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BOOK REVIEW

THE LAW OF RESTITUTION

BY PETER D. MADDAUGH & JOHN D. McCAMUS
(Aurora: Canada Law Book, 1990) 773 pages

In 1954, in *Deglman v. Guaranty Trust Co. of Canada*,¹ the Supreme Court of Canada rejected the "implied contract theory" and recognized the existence of the "principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff."² The importance of that decision was not immediately recognized in Canada, and many of the earlier decisions which invoked the principle of unjust enrichment did so in the most general terms. It was Dickson J.'s judgment in *Rathwell v. Rathwell*³ which significantly built on *Deglman* and sought to give content to the subordinate principles which form part of that general principle. As Mr. Maddaugh and Professor McCamus rightly conclude, such reasoning has helped to formulate "a distinctive Canadian jurisprudence" which, for example, has jettisoned the albatross of the concept of total failure of consideration. Maddaugh and McCamus in the *Law of Restitution* is a valuable juristic synthesis of the development of the common law in the courts.

Readers of the text will immediately become aware of how thorough has been the research of the authors. The footnotes at times overwhelm the text. It may be prudent in the next edition, and there will surely be one, to be more discriminating, drawing attention to the more influential decisions. In the introductory chapter, the authors note that the law of restitution may provide a unique opportunity for an interchange of ideas between Canada's two legal systems, given that "the theory of unjustified enrichment is now undeniably incorporated into the civil law of Quebec."⁴ It is

¹ [1954] S.C.R. 725.

² *Ibid.* at 728, Rand J.

³ [1978] 2 S.C.R. 436.

⁴ *Cie Immobilière Viger Lté v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67 at 75, Beetz J.

to be hoped that the next edition of this book will provide the juristic impetus for this interchange. Common lawyers have much to learn from the experience of civilian jurisdictions, not only in Quebec, but in continental Europe.

There are three Parts to the *Law of Restitution: Introduction, Remedies, and The Right to Restitution*. For an English reader, the comments in the *Introduction* on the distinctive contribution of the Canadian courts are most rewarding. Certainly, they have been much bolder than other Commonwealth jurisdictions in discovering the existence of a fiduciary obligation, and no better example can be found of this trend than in the judgments of three members of the Supreme Court of Canada in *Lac Minerals Ltd. v. Int'l Corona Resources Ltd.*⁵ "the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty." In Wilson J.'s view, "the distinction between the two causes of action as they arise on the facts of this case is a very fine one."⁶ The remedy of the constructive trust has also proved a most seductive siren in other areas, for example, as the elixir of disputes between former spouses and co-habitees. But to conclude that a constructive trust is imposed to prevent unjust enrichment is only to begin analysis, and it is incumbent on all common law courts to explain why it is appropriate so to do. Not all courts do so.

The second Part, *Remedies*, discusses not only the equitable remedies, such as the constructive trust, but the common law remedies, based on the old common counts, subrogation, and (oddly?) contribution and indemnity. There are also chapters on tracing at law and tracing in equity.

It is the third Part, *Right to Restitution*, which is the meat of the book. There are four principal topics: mistake, ineffective transactions, profit from wrongdoing, and officiousness. This last topic is somewhat unhappily named. Officiousness, as the authors are aware, is normally the kiss of death for any restitutionary claim, but the chapters, within the title of officiousness, are illustrations of situations where restitutionary claims have generally succeeded.

⁵ [1989] 2 S.C.R. 574 at 632.

⁶ *Ibid.*

The text is clearly written and the discussion of the case law both accurate and comprehensive. It is incumbent on any reviewer to conclude with some cautionary comments. This reviewer would suggest that it may be desirable in later editions to edit more severely the facts of the cases, and to be more discriminating in the extracts which are quoted from their judgments. Finally, it is not helpful in the footnotes to cite a chapter without the appropriate page reference: this is for the reader an inefficient exercise.

It is good to be able to welcome this text, which, I confidently predict, will become the authoritative Canadian text on the law of restitution.

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