ibid* at 298-99.

<sup>45</sup> *Ibid* at 299.

<sup>46</sup> *Ibid*.

<sup>47</sup> [1989] 2 SCR 574 at 675-79, 61 DLR (4th) 14.

<sup>48</sup> R3RUE, *supra* note 1, vol 2, s 60 at 439.

<sup>49</sup> *Ibid*, s 61 at 468-69.

## 6. Defences

Part IV of R3RUE is devoted to an extended treatment of the various defences available in restitution claims and predictably, detailed treatment is provided of defences of change of position, bona fide purchaser and passing on. Section 67<sup>50</sup> sets forth a defence of “Bona Fide Payee” which is, in effect, analogous to the protection afforded by the bona fide purchaser defence that is afforded to a purchaser of property other than money for value and without notice.

In circumstances where either the Bona Fide Purchaser or Bona Fide Payee defence is applicable, the success of the defence does not rest on establishing a detrimental change of position on the part of the defendant recipient. As the Commentary to both defences indicates, however, in cases where the transfer of value to the recipient results from fraud or mistake, and where the recipient is unable to demonstrate a change of position, a minority of states withhold these defences. A simple illustration of the minority view would arise in a case where A, being indebted to bank B, mistakenly makes a payment to B intending the payment to actually go to C. The minority view would allow A to recover the mistaken payment from B. A defence of change of position would be available, however, if B had relied on the payment by releasing security it held to secure the repayment of A’s loan.

Rounding out the list of defences covered in Part IV, there is an illuminating discussion of the principles of limitation of actions and laches and two innovations in R3RUE, a defence of “Recipient Not Unjustly Enriched”<sup>51</sup> and a defence of “Equitable Disqualification” or “Unclean Hands.”<sup>52</sup> The former defence may appear redundant as the burden in a restitution claim is on the plaintiff to establish an unjust enrichment. The “No Unjust Enrichment” defence, however, is designed to state the principle applicable in unusual cases in which, for example, a claim to recover a mistaken payment is made out, but when the payment is viewed in the larger transactional context or relationship between the parties, the enrichment does not appear to be unjust. Consider, for example, one who mistakenly pays a statute-barred debt, not realizing that there is no longer a legal obligation to make the payment. This may appear to meet the requirements of the mistaken payment rule but, given the existence of the

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<sup>50</sup> *Ibid* at 558.

<sup>51</sup> *Ibid* at 481.

<sup>52</sup> *Ibid* at 487.

valid but now unenforceable debt, the retention of the payment is arguably not unjust.<sup>53</sup>

The defence of clean hands set out in section 62 draws on familiar notions of equity, of course, but as well from the notion, traceable at least back to *Moses*<sup>54</sup> that in a quasi-contractual claim, the defendant ought to be able to raise any equitable defence. An illustration of the application of the doctrine to a common law quasi-contract claim could arise in the context of a mistaken payment. Imagine, for example, that a mistaken payment is made for a corrupt purpose. Although the mistaken payment would normally be recoverable, the corrupt purpose may disqualify the payer from relief.<sup>55</sup> One risk with a defence of this kind, however, is that it might undo the important notion, referred to above, that the fact that a claimant is a party to an illegal contract should not in itself constitute an automatic bar to relief. This issue is discussed in the Commentary to section 63 at some length and the point is clearly made that the principal determination to be made with respect to a claim for benefits transferred under an illegal contact is whether the appropriate sanctions for violation of the prohibition should include “forfeiture of what would otherwise be the claimant’s entitlement to restitution.”<sup>56</sup> Where, as a general proposition, recovery would not be precluded, “[t]he relative culpability of the claimant and the recipient in the transaction between them will sometimes, but not always, be taken into account.”<sup>57</sup> It appears to be intended, then, that the gravity of the misconduct of the claimant may preclude recovery even in the case where no general disqualification exists.

Canadian readers may be particularly interested to see that the passing on defence continues to persist in American law and is restated in R3RUE. In the *Air Canada v British Columbia* case<sup>58</sup> La Forest J, inspired by American jurisprudence recognizing such a defence, had suggested in *obiter* that the defence might be applied to deny recovery against the Crown to a payer of an unlawful tax who has been able to shift the burden of the tax to a third party by, for example, simply raising the prices charged to third party customers. The passing on defence has been subjected to sharp criticism both in commonwealth jurisprudence and in the academic

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<sup>53</sup> For criticism of this result and the defence more generally, see Adam Rigoni, “A Sin of Admission: Why Section 62 Should Have Been Omitted from the Restatement (Third) of Restitution and Unjust Enrichment” (2011) 68 Wash & Lee L Rev 1203.

<sup>54</sup> *Supra* note 16.

<sup>55</sup> For an illustration, see R3RUE, *supra* note 1, vol 2, Illustration 10 at 493-94.

<sup>56</sup> *Ibid* at 489.

<sup>57</sup> *Ibid*.

<sup>58</sup> [1989] SCR 1161 at 1202, 59 DLR (4th) 161. See generally Michael Rush, *The Defence of Passing On* (Oxford, Hart Publishing, 2006).

literature on several grounds. First, it is difficult to reconcile the defence with the basic restitutionary principle that a mistaken payment should be recoverable and the fact that, as a general proposition, the law of restitution ignores whether or not a mistaken payer may have been able to recoup his loss in some way in dealings with third parties. As between the payer and the payee, the payment ought to be recoverable and it is not obvious that the Crown requires a special defence of this kind. Second, the defence is often criticized on economic grounds on the basis that it is difficult to determine with any degree of certainty who will bear the ultimate burden of a tax and accordingly, it is difficult to determine with precision whether or not the burden of the tax payment has truly been passed on. For reasons such as these, the defence has been flatly rejected in Australia.<sup>59</sup>

In *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*,<sup>60</sup> the Supreme Court of Canada abolished the defence for purposes of Canadian restitutionary law. In *Kingstreet*, the Court noted that the initial experience of Canadian courts with the defence indicated considerable difficulty in applying the defence in a consistent fashion.<sup>61</sup> True to its task of restatement rather than reform, R3RUE nonetheless restates the defence in section 64. The Commentary to that section, however, goes on to indicate the theoretically problematic nature of the defence and indicates that it is difficult to apply. Further, section 64 tries to restrict the availability of the defence to clear cases of passing on by limiting its scope to situations in which the clarity of the fact that the burden of the payment has been passed on to the taxpayer's customers, for example, is such that the monies, if returned by the payee to the payer, would plainly be recoverable from the payer, in a restitution claim by the customers. Whether this approach will significantly reduce the application of the defence in American law remains to be seen.

### 7. Terminological Issues and the New Title

Perhaps the most striking change from the 1937 *Restatement* to R3RUE is the change in title from "Restatement of Restitution" to "Restatement of Restitution and Unjust Enrichment." This is a change that requires an explanation and it does indeed receive one in the Commentary to section 1 of R3RUE.

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<sup>59</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd*, [2001] HCA 68, 208 CLR 516.

<sup>60</sup> 2007 SCC 1, [2007] 1 SCR 3 [*Kingstreet*].

<sup>61</sup> *Ibid* at 31.

The Commentary notes that use of the term “restitution” to refer to a liability based on unjust enrichment “has frequently proved confusing.”<sup>62</sup> The Commentary goes on to explain the adoption of the term “restitution” as the title for the 1937 *Restatement* of the following terms:

The former Restatement of Restitution (1937) adopted the name “restitution” for this topic because recognition of unjust enrichment leads, in most instances, either to the avoidance of a transfer or to an obligation on the part of the transferee for what has been transferred. Either remedy results in a form of “restitution” to the transferor. And yet the concepts of unjust enrichment and restitution (in the literal meaning of “restoration”) correlate only imperfectly.<sup>63</sup>

As the Commentary further explains, there are instances of liability, notably disgorgement of profits and other value acquired by wrongful conduct, which do not involve the restoration of something the claimant previously owned. Moreover, there are instances of restoration, such as rescission for misrepresentation, where, if the misrepresentee paid market value for the value transferred, no unjust enrichment has occurred. In the result, however, most of the “law of restitution” might more helpfully be referred to as the law of “unjust enrichment.” At the same time, the Commentary notes, the term “restitution,” no doubt as a result of the influence of the 1937 *Restatement*, is the term “most commonly employed throughout the common law world to refer to this set of legal obligations and their associated remedies, some but not all of which involve a literal restitution in the sense of restoration or giving back.”<sup>64</sup> The new restatement includes both “restitution” and “unjust enrichment” in its title “not to imply that they are correlatives, much less synonyms, but to convey as clearly and immediately as possible an accurate idea of the overlapping topics treated herein.”<sup>65</sup> In other words, unjust enrichment as R3RUE uses the term does not capture every instance of “restitution” and, on the other hand, literal “restitution” cannot always be explained by a literal interpretation of “unjust enrichment.” Using both terms seems intended, therefore, to capture all of the types of liability described in R3RUE.

It appears that throughout this discussion the term “unjust enrichment” is essentially being used by R3RUE to refer to the rules imposing liability and that “restitution,” at least in its narrow sense, is used to refer to the remedy available for unjust enrichment. Nonetheless, the Commentary also clearly makes the point that the use of the term “restitution” to refer to

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<sup>62</sup> R3RUE, *supra* note 1, vol 1 at 6.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* at 7.

<sup>65</sup> *Ibid.*



the substantive liability rules is not being abandoned. As the Commentary observes:

When used in this restatement to refer to a theory of liability or a body of legal doctrine, the terms “restitution” and “unjust enrichment” will generally be treated as synonymous [but that when terms are being used in a more narrow sense, this] should be clear from the context.<sup>66</sup>

For the American lawyer, then, it seems likely that this third branch of the law will continue to be known as the law as the “law of restitution” though it may well be that the change in title will lead to increased use of the phrase “unjust enrichment,” to refer to the substantive rules imposing restitutionary liability.

In essence, R3RUE simply continues to employ meanings for the terms “unjust enrichment” and “restitution that became conventional in America in the wake of the 1937 *Restatement* and, indeed, in due course throughout the common law world. This seems to me to be a wise choice by Kull and the Institute. There is little to be gained in my view, and much to be lost by adopting and attempting to promote novel definitions for these basic terms. Not every observer will agree, however. In particular, devotees of the later works of the late Peter Birks will no doubt be very disappointed by R3RUE’s failure to incorporate his suggestions for a dramatic restructuring of these basic concepts. Although Birks had accepted as given and worked with the American terminology in his first book on restitution,<sup>67</sup> late in life he came to recant all of his previous work<sup>68</sup> including that (in my view) rather fine book, and proposed new redefinitions of basic terminology and a new scheme for organizing at least a part of the existing law of “restitution.” Beginning in 1998<sup>69</sup> and culminating in his last work, *Unjust Enrichment*,<sup>70</sup> Birks proposed his

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<sup>66</sup> *Ibid.*

<sup>67</sup> Birks, *An Introduction*, *supra* note 30.

<sup>68</sup> Birks, *Unjust Enrichment*, *supra* note 25 at xii (“Almost everything of mine needs calling back for burning”).

<sup>69</sup> Peter Birks, “Misnomer,” in William R Cornish *et al*, eds, *Restitution, Past, Present and Future* (Oxford, Hart Publishing, 1998) c 1. Andrew Burrows, a leading English restitution scholar, unsuccessfully tried to persuade Birks that attempting to redefine the basic terminology was both unnecessary and likely to cause confusion to a profession acclimatized to the conventional American usage; see Andrew Burrows, “Quadrating Restitution and Unjust Enrichment: A Matter of Principle?” (2000) *Rest L Rev* 257. See also Andrew Tettenborn, “Misnomer – A Response to Professor Birks,” in Cornish, *ibid*, c 2. Birks apparently remained confident, however, that there existed a pressing need to change professional usage of the basic terminology of restitution.

<sup>70</sup> *Supra* note 25.

own new definitions of “restitution” and “unjust enrichment” and insisted that all English lawyers must adopt his new definitions for these terms.

Briefly stated, Birks’s new scheme was that “restitution” should be defined as referring to “disgorgement” and that “disgorgement” in turn be taken to refer both to the restoration of benefits transferred by the plaintiff to the defendant and the giving up of profits and other benefits secured from third parties. Restitution as thus defined could thus embrace both forms of benefit based restitutionary liability. So far so good, one might say, as this is pretty much consistent with American usage when used to refer to the entire content of this third branch of the law. Birks went on to insist, however, on two further definitional moves which substantially depart from American usage.

First, Birks insisted that “restitution” could never be used to refer to the substantive grounds for liability. That term must, in his view, refer only to the remedy and not to the substantive liability rules giving rise to the remedy of restitution. Second, he insisted that the term “unjust enrichment” must be narrowly construed to refer only to cases of enrichment by transfer of value from the plaintiff to the defendant such as in a mistaken payment case. The law of unjust enrichment properly understood, contained, in his view, only the core case of mistaken payment and all cases strictly analogous thereto. The implication of this pronouncement is that much of the “law of restitution” in the American sense must no longer be considered to be grounded on the principle against unjust enrichment. Birks’s new law of unjust enrichment, at the risk of some over-simplification, thus includes only some but not all of the old law of quasi contract with a bit of equitable rescission thrown into the mix. Thus, much of the content of the 1937 *Restatement* (and R3RUE) does not deal with “unjust enrichment” in his narrow sense.

It is part and parcel of Birks’s new view of the narrow scope of “unjust enrichment” that the remedy of restitution, when available outside narrow “unjust enrichment” is “parasitic” on other branches of the law. Liability in narrow “unjust enrichment” rests on its own theory of liability and is thus primary in some sense, whereas restitution for tort, for example, is secondary liability, that is, merely a remedy for a liability established in some other branch of the law, in this case tort. There are, in my view, a number of difficulties with the parasitic theory. As Daniel Friedmann has pointed out, it is not obvious that it captures accurately the history of tort law.<sup>71</sup> Further, it is not obvious how one should distinguish between

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<sup>71</sup> See Daniel Friedmann, “Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong” (1980) 80 Col L Rev 504.

primary and secondary sources of liability. More particularly, it is not at all clear how such a distinction could apply to restitution for breach of fiduciary duty where the law of substantive liability developed for the explicit purpose of providing restitutionary forms of relief.<sup>72</sup> From a theoretical perspective, the parasitic theory dictates that the rules for restitution must be a derivative of rules developed to provide compensation. But why must the rules for restitutionary relief be the same as those for the different objective of compensation? The parasitic “theory” rests on a simple assertion or *ipse dixit* to the effect that this must be so. Further, since not all torts give rise to restitution nor do all breaches of contract give rise to disgorgement, one might ask what is the natural home for the rules determining which torts and which breaches of contract give rise to these forms of restitutionary relief. One plausible answer, surely, is that the law of restitution which gathers together all the rules for awarding such relief might be that home. Fruitful analysis of the difficult question as to when restitutionary liability for profitable torts ought to arise might best be undertaken in the midst of an account of all the rules awarding such relief for wrongful conduct of various kinds. Some evidence of and support for this proposition might be the fact that the tort textbooks do not typically address these questions whereas the restitution books do.

Be this as it may, it must be said that it almost never makes any difference, in the real world, whether one considers restitutionary liability in the context of contracts and wrongs to be parasitic or not. The only situation that I am aware of in which an adherent of the parasitic theory might favour a solution to a real world problem that might differ from someone not afflicted by the parasitic theory arises in the context of waiver of tort. Where the tort at issue is one which contains as one of its elements the occurrence of an injury, as is the case with fraud for example, one must consider whether in a case where an injury cannot be demonstrated, a plaintiff targeted by the fraud might nonetheless be able to recover restitution for the value of the ill-gotten gains. A parasitic theorist would claim that such recovery is impossible because no tort has occurred. One who believes that restitutionary liability is not subject to the parasitic theory might take the view that just as is the case with the equitable fraud of breach of fiduciary obligation, the commission of a common law fraud might, at least in some circumstances, appropriately attract a restitutionary form of relief, even in the absence of compensable loss being suffered by

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<sup>72</sup> The idea that damages might be an available remedy for breach of fiduciary obligation is very much an afterthought. The rare cases awarding compensation for breach of fiduciary obligation such as *Nocton v Lord Ashburton*, [1914] AC 932, 83 LJ Ch 784 (HL) were generally considered to be exceptional, perhaps anomalous, and not in any sense primary.

its target.<sup>73</sup> Surely, the rational way to approach the analysis of this question is to ask, not whether one adheres to the parasitic theory or not, but, rather, whether the policies underlying disgorgement relief for breach of fiduciary obligation in the absence of loss also support that form of relief in the context of common law fraud. In short, the answer to a difficult question of this kind, whatever it might be, should be pursued on the basis of principle and underlying rationale rather than on the basis of an *ipse dixit* theory of the parasitic nature of restitution outside Birks's narrowly conceived law of "unjust enrichment."

Birks openly pressed his case for new definitions of "unjust enrichment" and "restitution" to the American Law Institute in his "A Letter to America: A New Restatement of Restitution."<sup>74</sup> Birks urged that "restitution" should never be used to refer to the substantive law of restitution. It must be used only to refer to the remedy. To use "restitution" to refer to the substantive doctrine was to ignore the "nursery school truth"<sup>75</sup> that a series beginning with contract and tort cannot end with the name of a remedy. The resulting misnomer of the 1937 *Restatement* had "wrecked the Scott and Seavey project in the 1930s."<sup>76</sup> He asserted that "we must not be indecisive in putting it right." With respect to the remedy of "restitution," however, it should be defined broadly to include both forms of gain-based recovery. He further urged the Institute that to adopt his narrow definition of "unjust enrichment" to refer only to mistaken payments and similar cases where benefits are transferred from plaintiff to the defendant. Accordingly, he proposed that the new Restatement either be narrowly restricted to cover only "unjust enrichment" in his sense and to be so titled or if it was to extend to cover all of those subjects covered within the 1937 *Restatement*, it should be considered to be a restatement of "unjust enrichment and other causes of restitution" (such as contract, tort and other wrongs, presumably) for which he proposed as a title "Restatement (Third) of Restitution: Unjust Enrichment and Other

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<sup>73</sup> Imagine, for example, that A, who is interested in purchasing Blackacre, is falsely told by B that he is acting as the Vendor's agent. A tells B he is willing to offer \$100,000.00 for Blackacre an amount fairly representing its market value. B tells A he will communicate the offer to Vendor. In fact, he offers \$80,000 to Vendor who accepts. B then disguises the transaction as a sale directly from Vendor to A for \$100,000.00 and pockets \$20,000. Arguably, A has suffered no loss. Should he nonetheless be able to recover the \$20,000.00 profit secured by B's deceit? See *Ward v Taggart* (1959), 336 P 2d 534 (Cal CA) (recovery in unjust enrichment even though unavailable in tort) *per* Traynor J.

<sup>74</sup> Online: (2003) 3:2 Global Jurist Frontiers 2 <<http://www.bepress.com/gj/frontiers/vol3/iss2/art2>>.

<sup>75</sup> *Ibid* at 20.

<sup>76</sup> *Ibid* at 19.

Causes.” Andrew Kull’s proposed title of “Restitution and Unjust Enrichment” was in his view unintelligible. It contained a “puzzle that is formed into a riddle.”<sup>77</sup> One might add, however, that the puzzle arises only if one agrees to adopt Birks’s strict new definitions of these basic terms. The Institute’s decision to persist with the conventional American terminology obviously involves a rejection of these proposals.

### 8. Conclusion

The bold experiment of the 1937 *Restatement* of inventing a new third branch of the law to stand alongside contract and tort has enjoyed enormous success. The three paradigms of promise enforcement (contract), compensation for injuries caused by wrongful conduct (tort) and benefit-based liability in restitution have provided a conceptual framework around which legal scholars (and the restatements themselves) have been able to hang the details of the entire private law of obligations. The three paradigms have also found a home in professional consciousness. My impression, drawn from my interaction with many members of the profession, is that litigators in particular quickly and virtually instinctively identify benefit-based liability issues as separate from contract and tort and that, by and large, they know how to go about finding an answer to their problem. This may be surprising, given that so few formal courses on restitution are given across the country with the result that the vast majority of lawyers have not studied restitution in depth. Nonetheless, I suspect that most law students are introduced to the basic paradigm of unjust enrichment in their first year courses on contract law. Across the common law world, there has been a flowering of scholarly writing on restitution as legal scholars in the various common law jurisdictions assimilated and drew upon the lessons of 1937 *Restatement* in their own scholarly work.

It is true that R3RUE stands firmly on the foundation of the 1937 *Restatement* and the scholarly writing that it inspired. Nonetheless, R3RUE is itself a stunning achievement, the credit for which is entirely due to its author and Reporter, Andrew Kull. The Reporter’s prodigious research, his mastery of this vast and complex body of law and his ability to craft elegant and accessible principles aptly summarizing the black-letter of tangled strands of doctrine have produced a restatement that is not merely a worthy successor to its 1937 ancestor but a very substantial leap forward in our understanding of the law of restitution and the interaction of its various components. From a Canadian perspective, and apart from matters of detail, the law of restitution as restated in R3RUE is equivalent

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<sup>77</sup> *Ibid* at 18.

in its essentials to the Canadian common law in this field. For Canadian lawyers, then, it is my view that R3RUE provides not only a useful exposition of the fundamentals of the Canadian law of restitution but, where it differs in detail, a fruitful set of suggestions for possible future directions in Canadian law. We are all very much in Kull's debt.

