Forty Years of Restitution: A Retrospective

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I. INTRODUCTION

The most remarkable development in Canadian restitution law over the past four decades was the very recognition of the subject as a third branch of the private law of obligations in addition to contract and tort. Although this development began to unfold in 1954, recognition was not achieved until 30 years ago with the ground-breaking decision of the Supreme Court of Canada in *Pettkus v. Becker*.

This retrospective begins with the Canadian reception of the thesis advanced by the American Law Institute in the *Restatement of Restitution* that vast bodies of common law and equity could be unified as a new branch of the law on the basis that they all exemplified forms of relief granted to prevent unjust enrichment. In addition to recognition of the unity of restitution law, a review of Canadian restitutionary jurisprudence over the last four decades plainly illustrates the proposition that adoption of the American unjust enrichment analysis facilitated a substantial rationalization and reform of Canadian restitutionary doctrine. To illustrate, this paper will survey developments in the context of a central topic for the law of restitution, the recovery of benefits transferred by mistake. Finally, it is impossible to avoid a consideration of the possible impact of the reasoning of the

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Forty Years of Restitution

Supreme Court of Canada in *Garland v. Consumers' Gas Co.* in which the court adopted a highly innovative and unprecedented analysis that some observers consider to have had the effect of simply overruling all prior law and replacing it with a civilian doctrine. The idea of starting all over again and "making the law up from scratch," however is not only profoundly inconsistent with the common law method, it renders the law, as recent cases illustrate, essentially unknowable.

II. CANADIAN RECEPTION OF THE RESTATEMENT MODEL

1. The American Law Institute's Restatement of Restitution

The great restatements produced by the American Law Institute dealt with well-established subjects or branches of the law such as contracts and torts. Exceptionally, however, the *Restatement of Restitution* had the bold ambition of establishing a new branch of American private law. Although the *Restatement* was an exercise in restating the existing doctrine, this restatement reassembled two large bodies of common law and equity, previously recognized as disparate fields, and unified them as a third branch of private law. The basic premise was that the three paradigms of benefit-based restitution, promise-based contract law and compensation-for-harms based tort law provide a conceptual framework on which to hang virtually the entire private law of obligations.

The groundwork for the *Restatement* had a close association with Harvard Law School. In 1887, Harvard Professor James Barr Ames, suggested that the large body of common law, known as quasi-contract, and a similarly large body of equitable doctrine concerning the constructive trust had, as their common objective, the remedying of unjust enrichment. In 1920, Harvard colleague Roscoe Pound made similar observations with reference to the concept of constructive trust. When the Institute added a *Restatement of Restitution* to its treatment of the private law of

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4. W.A. Seavey and A.W. Scott, "Restitution" (1938), 54 Law Q. Rev. 29, at p. 31.
obligations, it designated as the Reporters two Harvard Professors.\footnote{Austin W. Scott and Warren A. Seavey.}

The animating idea was that the nature of both quasi-contract and constructive trust had been obscured by their historical connection with contract and the law of express trusts. Liability in quasi-contract had been based on the implication of contractual obligations and was therefore constrained by contractual doctrine. Similarly, constructive trusts had been thought to rest on the implication of trust arrangements and, accordingly, were limited to breaches of fiduciary duty which were akin to breaches of duty by express trustees. In each case, they were properly considered to be obligations imposed by law which were independent of either contractual obligations or express trusts. The old myths of implied contract and implied trust had created much confusion in the law and were to be abandoned.

Illustration 1. The Restatement scheme: prying quasi-contracts and constructive trusts loose from their (false) homes in contract and trust to form a new subject.
The underlying principle of unjust enrichment was set out in section 1 in the following oft-quoted words:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.\(^8\)

The scope of restitution is often not appreciated by those unfamiliar with the subject. The following table lists the common law and equitable doctrines embraced by the *Restatement*.

**The Law of Restitution**

<table>
<thead>
<tr>
<th>Common Law (quasi-contract)</th>
<th>Equity (constructive trust and other equitable doctrines)</th>
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<tr>
<td>mistake</td>
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<td>informalty</td>
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<td>profits from breach of contract</td>
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<td>illegality</td>
<td>ineffective transactions</td>
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<td>discharge by breach</td>
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<td>mistake</td>
<td>undue influence</td>
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<tr>
<td>frustration</td>
<td>unconscionability</td>
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<tr>
<td>want of authority</td>
<td>mistake</td>
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<tr>
<td>anticipated contracts or gifts</td>
<td>matrimonial property</td>
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<tr>
<td>compulsory discharge of another's liability</td>
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<tr>
<td>necessitous intervention</td>
<td></td>
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<tr>
<td>self-serving intermeddler</td>
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</tbody>
</table>

Illustration 2. The contents of the law of restitution listed by their origins in common law and equity.\(^9\)

The *Restatement* included much equitable doctrine. Thus, fiduciary obligation, the principal doctrinal home for the constructive trust in English law, is a central component of

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9. The list is expanded, from the table of contents of the first *Restatement of Restitution*, to include categories of restitutionary liability that have subsequently been recognized to deal with analogous problems, including three topics — matrimonial property, profits from breach of contract and self-serving intermeddlers that have been included in the new third *Restatement of Restitution*, the final instalment of which was approved by the Institute at its meetings in May of this year. American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (Tentative Draft No. 7) (Philadelphia, American Law Institute Publishers, 2010).
restitution. But the Restatement also includes a large body of common law doctrine. Thus, it is an erroneous, if widely held, notion that “restitution” is simply a new name for “equity.” Further, we may note the parallels between the two lists. Mistake at common law can be paired with relief from mistake in equity. Duress at common law parallels the forms of coercion recognized in equity. Both lists include the recovery of benefits transferred under ineffective transactions. Both lists include doctrines which have as their object the lifting of profits secured through wrongful conduct. In common law, the doctrine of “waiver of tort” grants recovery of profits secured through tortious wrongdoing. In equity, the doctrines of fiduciary obligation and breach of confidence have a similar purpose.

Restitution is a very large and variegated body of doctrine. It covers a vast amount of material. The lists of cases in the standard treatises include several thousand citations. The doctrines are variegated in the sense that, although they can be said to be linked together by the unjust enrichment principle, the reasons for granting restitution are not identical from one category to another. So too, the rules for determining whether restitution is appropriate in each context differ markedly. Thus, the rules for recovery of mistaken payments set out tests for determining the kinds of mistakes that will ground recovery and various defences to such claims. The rules of duress identify the kinds of threats — including, in the modern cases, threatened breach of contract — that should ground recovery. These rules are quite unlike the rules defining the nature of fiduciary obligation. These rules, in turn, have nothing to say about restitution for benefits conferred in an emergency, under an ineffective transaction or as a result of the separation of cohabitants.

The materials gathered together in the first Restatement manifest two different measures of relief. Both measures can be said to be “benefit-based” in the sense that the rules awarding the relief require the defendant to turn over to the plaintiff a “benefit” unjustly retained. In some cases, the benefit in question has been obtained by the defendant from the plaintiff. A mistaken payment is an obvious illustration of this. Call these “subtraction” cases. In other cases, however, the benefit might be acquired by the defendant from third parties as a result of a breach of a duty

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10. For a more extended explanation, see M. McInnes, “The Equitable Action in Unjust Enrichment: Ambiguity and Error” (2007), 45 C.B.L.J. 253. It is true, however, that “restitution” supplanted much of the old category of equity. Though there is a restatement of trusts, there is no restatement of “equity.”
owed to the plaintiff. Profits secured by dealings with third parties by a defendant in breach of a fiduciary obligation owed to the plaintiff are an obvious illustration. Call these claims in the “profit measure.” In some contexts, such as breach of fiduciary duty, both measures are available. A victim of a breach of fiduciary duty can recover a benefit directly conferred on the defendant fiduciary as well as profits secured by the defendant in dealings with third parties.

A critical component of the Restatement model is that the constructive trust is viewed, not as a true or express trust, but as a remedy imposed to prevent unjust enrichment. The “trust” is a fiction enabling such relief. Once recognized as a remedy for unjust enrichment, it is obvious that the constructive trust remedy might be available in contexts other than breach of fiduciary duty.

2. Canadian Reception of the Restatement Model

The Supreme Court of Canada was the first Commonwealth court to adopt the American unjust enrichment approach. The first breakthrough occurred in 1954 in Degiman v. Guaranty Trust Co. of Canada. A nephew provided services to his aunt on the faith of her oral, and therefore unenforceable, undertaking that he would

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12. Interestingly, Reporters Seavey and Scott explained that where, for example, the profit measure is available to recover the profits of tortious wrongdoing “the accent may change from ‘restitution’ to ‘unjust enrichment.’” See, Seavey and Scott, supra, footnote 4, at p. 37. Many scholars and judges continue to use the term unjust enrichment to include cases that grant relief in the profit measure. However, the late Professor Peter Birks suggested that the term “unjust enrichment” ought not apply to relief in the profit measure and out to be restricted to a subset of subtraction cases. Followers of Professor Birks use the term in this rather unconventional way, often without clearly signalling to the uninitiated that this idiosyncratic meaning is intended. See, generally, P. Birks, “Misnomer” in W.R. Cornish, R. Nolan, J. O’Sullivan and G. Virgo, eds., Restitution: Past, Present and Future (Oxford, Hart Publishing, 1998), p. 1; P. Birks, Unjust Enrichment, 2nd ed. (Oxford, Oxford University Press, 2005). For criticism of this suggested transformation of the definition of “unjust enrichment” see A. Burrows, “Quadrating Restitution and Unjust Enrichment: A Matter of Principle?,” [2000] 8 R.L.R. 257.


14. For failure to comply with the Statute of Frauds, R.S.O. 1950, c. 371.
be compensated for his efforts by a transfer of real property to him by will. The court famously held that mere unenforceability of the agreement did not preclude a restitutionary claim for the value of the services he had provided. In the leading opinion, Rand J. opined that "The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff."\(^\text{15}\)

This embrace of the American theory of restitution was neither accidental nor uninformed. Rand J. graduated from Harvard Law School in 1912. James Barr Ames was the Dean as he entered first year. Rand studied "equity and quasi-contracts" with Roscoe Pound.\(^\text{16}\)

The unjust enrichment model was quickly adopted by Canadian courts in quasi-contractual claims.\(^\text{17}\) It was not until the 1980 decision in *Pettkus v. Becker*,\(^\text{18}\) however, that the Supreme Court of Canada adopted and applied the American remedial theory of constructive trust. The court imposed a constructive trust on a cohabitant who refused to share with his partner assets acquired through joint effort but held in his name, upon dissolution of their relationship. In *Pettkus*, the trust was unmistakably remedial in character. As Dickson J. explained, "The principle of unjust enrichment lies at the heart of the constructive trust."\(^\text{19}\) The Supreme Court of Canada has imposed such relief in the context of a breach of confidence\(^\text{20}\) and has also signalled its potential availability in a claim to recover moneys paid by mistake.\(^\text{21}\) There exists authority for its availability in a restitutionary duress claim,\(^\text{22}\) and to lift the profits from criminal misconduct.\(^\text{23}\)


\(^{18}\) *Pettkus*, supra, footnote 1.

\(^{19}\) Ibid., at p. 847 (S.C.R.).


\(^{21}\) Ibid., at pp. 649-652, La Forest J.

potential availability in the context of waiver of tort is now much discussed. In sum, the remedial constructive trust is now to be a well-accepted feature of Canadian restitutionary law.

In Pettkus, however for reasons unknown, Dickson J. saw fit to articulate the unjust enrichment principle in his own innovative terms as "an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment." The use of the term "deprivation" was presumably not intended by Dickson J. to simply overrule or abolish prior case law applying the profit measure of relief. As there is arguably no "deprivation" suffered in such cases, it might be thought that the unjust enrichment principle could no longer apply to them. It is unlikely that Dickson J. had such a dramatic rejection of the unjust enrichment approach in mind. Presumably, he simply was not addressing his mind to profit-measure relief. Nonetheless, some later courts have assumed, with unfortunate effect, that the Canadian version of the unjust enrichment principle only applies to a case granting relief in the subtraction measure.

Further, although Pettkus plainly recognized an innovative claim for a share of wealth created by joint effort during cohabitation, it unfortunately did not clearly articulate the elements of the claim or its underlying rationale. Thus, some observers and later courts have taken the view that in Pettkus, a new cause of action in unjust enrichment was created rather, than.

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as seems more likely to be the intention, a claim for a share of the value of jointly created wealth during cohabitation.

III. CONSOLIDATION AND DEVELOPMENT OF THE CANADIAN LAW OF RESTITUTION

Canadian reception of the Restatement unjust enrichment model initiated a period of remarkable growth and evolution of Canadian restitutionary law. A prime illustration is the central topic of the recovery of mistaken payments. A portrait of the law relating to the recovery of mistaken payments 40 years ago would reveal a doctrine plagued with complexity and confusion. The basic rule permitting recovery of moneys paid by mistake, as articulated in the leading Canadian case,\(^\text{28}\) required that first, the mistake be an honest one (even if careless), second, the mistake be “as between the parties” in the sense that the recipient of the moneys “must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it,”\(^\text{29}\) third, the mistake be as to a fact which if true would render the payer legally obliged to make the payment and fourth, that it is not inequitable for the defendant to retain payment.

The problems with this formulation are notorious.\(^\text{30}\) Although the first branch is both well-established and quite acceptable — carelessness should not preclude recovery — the second and third branches are simply nonsensical. The content of the second branch is obscure and appears to be a misguided attempt to impose some kind of contractual link between the payer and the payee. The third requirement has the unfortunate effect of precluding recovery of mistaken gifts. The fourth requirement was essentially an estoppel doctrine that had the unmeritorious effect of precluding all recovery in any case in which some detrimental reliance on the receipt of the payment had occurred.

In addition to these problems with the basic liability test, the traditional doctrine precluded all recovery if the mistake was one of law. The difficulties with this principle were also notorious. It was an ill-designed device to preclude recovery where the payer made the payment to settle a claim or demand made by the defendant even though aware of some uncertainty concerning the


\(^{29}\) Ibid., at p. 689 (D.L.R.).

\(^{30}\) For more extended treatment, see Maddaugh and McCamus, supra, footnote 23, at § 10:300.
defendant's legal entitlement. The rule was over-inclusive and precluded recovery in meritorious cases not of this kind. Accordingly, the “rule” had many exceptions and was unpredictable in its application.31

A scholarly consensus emerged that the key to unlocking more coherent doctrine would be adoption of the American defence of change of position which would more precisely protect the recipient’s interest in not being detrimentally prejudiced by the receipt of the payment. Under American law, a defence of change of position in a mistaken payment case would be available in all cases in which the recipient innocently suffered prejudice through a detrimental change of position as a result of the receipt, but only to the extent that prejudice had been suffered.

The first Commonwealth court to import this American idea was the Supreme Court of Canada in 1976.32 Relying, in part, on section 142 of the Restatement, the court recognized change of circumstances as a general defence to a claim for a mistaken payment where the recipient, relying on the receipt, made expenditures that it would not have otherwise have made. With the recipient’s reliance interest now plainly protected, the possibility of a more straightforward recovery rule emerged. If the defendant recipient did not suffer detrimental reliance, why not allow recovery? In particular, it would now be possible to jettison the unattractive second and third branches of the basic rule. Oddly, simplification of the liability rule in light of the availability of change of position defence occurred first not in Canada but in England where, in truth, the change of position defence had not been plainly recognized.33

In the 1980 decision, Barclays Bank Ltd.,34 Goff J. asserted that no existing, binding authority precluded him from modernizing the test for recovery. The new rule would allow recovery whenever the payment was caused by a mistake unless (a) the payer intends the payee shall have the money in all events whether the fact be true or

false or (b) the payment is made for good consideration or (c) the recipient has changed his position in good faith in reliance on the receipt. In this reformulated rule, the second and third branches of the traditional rule disappear and are replaced by a simple causation test. The fourth branch is replaced by the adoption of the change of position defence. Oversimplifying, a mistaken payment is *prima facie* recoverable unless the payment was made in order to settle a demand made by the recipient or in the performance of a contract or the recipient has suffered a change of position. The new simplified rule is suitably designed to protect the legitimate interests of both the payer and the recipient. An occasion for consideration of the *Barclays Bank* test by Canadian Supreme Court did not arrive until 2009 in the *B.M.P. Global* case,\(^{35}\) in which the court unanimously confirmed that the *Barclays Bank* doctrine, had indeed become the Canadian law on the point. The Supreme Court of Canada again took the lead, however, with the other major modern reform of the law of mistaken payments in its abolition of the mistake of law bar to recovery. In 1982, in his dissenting opinion in the *Nepean* case,\(^ {36}\) Dickson J. mounted a sustained attack on the deficiencies of the mistake of law rule and strongly urged that the doctrine simply be abolished. For Dickson J., the underlying rationale for the rule was that a payer who had voluntarily submitted to an honest claim, regardless of whether, in the payer's view, the recipient was truly entitled to the payment, could not successfully seek recovery of the moneys paid. Relief should be denied in such a case whether the payer's mistake was legal rather than factual in nature. Accordingly, the mistake of law doctrine should be abolished and replaced by a rule denying relief where a payment was made to settle a demand. Ultimately, Dickson J.'s views did prevail in 1989\(^ {37}\) in the *Air Canada* and *Canadian Pacific* cases. In the majority opinion of the court, La Forest J. opined that although he favoured abolition of the traditional mistake of law bar, he considered nonetheless that the bar should be preserved where the mistake in question related

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to the *vires* of a taxing statute in order to protect the public purse. Otherwise, where a taxing statute failed on constitutional grounds, allegedly ruinous liabilities might be thrust upon the government that had collected the unlawful taxes.

In *Air Canada*, La Forest J. also suggested that, in such cases, it would be appropriate to recognize a defence of "passing on" to preclude liability where the taxpayer had effectively passed on the burden on the tax to its customers by increasing the prices charged to them.\(^3\) For present purposes, it is sufficient to note that both of these *obiter* suggestions of La Forest J. were authoritatively rejected by the Supreme Court of Canada in its more recent decision in the *Kingstreet Investments* case.\(^3\) Canadian abolition of the mistake of law bar is now complete.

In a series of leading decisions, then, Supreme Court of Canada has reformulated the traditional mistaken payments rule and replaced it with a modern version which is stripped of the confusions associated with the traditional rule and provides a coherent basis for identifying fact situations in which recovery of mistaken payments should be allowed.

When one turns to consider the prospects for the recovery of mistakenly transferred value in other forms, such as services rendered in error or the mistaken discharge of another’s liability, a more complicated picture emerges. Less progress has been made. Both at common law and in equity, courts were reluctant to grant restitutionary claims of this kind. The reluctance to grant recovery for non-monetary benefits conferred by mistake arises, presumably, from the potential difficulty that results from the illiquid nature of the benefit. Moneys paid by mistake, in the absence of a detrimental change of position, can simply be restored to the payer without significant prejudice to the recipient. The recipient of a mistaken improvement to one’s land, however, may

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\(^{38}\) For a critique of these proposals, see, generally, Maddaugh and McCamus, *supra*, footnote 23, at §§ 22:300.10 and 22:300.50.

\(^{39}\) *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3, 276 D.L.R. (4th) 342. Although rejection of these special defences for the Crown is, in my view, sound, the decision in *Kingstreet* is not, in my view at least, unblemished. The decision goes on to develop a special "public law" doctrine that places claims against the Crown on a separate doctrinal footing. The uncertain scope of the doctrine, its uneasy relationship with existing doctrines of mistake and duress rendered these aspects of the decision regrettable. For an extended critique see J.D. McCamus, "Restitutionary Liability of Public Authorities in Canada" in C.E.F. Rickett and R.B. Grantham, eds., *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, Hart Publishing, 2008), p. 291.
not have freely chosen to invest his assets in acquiring the improvement in question. The owner is being forced to invest his assets in a "benefit" which may have no material value to him. In simple terms, the basic rule eventually recognized was that a mistaken improver of land could only recover the value of the improvement where a particular kind of mistake occurred — he believed that he owned the land in question — and, further, that the true owner engaged in devious conduct — being aware of the improver's mistake, she either encouraged or acquiesced in the making of the improvements.

A more modern view would identify cases in which the problem of forced investment is not present and grant recovery where to do so would prevent the unjust enrichment of the recipient. Further, a modern approach would not restrict recovery to a particular kind of mistake. Where the non-monetary benefit transferred is a discharge of another's liability, such as the mistaken payment of another's taxes, the forced investment problem is not present. If I accidentally pay your taxes, I have unquestionably conferred value upon you and you have been saved an expense that otherwise would have inevitably occurred. Nonetheless, under traditional doctrine, benefits in the form of discharging another person's liability would ground recovery only if the plaintiff had been compelled, in a very narrow sense of that term, to provide the benefit in question. Thus, if both the plaintiff and defendant were required by law to make a payment to a third party, typically the Crown, and as between the two parties the liability of the defendant was primary in some sense, the plaintiff could obtain recovery.\textsuperscript{40} The fact that one had mistakenly discharged another's liability would not ground recovery under this traditional rule.

One cannot yet report that a substantial modernization of the law relating to mistakenly conferred non-monetary benefits has been achieved. Nonetheless, some progress has occurred. As early as 1965, the Supreme Court of Canada allowed a claim for mistaken discharge of another's obligation. In \textit{Carleton (County) v. Ottawa (City)},\textsuperscript{41} the plaintiff municipality had paid for the care of an indigent person on the mistaken belief that the individual lived within the municipality. In fact, the indigent was resident in the neighbouring defendant municipality which therefore had a statutory obligation to provide for her care. Relying on the unjust

\textsuperscript{40} For discussion of the traditional doctrine, see Maddaugh and McCamus, \textit{supra}, footnote 23, at ch. 32.

enrichment principle, the court held that the conferral of such benefits under a mistake should warrant recovery.

In the analogous context of a mistaken discharge of a debt by a creditor, a similar result obtained in the *Dixdale Mortgage* case. The plaintiff lender mistakenly registered a discharge of a mortgage which it held as first mortgagee. A second mortgage had been registered prior to the discharge. In due course, upon the mortgagor’s default, the second mortgagee issued a notice of sale and sold the property. The first mortgagee sought repayment of the first mortgage debt in full from the proceeds. The Ontario Court of Appeal agreed. Laskin J.A. applied the causation test from *Barclays Bank* by analogy and concluded that the discharge had conferred a benefit upon the second mortgagee that it was unjust for the second mortgagee to retain.

Mistaken discharge of another’s debt or payment of their taxes are, however, easy cases. The problem of forced investment is simply not engaged on these facts. More difficult problems posed by mistaken improvements to property have not yet been subjected to a similar analysis. A rule based on the forced investments principle could apply to such cases. Where the improvements constitute necessary repairs or have been turned to account by the owner’s sale of the improved asset or could be sold without prejudice, to the owner, a compelling case for recovery is present. There are, indeed, some authorities pointing in this direction. A modern articulation of the governing rule in terms that accommodate the principle against forced investment is set forth in the third *Restatement*. It may well provide a useful model for future developments in Canadian law.

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46. *Greenwood, supra*, footnote 43; *Olchowy, ibid.*

(1) 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 to the extent that:

(a) specific restitution is feasible;

(b) the benefit is subsequently realized in money or its equivalent;
Beyond the law of mistaken transfers almost every aspect of restitution has been touched by similar modernizing trends. For present purposes, a few illustrations may suffice. In the context of ineffective transactions, the traditional doctrinal approach to transactions ineffective at common law is markedly different from the treatment in equity. Typically, one can recover benefits conferred under transactions which are unenforceable at common law because of informality, illegality, and the like. In equity, however, under a transaction voidable, for example, for undue influence or unconscionability, the plaintiff can only achieve restitution only by obtaining an equitable decree of rescission. Such relief is unavailable if the plaintiff is unable to make "restitutio in integrum," this being a traditional "bar" to rescission. As is well known, if the plaintiff is unable to restore, essentially in specie, the benefits the plaintiff has in turn received from the defendant, no rescission is available and thus no restitution is allowed to the plaintiff. The defendant simply retains the ill-gotten gain. There is no equivalent doctrine at common law.

It is not self-evident that such similar problems should be treated so differently. The Restatement approach of bringing the two subject areas together might reveal an anomaly of this kind and, perhaps, lead to its resolution. This has, indeed, recently occurred. In Rick v. Brandsema, the Supreme Court of Canada held, in an unconscionability case, that the inability to make restitutio should not preclude an action for the value of the benefit secured by the unconscionable arrangement.

One of the most difficult topics in restitution is the recovery of benefits transferred under illegal transactions. The basic rule is that a party to such a transaction who is party to the illegality is simply denied restitutionary recovery. An absolute denial of restitutionary relief in all such cases, however, is simply unacceptable. Accordingly, courts have developed a mystifying list of exceptions to the basic rule. The key to an effective modernization of these doctrines rests on a straightforward recognition of the possibility that in an appropriate case, a party

(c) the recipient has revealed a willingness to pay for the benefit; or
(d) the defendant has been spared an otherwise necessary expense.

The second subsection of section 12 restates the common law rule permitting recovery in cases where the recipient has not been demonstratively enriched if the recipient has engaged in devious conduct.

48. Though in a case where benefits have been received by the plaintiff, the defendant would enjoy a restitutionary counterclaim or set-off.


50. The traditional rule from Holman v. Johnson (1775), 1 Cowp. 341, 98 E.R. 1120.
who has committed an unlawful act may, nonetheless, be entitled to restitution. The Ontario Court of Appeal has recently adopted a modern restatement of the rule permitting restitutionary recovery for the guilty party where not precluded by that party’s “moral turpitude” or by the policies underlying the rule that renders the transaction illegal.\(^{51}\) The Ontario decision makes a valuable contribution to the growing international jurisprudence supporting reform of this kind.\(^{52}\)

IV. THE ROLE OF THE GENERAL PRINCIPLE AGAINST UNJUST ENRICHMENT

Few topics are more contentious than this. The role of the general principle against unjust enrichment in the original Restatement was, in part at least, to identify a unifying theme for this new third branch of the law and contrast the fundamental interest protected by restitution — avoiding unjust enrichment — with the fundamental interests protected by contract law — promise enforcement — and tort law — compensation for harms.\(^{53}\) The objective was one of “making clear the principles underlying this group and attempting to give to it the individual life and development which its importance demands.”\(^{54}\) In the Restatement, the principle also served to emphasize the independent nature of the theory of liability underlying restitutionary doctrines. It was the debunker of the misguided implied contract and implied trust theories.

To be sure, as the Reporters intimated,\(^{55}\) recognition of the true nature of restitutionary liability was likely to reveal anomalies in the existing law and suggest fruitful evolutionary changes in the law. In Canada, the unjust enrichment analysis has plainly had this effect. Rationalization and reform of restitutionary doctrine has often been embellished by Canadian courts with references to the general principle against unjust enrichment. This was true in Pettkus itself. The role of the general principle in facilitating reform of existing doctrine has been elegantly reaffirmed by Chief Justice McLachlin.\(^{56}\)


\(^{52}\) For an account of which, see Maddaugh and McCamus, *supra*, footnote 23, at § 15:700.

\(^{53}\) Seavey and Scott, *supra*, footnote 4, at pp. 31-32.

\(^{54}\) *Ibid.*, at p. 29.

\(^{55}\) *Ibid.*

In recent cases, the Supreme Court of Canada has suggested that the general principle may properly be considered to establish the elements of a *prima facie* case. Although this is, in itself, not a contentious point — Canadian courts have often applied the *Pettkus* test in this fashion — the reasoning of the court in *Garland* invented a novel analysis of the "juristic reason" aspect of the tripartite *Pettkus* test that seems destined to add unnecessary complexity to the analysis of restitutionary claims.

Under traditional Canadian, English and American restitutionary doctrine, the burden is on the plaintiff to establish a basis for granting relief. Those grounds, indeed, constitute the vast bulk of restitutionary doctrine, articulating the rules relating to the recovery of benefits conferred by mistake, under coercion of various kinds, by performance of ineffective transactions, as a result of undue influence, unconscionable conduct, breach of fiduciary duty, breach of confidence, in circumstances of necessitous intervention, and so on. As noted above, these doctrines are quite variegated. The detailed rules for recovery of mistaken payments, for example, have very little in common with the rules identifying the types of threats that amount to coercion or the types of duties that are imposed on fiduciaries or the rules relating to the recovery of benefits conferred under illegal transactions.

This pattern of the existing common law is, unsurprisingly, repeated in the new *Restatement*. The late Professor Birks famously referred to this as the "unjust factors" approach. In his latest work he argued for the abolition of the unjust factors approach (i.e., the existing common law) and its replacement by the civilian approach of a simple rule allowing recovery in the "absence of a basis" for the transfer. Although there is virtually no prospect that so radical a transformation of English or American law will occur, some Canadian followers of Birks hold that the Canadian "juristic reason" test — as reformulated in *Garland* — provides an opportunity to argue that Canadian law has made this "civilian turn." I have argued elsewhere that this is neither a necessary nor sensible reading of the intent of the *Garland* decision. Canadian Birks-ites, however, who favour this civilianization or Garlandization or Birksian reform of

restitutionary law will, no doubt continue to advocate that this is the preferred interpretation to be placed on the *Garland* decision. In *Pettkus*, Dickson J. restated the unjust enrichment principle in his own terms as requiring the plaintiff to establish a benefit to the defendant, a corresponding detriment to the plaintiff and no "juristic reason" for the transfer. No one could reasonably suggest that in doing so, Dickson J. was intending to replace all existing restitutionary law with his new principle. Quite evidently, he was articulating the general principle underlying this area of the area and reassuring his colleagues that the novel remedy he was proposing in matrimonial property cases was consistent with that principle.

The analytical model invented by Iacobucci J. in *Garland*, proposed a two-step analytical model for analyzing unjust enrichment claims. The first step places the burden on the plaintiff to establish the existence of a benefit, a corresponding detriment and no juristic reason for the transfer. To show no juristic reason, the plaintiff must prove that there exists no contract, no gift, no disposition of law or other valid common law, equitable or statutory obligation to justify the transfer. Once step one has been completed, the plaintiff will have a *prima facie* case. The second step is then undertaken with the burden on the defendant to rebut that *prima facie* case by drawing the court's attention to two factors, the "reasonable expectations" of the parties and "public policy" considerations. This *Garland* two-step analysis creates a number of practical problems for the parties and their counsel.

First, an unprecedented burden is placed on the plaintiff in step one to prove a negative proposition — that there exists no juristic reason for the transfer. Unless it is intended that the plaintiff will simply deny that there exists any juristic reason for the transfer without specifying any and the reasons for their non-existence, the burden is potentially an overwhelming one. A plaintiff can easily understand the obligation to establish that the benefit conferred on the defendant was not intended as a gift or transferred pursuant to the terms of an agreement. Much greater ingenuity will be required to conceive of all the possible reasons for there being a "disposition of law" or a common law, equitable or statutory obligation for the transfer of the benefit and, in each case, disprove their existence.

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59. In *Pettkus*, supra, footnote 1, of course, Dickson J. was essentially overruling a relatively recent Supreme Court of Canada decision denying relief in such cases. See *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367.
These concepts are very broad and vague in their ambit. The standards applied, including the various elements of the *prima facie* case and the step two analysis of "reasonable expectations" and "public policy" are inherently open-textured. A major practical problem with the analytical model, then, is that the vagueness of the central concepts employed create a remarkably uncertain and difficult-to-articulate jurisprudence.

If the plaintiff truly is to plead and disprove the existence of all conceivable juristic reasons for the transfer this will be very helpful to an unimaginative defendant but it is unusual, to say the least, to impose on the plaintiff the burden to articulate all or most of the possible arguments to be made by the defendant and rebut them as an opening move in the analysis of a claim. Where, for example, the plaintiff has made a payment to the defendant by mistake, it would seem much more sensible simply to require the plaintiff to plead and prove that a mistake had occurred.

As a practical matter, then, it is not surprising that in cases where plaintiffs can identify existing authorities that support the claim they wish to advance, they tend to rely on that existing doctrine and explain affirmative reasons why they think they should be entitled to relief. It has also become common practice, however, to couple that analysis with a formulaic argument in terms of the *Garland* two-step in order to ensure that all bases are covered. Similarly, the defendant who can find a defence on the existing authorities tends to rely on that existing defence and then, out of an abundance of caution, adds step two of the *Garland* analysis and identifies whatever arguments based on "reasonable expectations" or "public policy" that the defendant can concoct whether or not they find any support in the existing doctrine. In many cases, then, the *Garland* two-step analysis does not add much value. It simply creates unnecessary complexity. Even in cases in which the plaintiff seeks to step beyond the existing doctrine, surely the traditional methods of common law analysis of relying by analogy on authorities dealing with similar fact situations or identifying deficiencies in the existing rules would be preferable to simply "making up the law from scratch" which, as I will suggest below, is a risky business indeed.

More deep-seated objections to the proposal that all existing law be replaced by the *Garland* version of the unjust enrichment principle can only be briefly sketched here. A critical difficulty is that it confuses the role of underlying principle with that of the rules for granting restitution in particular contexts. This is a
category mistake that one would not make in the better-known branches of private law, contract and tort. Professor Swan, for example, believes that the underlying principle or objective of contract law is to give effect to the "reasonable expectations of the parties." No one would suggest abolishing the existing rules of contractual liability and replacing them with that principle as the new rule.

A Birks-ite might argue that Garland should be considered to accomplish for the law of restitution what Donoghue v. Stevenson accomplished for the law of negligence. The analogy is misconceived. Oversimplifying the history, Donoghue v. Stevenson unified a body of seemingly disparate doctrine which, as the House of Lords recognized in that leading case, dealt with the same kind of claim — claims for compensation for injuries caused by negligent conduct. The policy analysis — that is, the reasons for imposing liability — underlying each of the previously disparate claims was the same — the imposition of liability for harms caused by careless conduct. It would not be suggested, however, that different factual categories of negligence claims are different causes of action resting on distinct policy grounds. One could not plausibly argue, however, that the policy grounds underlying all of the variegated body of restitutory claims doctrine are identical. The policy reasons for granting recovery of a mistaken payment are different from those for granting recovery of benefits conferred in response to an emergency. Those underlying rescission for breach of fiduciary duty are different from those underlying the recovery of benefits secured by duress. The rules relating to the various kinds of restitutory claims are also different. Even within the context of ineffective transactions, for example, the rules relating to the recovery of benefits conferred under illegal transactions differ from those conferred under

60. A. Swan, Canadian Contract Law, 2nd ed. (Markham, LexisNexis Canada, 2009), ch. 1.3.
62. Indeed, the more appropriate analogy to restitution is tort law more generally, a family of different types of claims unified by a fundamental principle or objective — compensation for harms. See S.A. Smith, "Unjust Enrichment: Nearer to Tort than Contract" in R. Chambers, C. Mitchell and J. Penner, eds., Philosophical Foundations of the Law of Unjust Enrichment (Oxford, Oxford University Press, 2009), at p. 208 ("The various forms of unjust enrichment resemble torts in their heterogeneity").
63. For a brief account, see L. Klar, Tort Law, 4th ed. (Toronto, Carswell, 2008), pp. 157-160.
64. The precise nature of those policy considerations are, of course, a matter of continuing debate and analysis.
transactions vitiated by informality, mistake, and so on. To pretend that each of the differing types of claims bought together as the law of restitution are merely instances of the application of a single cause of action or rule is a recipe for deepening confusion and uncertainty in restitutitory jurisprudence. *Donoghue v. Stevenson* simplified and rendered more accessible and easily applicable a body of doctrine that had been needlessly complex. *Garland*, if interpreted as a radical overturning of all prior law, would have the opposite effect.

V. THE FUTURE: REASONED ELABORATION AND REFORM OF THE EXISTING JURISPRUDENCE OR “MAKING IT UP FROM SCRATCH”?

Looking back over four decades and more of Canadian restitutitory jurisprudence, one can observe very significant progress and reform of various aspects of restitutitory doctrine. The pace of change has been more intense in the law of restitution than in other aspects of private law. One may attribute this heightened level of innovation to the reasons articulated by the *Restatement’s Reporters*. Little studied or understood until well into the 20th century, restitution had been neglected by the academic community. In comparative terms, over the last five decades or so, the Supreme Court of Canada has played a leading role in adopting the American unjust enrichment analysis and applying it to Commonwealth restitutitory doctrine with beneficial results.

As one looks to the future, however, one cannot assume that Canadian restitutitory doctrine will continue to evolve in a sound fashion, nor that Canadian jurisprudence will maintain a leadership role internationally in the field. The principal obstacle to continued reasoned elaboration and reform of Canadian restitutitory doctrine is the view, advanced by Canadian Birks-ites, that the *Garland* decision is to be read as a radical restructuring of the Canadian restitutitory doctrine which has the effect of replacing all prior Canadian common law with what is essentially a civilian rule to the effect that recovery will simply be granted in the absence of a juristic reason (or “basis”) for the transfer of value. On this view, then, one simply ignores existing jurisprudence and analyzes restitutitory problems on the basis of the *Garland* two-step analysis. Rather than engage in a reasoned

elaboration and reform of the existing jurisprudence, one simply ignores it and moves on to “make up the law from scratch.” This is an uncharacteristic way for the common law to proceed to develop new doctrine and, I would suggest, a rather risky venture. To be sure, there are now decisions of Canadian courts in which judges appear to simply adopt this radical approach to reasoning in restitutionary cases. One must ask, however, whether this is desirable or whether a more conservative approach — employing the unjust enrichment analysis as a basis for filling in gaps and modifying existing doctrine — is a surer path to sound evolution of Canadian restitutionary doctrine. Recent authorities applying the Garland two-step analysis illustrate the potential risks of the radical approach.

The Garland case itself invented new and, arguably, quite unsatisfactory doctrine through application of the “reasonable expectations” factor in step two of the analysis. Under traditional principles, Garland involved a claim for moneys paid under mistake or, alternatively, under an illegal contract term. Under the mistake analysis, the fact that the mistake is one of law rather than fact would no longer preclude recovery, and it would become material to consider whether the defence of change of position would have been available to the defendant on the basis that the moneys collected from the plaintiff class had been disbursed to its customers through reduced rates charged for natural gas under the rate scheme approved by the Ontario Energy Board. The court rejected the change of position defence on the basis that the defendant utility had engaged in criminal misconduct. This is a possible view and would lead to the conclusion that the claim should enjoy success. Another possible view is that the approved rate structure did give rise to a change of position defence, in which case the claim would be completely denied. Iacobucci J. went

66. Professor Burrows has convincingly argued that the rejection of the existing law and its replacement by the civilian “absence of basis,” proposed by Birks is both inappropriate and unnecessary. See A. Burrows, “Absence of Basis: The New Birksian Scheme” in A. Burrows and A. Rodger, eds., Mapping the Law: Essays in Memory of Peter Birks (Oxford, Oxford University Press, 2006), p. 33. (“... the best approach is to stick with what we know by continuing to apply the common law approach, while using the Birksian scheme as a cross-check in difficult or novel cases.”) at p. 48. See also, K. Barker, “Unjust Factors or Absence of Legal Ground? Starting Points in Unjust Enrichment Analysis” in C.E.F. Rickett and R.B. Grantham, eds., supra, footnote 39, at p. 173.

67. When stated as an absolute bar, however, no matter how “innocent” the defendant might be, it is not a view with which I agree. See J.D. McCamus, “Rethinking Section 142 of the Restatement of Restitution: Fault, Bad Faith, and Change of Position” (2008), 65 Wash. & Lee L. Rev. 889.
further to invent a new defence of "reasonable expectations" which protected the defendant, on the basis that it reasonably believed it should follow orders of the Ontario Energy Board. The defence was available, however, only until such time as the lawsuit was commenced by the plaintiff class because, in theory at least, at that point the expectations of the defendant were no longer considered to be reasonable. The claim was thus split in two, with partial recover only. This is a completely novel doctrine which leads to an indefensible proposition that one can retain moneys acquired by criminally wrongful conduct provided that one reasonably believed that one was acting innocently, even in the absence of any detrimental reliance on the receipt. Thus, even if the moneys in question were sitting in the defendant’s savings account, the reasonable expectations defence would succeed.

In Pacific National Investments Ltd. v. Victoria (City), the Supreme Court of Canada wrote new law in deciding, if indeed this is what the court decided, that generally speaking, restitutionary recovery will be granted for the value of benefits conferred on public authorities who have acquired them under agreements which are *vires* the authority. Although I quite agree with this conclusion and its implicit rejection of *Sinclair v. Brougham* some aspects of the reasoning are rather unfortunate. Thus, in the course of analyzing the problem, the Supreme Court of Canada indicated that it was significant that both parties in this case suffered from a "common mistake" (i.e., the mistaken belief that the agreement in question was *intra vires*) and that the result in such a case might well be different in cases where the parties did not suffer from such a "common mistake." This unfortunate suggestion is not to be found in prior law. Thus, if the defendant municipality was not mistaken but appreciated, in fact, that it was behaving in an unlawful manner, this surely would only strengthen the plaintiff’s claim for restitutionary relief. There is therefore no need to establish that the defendant was mistaken. Turning to consider the plaintiff’s position, if the plaintiff appreciated that the defendant was acting unlawfully but complied with the defendant public authority’s wishes only because the plaintiff felt it had no option

68. If analyzed as an illegality problem, the claim would enjoy complete success on the basis that the plaintiffs were victims of the illegality unless a more modern view was taken as to the defences available to a defendant in such circumstances. Again there would be either full recovery, or none at all.


but to do so, the plaintiff’s claim for recovery would only be strengthened.\textsuperscript{71} In other words, it is simply not the case that a common mistake is either required by prior authority or, indeed, sensible in the circumstances. The reasoning in this case strongly suggests that the \textit{Garland} two-step analysis invites speculation by the court as to what the rules might be, in the absence of any consideration of prior authority and, indeed, with respect to circumstances not present in the dispute to be resolved.

Further, a reluctance to apply existing doctrine is likely to lead courts to ignore or forget the wisdom and/or principles developed in the prior law. Thus, in the existing law of mistaken payments, it is well established that one cannot recover the moneys paid under an existing contract unless it can be established that the contract in question is itself rendered unenforceable by virtue of the mistake.\textsuperscript{72} In a recent case,\textsuperscript{73} a trial judge simply applied the \textit{Garland} analysis to a mistaken payment claim and missed this problem.

These examples can be multiplied. The suggestion that, as a general matter, the existence of a statutory scheme may constitute a “disposition of law” is likely to mislead. Thus, in another trial decision,\textsuperscript{74} a claim for mistaken improvements to land was dismissed for the novel reason that the land titles legislation constituted a juristic reason for the transfer of the improvement to the purchaser of the land without compensation. There might be, in particular circumstances, perfectly adequate reasons to deny such a claim, but this is surely not one of them. A valid restitutionary claim against the owner of land would not be lost because of failure to register the claim against title in the land titles office.

In short, the old adage that cases are best decided when the existing precedents dealing with similar matters are examined is generally good advice and it is much to hoped that this traditional method of the common law will not be ignored in the vast body of restitutionary jurisprudence. From this perspective, some comfort may be drawn from a recent case in which the Supreme Court of Canada indicated that the “policy considerations” advanced by the defendant in the second stage of the \textit{Garland} two-step analysis should be drawn from the existing law.\textsuperscript{75} Even more reassuring,

\textsuperscript{72} \textit{Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.}, supra, footnote 34.
\textsuperscript{74} \textit{Olchowy}, supra, footnote 45.
however, is that in two leading recent cases, the Supreme Court has simply ignored the *Garland* two-step analysis and employed the more traditional methods of the common law while, at the same time, extending restitutory doctrine in new directions. In each case, the Supreme Court of Canada made an important and, in my view, very welcome adjustment to existing doctrine.

In the first, *B.M.P. Global*, the Supreme Court of Canada analyzed a central problem for the law of restitution, the granting of recovery of moneys paid by virtue of a mistake. As noted above, the court embraced a modern reformulation of the mistaken payment rule and applied it to a difficult problem relating to recovery of moneys paid by a drawee bank on a forged cheque. In reaching this conclusion, the court applied the traditional methods of common law analysis. The court examined the existing authorities with some care, considered the criticisms of the existing doctrine that have been advanced over the years in the law review literature and rendered a decision which, in my view at least, is entirely satisfactory. No reference was made to the *Garland* two-step. A similar approach was taken in *Rick v. Brandsema*. As noted above, in this important decision, the Supreme Court of Canada essentially obliterated the traditional distinction between the treatment accorded to restitution under ineffective transactions at common law and in equity. These cases strongly suggest that, notwithstanding some academic views to the contrary, the Supreme Court of Canada remains inclined to begin its analysis of a restitutory problem by examining the existing authorities and their deficiencies.

Predicting the future course of private law is not for the faint of heart. The future course of Canadian restitution law is, as a result of the controversy concerning the role of *Garland*, now most unclear. I do believe that there exists a risk that adventurous applications of the *Garland* two-step will generate a bewildering body of Canadian restitution law. If confined to its proper role of informing reasoned elaboration and reform of the existing doctrine, however, the principle against unjust enrichment — even in its *Garland* two-step version — may stimulate continued progress on the path to a more coherent body of rules for granting restitutory relief.

75. *Kingstreet Investments*, supra, footnote 39, at para. 38, Bastarache J.
77. For discussion of these aspects of the decision, see *McCamus*, supra, footnote 35.