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**Restitution as an Alternative to Damages in Contract and Tort**

John D. McCamus  
*Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca*

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Restitution as an Alternative to Damages in Contract and Tort

John D. McCamus

A. INTRODUCTION

The availability of restitutionary relief as an alternative to the claim for damages in the context of breach of contract and tortious wrongdoing, though not as widely understood within the profession as it might be, constitutes a potentially very important weapon in the litigator’s remedial arsenal. The principal objective of this paper, then, is to familiarize the reader with some basic ideas about the law of restitution and, more particularly, the restitutionary remedies available for breach of contractual and tortious duties. More particularly still, the objective is to focus attention on remedies, often now referred to as relief in the “disgorgement” measure, which have been available in the context of tort law and, indeed, in the context of other forms of wrongdoing such as breach of fiduciary obligation, for centuries but which have been only recently recognized as being potentially available in the breach of contract context. Disgorgement relief essentially involves awarding the plaintiff the bene-

* John D. McCamus is Professor of Law and University Professor at Osgoode Hall Law School, York University in Toronto.

fits secured by the defendant wrongdoer through wrongful conduct. Disgorgement relief will be attractive to the plaintiff, obviously, where the benefits secured through the wrongful conduct offers a measure of relief which is more generous to the plaintiff than a claim for damages measured by the loss sustained by the plaintiff as a result of the wrongful conduct. Disgorgement may also be an attractive form of relief if the claim for damages suffered is, for some reason, unavailable to the plaintiff. Any examination of the civil remedies available to the victim of wrongful conduct, then, should include an assessment of the possibilities for restitutionary relief.

Although recognition of the utility or viability of "restitution" or "unjust enrichment" as the third branch of the law of obligations (in addition to contract and tort) has occurred within the last several decades in Canadian common law, it nonetheless remains the case, I fear, that the nature of the subject and its basic architecture is not widely understood within the legal profession. Although courses on restitution are offered in a number of Canadian law schools, this is not invariably the case. Moreover, such courses are certainly not mandatory for students. Accordingly, the typical law school graduate will not have studied the subject and, when first encountering its relevance in practice, is likely to find the material somewhat unfamiliar. The doctrines which have been drawn together to form the law of restitution are often rather complex. The terminology in which concepts are expressed often still reflect their medieval origins. Further complexity is introduced by recent controversies concerning the meaning of central concepts such as "restitution" and "unjust enrichment." In short, working with restitutionary doctrine poses challenges that are not present to the same degree or not present at all when working with the more familiar doctrines of contract and tort. Nonetheless, the field is not impenetrable. Indeed, the basic objective of the recognition or development of the subject was to render the field more accessible and understandable. To some degree, that objective has been attained in recent years in common law jurisdictions. At the same time, on an occasion such as this, it is probably still desirable to begin a discussion of this kind by informing or reminding the reader about the basic architecture of this subject. The next two sections of this paper are devoted to this task. We will then turn to an examination of disgorgement in the context of tort and contractual breach.
B. BACK TO BASICS: WHAT IS THE LAW OF RESTITUTION?

At the risk of some over-simplification, it may be said that in the past, professional learning concerning the enforcement of promises was organized around the names of the medieval writs in which such claims (and, indeed, other claims) could be brought; the transition to a period in which these materials were ordered around a modern and more or less coherent conception of contract law began in the early nineteenth century. Thus, there is little in Blackstone’s magisterial mid-eighteenth century treatise, *Commentaries on the Law of England,* that would be familiar to or accessible to the modern student of contract law. The transformation of contract law into its modern shape was very much a nineteenth century exercise. The first treatises on contract law appeared early in that century. More academic works by Anson and Pollock appeared in 1876 and 1879.

Recognition of the law of torts as a second branch of the law of obligations came later. The first treatise on the law of torts, as such, was published in 1860. The general tenor of professional opinion was reflected in a sceptical review by Oliver Wendell Holmes, Jr. who suggested that “tort is not a proper subject for a law book.” Sixteen years later, Pollock wrote an open letter to Holmes, with whom he was on friendly terms, which was published as the preface to his own treatise on tort law. In it, he asserted that “the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts — that this is a true living branch of the Common Law, not a collection of heterogeneous instances.” As a result of the efforts of Pollock, and others, the law of torts took its place in due course beside the law of contracts as the second grand division of the common law of obligations.

More importantly for present purposes, the law of unjust enrichment or, as it is commonly labelled, the law of “restitution,” did not emerge until the first half of the twentieth century in the United States. It gained acceptance more recently in Canadian common law, and more recently still in England and Australia. The law of restitution was given its mod-

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ern form by the American Law Institute (and its reporters on this subject, Harvard Professors A.W. Scott and W.A. Seavey) which published the Restatement of Restitution in 1937 as one of a series of restatements on the private law of obligations including the familiar restatements of contract, tort, and property law. The restatements constituted an attempt to provide an authoritative but informal source of doctrine in each subject area in the hope of contributing to greater consistency of doctrinal development and application in the various state courts. The restatements adopted the format of restating the law in propositional form, followed by analytical discussions and illustrative examples of the application of each principle. The restatements might be said to be informal codes. They are of considerable influence in shaping American private law.

Although the Restatement of Restitution was essentially an exercise in restating existing private law doctrine, it was nonetheless a work of remarkable ingenuity. The foundational idea upon which the Restatement was constructed had been articulated by American legal academies in the decades preceding publication of the Restatement. As early as 1887, then Harvard Professor James Barr Ames had concluded that large bodies of common law doctrine, traditionally referred to as the law of quasi-contract, and a similarly expansive body of equitable doctrine much of which is centred on the use of the so-called constructive trust, had much in common and, in particular, appeared to have as their objective the remedying of unjust enrichment? The important step taken by the Institute, then, was to implement this insight and include Restitution in its program of restating the common law.

In the Restatement of Restitution, then, the common law of quasi-contract and the equitable doctrines of constructive trust were restated in the form of a new legal subject. These bodies of doctrine had much in common in the sense that they dealt with similar types of fact situations, even though, from a professional prospective, these collections of cases were considered to be located in the quite distinct and different doc-

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trinal domains of common law and equity. The two bodies of doctrine also had in common a history of being rather neglected by legal scholars and writers. In the modern private law treatises, quasi-contract typically received peremptory treatment in treatises on contract law. Constructive trust was afforded similar treatment in the books on the law of trusts. It was the insight of Seavey and Scott, and of those such as Ames who had preceded them, that these subjects had little in common with contract and trust, respectively, but much in common with each other. As they later wrote, "[B]ecause of the way in which the English law developed, a group of situations having distinct unity has never been dealt with as a unit and because of this has never received adequate treatment." The Restatement of Restitution was undertaken "for the purpose of making clear the principles underlying this group and of attempting to give it the individual life and development which its importance demands." The creation of a restatement for this new field, then, would not only provide a service for the profession by restating the doctrine in a more accessible and coherent form, it would facilitate the development of the field and reduce the prospect of the two bodies of doctrine reaching "different results upon the same set of facts." In the opening sections of the Restatement of Restitution, the authors attempted to identify the underlying principles of the entire field. The central principle, set out in Section 1, is the principle against unjust enrichment:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

The Restatement then proceeds to restate various substantive rules of quasi-contract and equity that are considered to rest upon the principle against unjust enrichment. From quasi-contract are drawn doctrines relating to the recovery of monies paid under mistake and fraud, under duress, in an emergency, under contracts rendered ineffective by various doctrines of common law, and benefits acquired by committing torts. Further, the rules relating to the recovery of other benefits conferred in the form of goods and services or in the discharge of another's liability in similar circumstances are restated. From the equitable side of the ledger are drawn doctrines relating to equitable relief from mistake, fraud, and

8 W.A. Seavey & A.W. Scott, "Restitution" (1938) 54 Law Q. Rev. 29.
9 Ibid.
10 Ibid. at 40.
11 Supra note 5 at 12.
coercion; from breach of fiduciary duty and breach of confidence; and the restitution of benefits conferred under transactions ineffective for equitable reasons.

The selection of "restitution" as the name for the new subject appears to have been a matter of some controversy at the inception of the Restatement. The controversy continues to the present time. There is some feeling that "unjust enrichment" more accurately captures the central theme or structure of the subject. Indeed, when initially presented to the Institute for approval, the Restatement bore the title Restatement of Restitution and Unjust Enrichment. The deletion of the latter phrase appears to have been made by the executive committee and the reporters as an editorial matter. The misfit between the ordinary understanding of "restitution" and the contents of the Restatement was, however, apparent from the beginning. As Seavey and Scott themselves noted, "restitution" connotes a "right to recover back something which one once had." The rules brought together in the restatement cover a broader range of situations than this. Indeed, in explaining that there are many cases of restitution of benefits acquired through tortious wrongdoing where the plaintiff will recover more than he lost, Seavey and Scott observed that in such cases "the accent may change from 'restitution' to 'unjust enrichment.'" Thus, if A steals a thousand dollars from B and then invests the money successfully, B may recover the investment from A in a restitution claim, even though the investment cannot be said to be something which B "once had." This may be a case of "unjust enrichment," one might say, but not really an instance of "restitution." Again, Seavey and Scott explained that "this injects an element of punishment, or perhaps compensation for the risk to which the complainant was unwillingly subjected." In the light of current controversies, it is interesting to note that Seavey and Scott here use the term "unjust enrichment" to refer to an enrichment (the benefit acquired through breach of duty) which was not previously held by the plaintiff. Interestingly, some modern writers have argued that the term "unjust enrichment" ought to be restricted to a subset of those cases in which restitutionary recovery is sought of

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14 Supra note 8 at 29.
15 Ibid. at 37.
16 Ibid.
benefits actually transferred from the plaintiff to the defendant.\textsuperscript{17} It is important to note that the doctrines brought within the four corners of the Restatement of Restitution include cases of unjust enrichment in the Seavey and Scott sense in which fiduciaries are held liable to disgorge benefits acquired through breach of fiduciary obligation even though the profit is not one which the plaintiff could or would have made. In the language of the Restatement, then, the liability of fiduciaries and other wrongdoers to disgorge profits obtained through breach of fiduciary obligation was merely one illustration of the application of the general principle against unjust enrichment.

The re-conceptualization of constructive trust as a remedy for unjust enrichment represented a marked departure from English doctrine. Under the English view, constructive trust is a legal concept associated principally, though not exclusively, with breach of fiduciary obligation. It is for this reason sometimes said that the English view of constructive trust is that it is a substantive institution — a trust — rather than, as under the American view, merely a remedy. If the concept of constructive trust is essentially restricted to fiduciaries or, we might say, “near-trustees,” it remains feasible to think of the law of constructive trusts as being intimately related, at least by analogy, with the law of express trusts. Once pried loose, however, as in the Restatement, from its intimate connection with fiduciary obligation and treated as a remedy for unjust enrichment, it becomes conceptually feasible to impose the constructive

\textsuperscript{17} See for example L.D. Smith, “The Province of Law of Restitution” (1992) 71 Can. Bar Rev. 672. Smith, following Birks, would subdivide the materials included in the Restatement into two separate subjects: autonomous unjust enrichment (including most of the old law of quasi-contract) and restitution for wrongs (including inter alia, fiduciary obligations). Smith would then reserve the term “unjust enrichment” for the former category, which would consist only of claims to recover benefits transferred from plaintiff to defendant in circumstances where the defendant has not committed a “wrong.” The distinguishing feature of restitution for wrongs is that the restitution claim is allegedly dependent on the finding of a “wrong” by the defendant according to some other body of doctrine (e.g., in the case of fiduciary obligation, presumably, “equity”). Cf. A. Kull, supra note 13 at 1222–26, rejecting this type of suggestion as “not logically compelled ... and it obscures the underlying unity of restitution’s reason and function across all of its factual settings” at 1223. See also D. Friedmann, “Restitution for Wrongs: The Basis of Liability” in W.R. Cornish, supra note 12 at 133 who argues, persuasively in my view, that the dependency or “parasitic” theory of restitution for wrongs imposes an artificial limitation on restitutionary relief and fails to see that “the policy considerations underlying liability to compensate for damage inflicted are not necessarily identical with the considerations that require restitution of gains” at 154. See also J. Beattson, The Use and Abuse of Unjust Enrichment (Oxford: Clarendon Press, 1991) c. 8.
trust remedy on non-fiduciaries in cases of unjust enrichment. In taking this approach, the Restatement both reflected existing doctrine and anticipated future developments in American law.

In retrospect, the Restatement of Restitution stands as a remarkable and innovative achievement. Though it is possible to exaggerate the significance of a re-organization of our knowledge of legal doctrine, the Restatement represented nothing less than a radical transformation of the categories used by the American profession to order its analysis of the law of obligations. Henceforth, the law of obligations would be organized around three conceptual paradigms, contract, tort, and restitution. The contractual paradigm concerned the enforcement of promises, the tort paradigm concerned compensation for harm resulting from wrongful conduct, and the restitution paradigm concerned the disgorgement of enrichments unjustly acquired. A distinct remedial principle or measure of relief was aligned with each of the paradigms. In contract, the plaintiff is entitled to remedies which provide the benefits of the promised performance—specific performance or damages in the expectancy measure. Tort awards compensation for the injuries sustained by the plaintiff. Restitution awards the plaintiff the benefit unjustly retained by the defendant.

It is of interest to note that the law of equity as a distinct discipline or sub-division of the law of obligations is more or less made to disappear by this re-categorization. Thus, the Institute did not produce a restatement of "equity." In contrast to the United Kingdom and Australia, there are no currently edited or published treatises on equity in the United States. Equity has disappeared from the curricula of the law schools. It is true, of course, that the law of trusts has survived as an identifiable doctrinal subject. There is a Restatement of the Law of Trusts. Seavey and Scott, however, appear to treat this as a matter of historical accident and professional convenience. In their view, trust falls within the contractual paradigm because it involves the enforcement of undertakings and the granting of remedies which provide for substitutional performance.8

It is worth emphasizing that the material brought together to form the law of restitution is rather vast. The detailed rules set out in the Restatement and, indeed, in the corresponding English and Canadian cases,

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cover a broad range of doctrines, many of them of some considerable subtlety and complexity. The rules on the recovery of mistaken payments, for example, set out tests for determining the kinds of mistakes that will ground recovery and various defences to such claims. The rules on 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 a fiduciary relationship and the corresponding duties thereby imposed. These rules, in turn, have nothing to say about when restitution is available for benefits conferred in an emergency or under an ineffective transaction or as a result of the separation of couples in married or similar relationships.

The law relating to the substantive grounds for restitutionary relief is thus a large and variegated body of doctrine. So too is the remedial law associated with this area of the law. Much of the arcane remedial language — quantum meruit, quantum valebat, money had and received, and the like — could be jettisoned and replaced by the more simple language of “a claim in restitution.” There are, however large areas of remedial doctrine — constructive trust, subrogation, quasi-subrogation, and contribution — where the substantive and remedial aspects of the law are intertwined in a way that contributes to the difficulty of the material for the modern legal analyst.

It was the thesis of the Restatement, then, that this rather vast and seemingly disparate body of material is given the unity and coherence of a branch of the law by the relationship of all the doctrines to the basic and underlying principle of unjust enrichment. The liability is “benefit-based,” rather than “promise-based” as in contract law or based on “compensation for harms” as in tort. That simple idea takes you to the right corner of the library, as it were, when the issue you are confronting is restitutionary in nature.

The classification or re-classification of the law of obligations is, of course, essentially a task for legal scholars. One might assume, therefore, that the success of such a venture would be measured by its impact on the vocabulary and reading habits of the profession and would not be dependent, in any critical sense, on an explicit approval of the re-classification by the judiciary. The success of the re-classification of prior doctrine into the law of contracts was thus not contingent upon explicit judicial acceptance of the new paradigm. We cannot and would not expect to be able to refer to a leading case in which “contracts” as a new branch or division of the law was given judicial approval. Accordingly, it is of considerable interest that the adoption of the unjust enrichment paradigm for the analysis of restitutionary jurisprudence
has been the subject of explicit adoption in a number of Commonwealth jurisdictions. Canadian common law judges were the first in the Commonwealth to embrace the American unjust enrichment model. In 1954, in Degman v. Guaranty Trust, the Supreme Court of Canada awarded relief in the context of a quasi-contract context on the basis of the unjust enrichment model. It may be of more than casual interest that the author of one of the two opinions in that case, Rand J., graduated from the Harvard Law School in 1912. Although the unjust enrichment model was quickly adopted by lower courts in analysing quasi-contract claims, explicit adoption of the unjust enrichment model on the equity side of the ledger occurred only a few decades later. In a series of matrimonial property cases in the 1970s culminating in the 1980 decision in Pettkus v. Becker, the Supreme Court adopted the American remedial theory of constructive trust and applied it innovatively to impose a constructive trust on a spouse who refused to share with his partner what might be referred to as matrimonial property, held in his name, upon the dissolution of their relationship. In Pettkus, then, the constructive trust remedy was imposed in the absence of a fiduciary relationship and its status as a remedy for unjust enrichment was plainly recognized. Dickson J. put this point beyond doubt by stating that “The principle of unjust enrichment lies at the heart of the constructive trust.”

Although, as intimated above, it may well be that a judicial imprimatur of this kind is not necessary to the success of an exercise in doctrinal re-classification, it has nonetheless proved to be an important stimulus to development in this field. An examination of the restitutary jurisprudence of the Supreme Court of Canada and of the lower courts strongly suggests that reliance on the unjust enrichment analysis has facilitated a reconsideration and adjustment of unsatisfactory restitutionary doctrine. Thus, for example, the Supreme Court of Canada took the lead in abolishing the distinction long-adhered to in the context of recovery of mistaken payments between payments made under a mistake of law as opposed to a mistake of fact. Other Commonwealth courts have followed suit. Further, as the matrimonial property cases illustrate, new kinds of claims have been recognized within the restitutary rubric. In addition, the restitutary nature of existing claims not previously so considered has occurred from time to time. Thus, for example, the Su-

21 Ibid. at 847.
preme Court of Canada has determined, correctly, in my view, that the rather complex rules imposing liabilities upon strangers to a trust who are in "knowing receipt" of trust property are restitutionary in nature. It is not surprising then, that textbooks on restitution, of which there are now many in England, Australia, New Zealand, and Canada, tend to be very lengthy and refer to many thousands of cases stretching back over the centuries. Indeed, substantial monographs have been published in recent years on various sub-topics of the law of restitution, of which the books on fiduciary obligation are perhaps the most widely known within the profession. Such developments were, of course, anticipated by Seavey and Scott. Indeed, reform of the doctrine was seen by them not only as a likely outcome of the re-conceptualization of the field but a matter of pressing concern. Similar acceptance of the validity of the unjust enrichment analysis has been accorded at the highest levels of the judiciary in Australia and the United Kingdom in more recent years. At the same time, however, a substantial reluctance to adopt the American remedial theory of constructive trust continues to persist in some judicial and academic circles in these jurisdictions.

Rationalization and reform of restitutionary doctrine has often been explicitly grounded on references to the general principle against unjust enrichment. Thus, in Petkuss the important decision recognizing a new cause of action relating to refusal to share jointly-produced wealth on spousal separation, Dickson J. rested recovery on an invocation of the general principle which he stated in his own terms as "an enrichment, a corresponding deprivation, and the absence of a juristic reason — for

25 Supra note 8.
28 Supra note 20.
the enrichment.\textsuperscript{29} Indeed, one of the attractive features of restitutionary law, at least from a plaintiff's perspective, is that our courts have openly acknowledged that resort may be made to the general principle as a basis for recovery in cases where the traditional doctrine affords no means of relief. As McLachlin J. observed in \textit{Peel v. Canada},\textsuperscript{30}

The tripartite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing conceptions of justice.

It follows from this that ... the traditional categories of recovery can be reconciled with the general principles enunciated in \textit{Petkus v. Becker}.... But new situations can arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule.\textsuperscript{31}

The decision of the Ontario Court of Appeal in \textit{Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.},\textsuperscript{32} illustrates the point. The plaintiff mortgagor had mistakenly discharged the defendant's mortgage. It was well-established at common law that a mistaken payment of funds gives rise to a right to recover, but no previous case had allowed recovery on these facts. And yet, it is obvious that a mistaken mortgage discharge is as valuable as money paid and ought to be subject to relief. The Court of Appeal invoked the general principle, relied by analogy on the mistaken payment cases (on the particular question of the relevance of the plaintiff's negligence), and granted recovery. In areas of the law where the rules granting relief are well-established, however, such as the law of fiduciary obligation, references to the general principle are less frequently required, but are typically not absent.\textsuperscript{33}

In recent cases, the Supreme Court has suggested that the general principle may properly be considered to establish the elements of a \textit{prima facie} case for relief.\textsuperscript{34} Although this is, in itself, not a contentious point from the perspective of Canadian law — Canadian courts have often applied

\begin{itemize}
  \item \textsuperscript{29} \textit{Ibid.} at 848.
  \item \textsuperscript{30} [1992] 3 S.C.R. 762 [\textit{Peel}].
  \item \textsuperscript{31} \textit{Ibid.} at 788–89.
  \item \textsuperscript{32} (1994), 121 D.L.R. (4th) 53 (Ont. C.A.).
\end{itemize}
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the *Pettkus* test in this fashion — the reasoning of the Court in *Garland v. Consumers’ Gas Co.*\(^{35}\) adopted a novel and quite unprecedented analysis of the "juristic reason" aspect of the tripartite *Pettkus* test that seems destined to add a further layer of complexity to the analysis of restitutionary claims. Although Iacobucci J., for the *Garland* court, emphasized that the analysis merely constituted an application of the above-quoted analysis offered by McLachlin J. of the relationship between the existing law and the general principle, the *Garland* analysis, if misunderstood and misapplied, may well destabilize existing understandings concerning the conceptual framework of restitutionary doctrine. If read expansively, the *Garland* analysis could be read as supplanting rather than merely supplementing the existing law.

An extended analysis of the *Garland* decision is beyond the scope of this paper.\(^{36}\) For present purposes, however, it is important to consider whether the new analytical model applies in merely a limited range of cases subject to analysis under the general principle or whether the court intends that the new model be of more general application across the broad range of restitutionary doctrine. Peter Maddaugh and I have argued elsewhere\(^{37}\) that the former and narrower scope of operation of the new model is likely what was intended by the court and represents the probable range of operation of the new analysis. In short, it seems likely that the new analysis will apply to novel types of claims where there is no existing body of authority to establish the tests for granting relief and the various defences that might be considered appropriate.

Our reasons for assuming that this is the correct interpretation of *Garland* are as follows. First, the view that the tripartite test from *Pettkus v. Becker*, as revised in *Garland*, is to be used in the context of novel fact situations in which the traditional case law appears not to yield a result favourable to the plaintiff is consistent with the history of the application of the *Pettkus v. Becker* test.\(^{38}\) In *Pettkus* itself, the principle was resorted to by Dickson J. because the traditional case law did not ground a favourable result for the plaintiff. In subsequent cases, the principle has been

\(^{35}\) Ibid.


\(^{37}\) Maddaugh & McCamus, *ibid.*, c. 5:200.40, from which the remainder of this paragraph is drawn.

\(^{38}\) McInnes, supra note 36 at 105.
relied upon, often as an alternative argument by plaintiffs, to provide a basis for recovery if relief cannot be awarded on the basis of traditional principles and doctrine. Second, this view is perfectly consistent with the views expressed by McLachlin J. in Peel,39 in the passages referred to with approval by Iacobucci J. in Garland.40 McLachlin J. indicated that the principled approach would be resorted to in cases where it was necessary to do so in order to go beyond the existing law or the existing categories of recovery. Further, Iacobucci J., having indicated that his analysis was consistent with Peel, went on to indicate that the open-textured nature of the principled approach required some “reformulation and refinement” in order to provide greater guidance to trial judges in applying the generalized unjust enrichment cause of action. It seems most unlikely that Iacobucci J. considered himself to be washing out all of the prior case law — the categories — in aid of the objective of providing more precise guidance to trial judges. Handing the trial judges a “blank slate”41 and a requirement to unlearn the existing law was surely not what was intended. Further, Iacobucci’s ahistorical references to the cause of action in unjust enrichment being “equitable” in nature and of recent invention,42 strongly suggests that he was referring to the application of the Pettus tripartite principle to novel fact situations rather than to the existing corpus of the law of restitution stretching through thousands of common law and equity cases and hundreds of years. Moreover, though it may be true that the claim in Garland could have been analyzed in more traditional terms, there were distinctive aspects of the fact situation, particularly its regulatory environment, that may well have made the case appear to be a novel one and accordingly, appropriate for the principled rather than the traditional analysis. Finally, resort to general principle as a basis for expanding or developing doctrine is perfectly consistent with the common law method. The common law does not stand still. When it moves forward, it does so, typically, on the basis of the application of underlying principles to novel fact situations. In short, it appears very likely that the court intends the current law to be that if the plaintiff can make a successful claim on the basis of the existing law of mistake, duress, undue influence, unconscionability, undue influence, unconscionability, breach of confidence, necessitous intervention, breach of fiduciary duty, or on the basis of other well-recognized cat-

39 Supra note 30 at 788.
40 Supra note 34 at 650 & 652.
42 Supra note 34 at 650.
categories of restitutionary liability, resort to the revised tripartite principle will not be necessary. It is the plaintiff who is making a novel argument, attempting to apply the cause of action to a novel fact situation, who will be obliged to engage the Garland analytical model.

C. TWO MEASURES OF RELIEF:
RESTORATION OF BENEFITS
CONFERRED AND DISGORGEMENT

As intimated above, the cases brought together within the rubric of the law of restitution manifest two different measures of relief. Each measure of relief responds, in turn, to a basic rationale or justification for providing benefit-based restitutionary recovery. The first measure of relief requires the defendant to restore to the plaintiff benefits received directly from the plaintiff. Such benefits may take the form of moneys paid, goods and services supplied, expenses saved and, indeed, any other transfer of value from the plaintiff to the defendant. Thus, where, for example, a party confers value on a defendant by spending money which discharges an obligation and therefore saves an expense of the defendant, restitutionary recovery in the form of restoration of the value of the benefit received by the defendant is available.43 The Deglman case is a case of this kind. A nephew provided services to his aunt on the faith of an unenforceable undertaking that he would be compensated therefor by a transfer of property to him by will. He was allowed to recover in restitution the value of the benefit conferred on the aunt through the provision of such services. The principal rationale underlying the granting of relief is that the unearned windfall benefit enjoyed by the aunt constitutes an unjust enrichment. The fact that the agreement is unenforceable does not justify a free ride for the aunt. The same rationale underlies recovery of money paid by mistake to a defendant. Absent special circumstances (or defences) there is no justification for the defendant's free ride through retention of the moneys paid.

The second measure of relief — now often referred to as disgorge-ment — grants recovery of the benefits acquired by the defendant through wrongful conduct. Disgorgement relief is perhaps most familiar to the profession in the context of breach of fiduciary obligation. A faithless fiduciary will be required to disgorge the value of benefits acquired through breach of a fiduciary duty. Fiduciaries are required to

43 Carleton (County) v. Ottawa (City), [1965] S.C.R. 663.
disgorge wrongfully acquired gains through the equitable remedies of an accounting of profits and constructive trust.\textsuperscript{44} The rationale underlying this second stream of restitutionary authority is that a wrongdoer should not be allowed to profit from wrongdoing. As a measure of relief, disgorgement takes the profit out of the wrongful conduct and turns it over to the plaintiff who has been wronged. The underlying justification for such relief must be a desire to remove the incentive that would otherwise be present for engaging in the wrongful conduct. Additionally, depending on the heinousness of the defendant’s conduct, it may be that the courts are simply offended by the phenomenon of a wrongdoer profiting from wrongdoing. Historically, disgorgement relief has been made available in a variety of contexts. Disgorgement relief has been made available to plaintiffs in the context of claims for breach of confidence,\textsuperscript{45} claims against defendants who have committed certain kinds of crimes\textsuperscript{46} and defendants guilty of tortious wrongdoing.\textsuperscript{47} More recently, it has been recognized in Canada that constructive trust relief will be available in the context of dissolution of married and other intimate relationships.\textsuperscript{48} In recent years, the question of whether disgorgement relief could also be made available in the context of breach of contract has been much debated. As we shall see, the application of disgorgement in this context is now well-established in England and may have some traction in common law Canada as well.\textsuperscript{49}

Just as claims for the restoration of value conferred by the plaintiff are benefit-based, so too are claims for disgorgement. The measure of relief is the benefit acquired by the defendant. It is a well-established and striking difference between the two measures of relief, however, that in the context of disgorgement, it is unnecessary for the plaintiff to establish that the wealth was transferred to the defendant by the plaintiff or indeed that the wealth is such that it could have been obtained by the plaintiff but for the defendant’s breach of duty. The faithless fiduciary must account for benefits acquired through breach of a fiduciary duty whether or not the person to whom the duty was owed could otherwise have obtained the benefit in question. As Laskin J. noted in Canadian Aero Service Ltd. v. O’Malley: “Liability of [the defendants] for breach of fiduciary duty does not depend upon proof by Canaero [the plaintiff] that,

\textsuperscript{44} Madauga & McCamus, supra note 36, c. 27.
\textsuperscript{45} Ibid., cc. 5,400 and 28.
\textsuperscript{46} Ibid., c. 23.
\textsuperscript{47} Ibid., c. 24.
\textsuperscript{48} Ibid., c. 30,400.
\textsuperscript{49} See below, Section E.
but for their intervention, it would have obtained the ... contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain.” In appropriate circumstances, a similar principle applies in the context of breach of confidence. Thus in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, the plaintiff was granted constructive trust relief against the ill-gotten gains acquired by the defendant through a breach of confidence without it being necessary to establish that but for the breach of confidence the plaintiff would, in fact, have enjoyed a similar gain. As we shall see, this feature is also present in the cases awarding disgorgement in the context of tortious wrongdoing and breach of contract.

D. DISGORGEMENT FOR TORT: “WAIVER OF TORT”

The line of cases awarding disgorgement for benefits acquired through tortious wrongdoing can be traced back to the seventeenth century and have traditionally been referred to by the misleading appellation, “waiver of tort.” The basic idea of a waiver of tort claim is a simple one. Suppose that a defendant converts the plaintiff’s property and later sells it at a profit. In tort, the damages are the value of the property at the time of the conversion. If, however, the defendant has sold at a price in excess of the value, a disgorgement or waiver of tort claim would allow the plaintiff to recover the defendant’s windfall and claim the full proceeds of the defendant’s sale. The availability of such relief is longstanding. What is attempted here is a mere “snapshot” of the doctrine. More detailed accounts are found in the standard texts on restitution.

The term “waiver of tort” is an unhelpful one. As then Professor Bradley Crawford, who introduced many students, myself included, to the law of restitution, observed of the doctrine: “It has nothing whatever to do with waiver and really very little to do with tort.” The label is likely to lead to confusion and has done so in the past. Its origin lies in

52 See for example Maddaugh & McCamus, supra note 36, c. 24; R. Goff & G. Jones, supra note 3, c. 36.
the expression "waiver of tort and suit in assumpsit," the latter being the historical antecedent of many modern common law "quasi-contract" restitutory claims. In an earlier era, it was thought that the "waiver" in question must be a genuine one in the sense that the victim of the tort had made an irrevocable decision to give up the tort claim in order to bring the claim in assumpsit. Having waived the tort, the victim would have affirmed the tort, and, in effect, ratified the defendant's wrongful conduct such that it could be maintained that the benefits were acquired on the plaintiff's behalf. In retrospect, this appears to be a somewhat desperate effort to find a contractual basis for a claim that now appears to be restitutory in nature and not dependent on a finding of ratification of the tort. This fictional ratification was completely laid to rest in the decision of the House of Lords in *United Australia, Ltd. v. Barclays Bank, Ltd.*\(^{54}\) In this case, a claim was brought against one of two joint tortfeasors in assumpsit and then a later claim was brought against the other in tort. The second defendant maintained that the tort had been waived and, accordingly, the tort claim could not enjoy success. Their Lordships dismissed the idea that waiver of tort rested on a consensual ratification of the tort as a mere "transparent" fiction. Lord Atkin went on to colourfully and famously explain the point in the following terms:

If the plaintiff in truth treats the wrongdoer as having acted as his agent, overlooks the wrong, and, by consent of both parties, is content to receive the proceeds, this will be a true waiver.... In the ordinary case, however, the plaintiff has never the slightest intention of waiving, excusing, or in any kind of way palliating the tort. If I find that a thief has stolen my securities and is in possession of proceeds, when I sue him for them, I am not excusing him. I am protesting violently that he is a thief, and, because of his theft, I am suing him.... I protest that a man cannot waive a wrong unless he either has a real intention to waive it or can fairly have imputed to him such an intention, and, in the cases which we have been considering, there can be no such intention, either actual or implied. These fantastic resemblances of contracts, invented in order to meet requirements of the law as to forms of action which have now disappeared, should not, in these days, be allowed to affect actual rights. When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred.\(^{55}\)

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55 Ibid. at 36–37.
Accordingly, the plaintiff is not required to elect in an irrevocable fashion to choose either a tort theory or a restitutionary theory of liability. The plaintiff may plead the claim in the alternative subject only to choosing the preferred form of remedy prior to application for judgment. The wrongdoing—the tort—provides the explanation for the wrongfulness of the defendant's conduct and, you might now say, the reason why the enrichment is unjust. The liability is concurrent.

The scope or ambit of the doctrine in terms of the list of torts for which disgorgement claims are possible remains a matter of some uncertainty. The earliest cases concern usurpation of office and the conversion and sale of goods. The doctrine has also been applied, however, to cases of detinue and trespass to chattels and has frequently been deployed in cases of deceit. On the other hand, some torts by their very nature would appear to be unlikely to produce benefits for the tortfeasor that would be subject to a disgorgement remedy. It is not likely that the doctrine would apply to the cases of assault, battery, false imprisonment, negligence, slander, or libel. On the other hand, in the unusual circumstance where a profit may be generated by the publication of defamatory statements, there would appear to be a perfectly plausible argument for awarding disgorgement relief.\(^56\)

An interesting American case applies the doctrine to the tort of interference with contractual relations. In *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, the plaintiff had agreed to sell 4,500 tonnes of sugar to a Norwegian agency at a price of $6.60 per cwt. An export permit was required for such transactions. The official in charge of issuing permits refused to issue a certificate to the plaintiff. He then incorporated the defendant and entered into a similar contract to sell sugar to the Norwegian agency at an increased price of $11.00 per cwt. When the plaintiff discovered what had happened, it brought a successful claim to waive the tort and force disgorgement of the defendant's profits of some $219,000. A similar result would be available, I would suggest, under Canadian law.

As in the context of fiduciary obligation, it is not necessary for the plaintiff seeking disgorgement to establish that but for the defendant's breach of duty the plaintiff would have earned a similar level of profit. The *Federal Sugar Refining Co.* case itself offers an American illustration of

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56 Indeed, in such circumstances, punitive damages have been awarded to take the profit out of the tort. See for example *Broome v. Casell & Co. Ltd.*, [1971] 2 Q.B. 554 (C.A.), aff'd in part [1972] A.C. 1027 (H.L.). A waiver of tort claim would achieve the same objective in a more direct fashion.

57 268 F. 575 (S.D.N.Y. 1920).
the point. The plaintiff in that case would not have enjoyed anything like the profits the defendant secured through interference with the plaintiff's contractual relations. Nonetheless, the defendant was required to disgorge the profit. The trial judge noted as follows:

The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.\textsuperscript{58}

The possibility that the benefits acquired through tortious misconduct may not be matched by an equivalent lost opportunity for the plaintiff to acquire a similar benefit by the plaintiff has also been recognized in our own jurisprudence. This possibility was recognized in Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.,\textsuperscript{59} where recovery was placed squarely on the ground that a wrongdoer ought not to be permitted to profit from his own wrongdoing. Denning L.J. noted\textsuperscript{60} that:

\begin{quote}
[In cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it, even though the plaintiff has lost nothing and suffered no damage...]\textsuperscript{61}
\end{quote}

He went on to state:

If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. ... If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire.\textsuperscript{62}

Lord Denning L.J. further stated:

The claim for a hiring charge is ... not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own

\textsuperscript{58} Ibid. at 382.
\textsuperscript{59} [1952] 2 Q.B. 246 (C.A.).
\textsuperscript{60} Ibid. at 253.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort.\footnote{ibid. at 254-55.}

The benefit obtained — here through saved expense — is subject to disgorgement even though the plaintiff had no intention to profit from renting out the chattels which the defendant had tortiously appropriated and utilized. A whimsical illustration of the point was provided by the Earl of Halsbury L.C. in The Mediana\footnote{[1900] A.C. 113 at 117.} to the effect that if a person took another’s chair and kept it for twelve months, it would not constitute a defence to a claim for the benefit enjoyed by the tortfeasor to establish that the owner did not usually sit in the chair or had several other chairs that could have been used. Similarly, Lord Shaw in Watson Laidlaw & Co. Ltd. v. Pott, Castles & Williamson\footnote{(194), 31 R.P.C. 104.} provided the following illustration:

If A, being a liveman, keeps his horse standing idle in the stable, and B, against his wishes or without his knowledge, rides or drives it out, it is no answer to A for B to say: “Against what loss do you want to be restored the horse? ... “There is no loss. The horse is none the worse. It is better for the exercise.”

As in the case of fiduciary obligation, then, the disgorgement liability is benefit-based and the liability is imposed in order to remove the benefit secured by wrongful conduct and eliminate the incentives otherwise present for engaging in such acts.

Although the doctrine of waiver of tort is not widely known within the profession,\footnote{Ibid. at 119.} it is not surprising that disgorgement developed at common law in the context of tort claims. If disgorgement is an appropriate remedy for breach of fiduciary obligation and breach of confidence, it is not surprising that courts, perhaps without seeing that parallel, came to the conclusion that outright fraud at common law, as opposed to mere equitable fraud, ought to give rise to disgorgement relief for the purpose of removing the incentives otherwise present to engage in tortiously wrongful conduct. It is perhaps also not surprising that the same idea

has recently manifested itself in the context of discussions of punitive damages in cases like *Epstein v. Cressy Development Corp.* In this case, the defendant had trespassed on a neighbour’s land in order to effect savings in the construction of a condominium complex. The savings enjoyed by this construction method exceeded the value of the injury inflicted through the trespass. The trial judge awarded damages in trespass and coupled that award with a substantial award of punitive damages taking into account “the saving effected by the trespassing.” The British Columbia Court of Appeal affirmed the award, observing that “if the punitive damages when added to the compensatory damages do not deprive the defendant of all benefit from the wrongful act then all the damages would be is a cost of doing business in carrying out the wrongful act.” In such a case, simply waiving the tort and allowing the disgorgement claim would more directly and more precisely accomplish that objective.

### E. DISGORGEMENT FOR BREACH OF CONTRACT

The idea that disgorgement relief might be available in the context of a breach of contract is, as we shall see, of much more recent vintage. One possible motive for a deliberate breach of contract could be a decision to attempt to secure a greater profit from performance than was provided under the existing agreement. Thus, a seller, for example, might refuse to perform an existing contract for the sale of goods in order to supply the goods at a higher price to a third party. Under traditional doctrine, the nature and extent of any profits secured through breach is irrelevant to the calculation of the buyer’s claim for damages for breach of contract. Under the governing expectancy principle, buyers in such circumstances are entitled only to recovery of sufficient money to put them in the position they would have been in if the contract had been performed. The purchaser, for example, could recover only the difference, if any, between the contract price and the market price the buyer would be required to pay in order to acquire substitute goods. In a particular set of facts, of course, the buyer’s expectancy damages may be equivalent to the seller’s profit as, for example, where the seller breaches the contract in order to

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69 *Ibid.* at 37, Lambert J.A.
sell the goods at the market price to a third party. Where the seller's price to the third party is higher than the market price, however, the excess over the market price is not recoverable by the buyer. In its recent decision in Attorney General v. Blake,71 however, the House of Lords held that in exceptional circumstances the victim of a breach of contract may sue for an accounting of profits as an alternative to the claim for damages for breach of contract. This case thus extends the disgorgement principle to the context of contractual breach, enabling the victim of a contract breach to recover profits secured by the wrongful act.

The traditional common law reluctance to award an account of profits for breach of contract is often defended on the basis that it is generally accepted, even by its proponents, that the remedy should be available only in unusual circumstances. By thus creating a need to distinguish between normal as opposed to outrageous, cynical, or bad faith breaches of contract, an unattractive element of uncertainty if not morality is introduced in the law of contract.72 Law and economics scholars offer a further defence of the traditional rule on the basis of the theory of "efficient breach."73 Under this theory, the seller who can breach the contract and sell the goods to a third party wishing to pay more than the contract price, ought to be encouraged to do so. Such breaches are efficient in the sense that the seller has improved his position, the third party who places a higher premium on acquiring the goods improves his position, and the purchaser who has suffered a loss will be fully compensated for it by the expectancy rule. Accordingly, the net effect of the breach is to increase wealth. On this view, then, a rule permitting an accounting of profits would discourage efficient behaviour. Many find this a persuasive view and, indeed, in the Blake decision, the House of Lords was careful to distinguish cases of efficient breach from those in which an accounting of profits might be made available. The doctrine


72 A view that may draw support from the famous statement of O.W. Holmes that a contractual obligation is nothing more than "a prediction that you must pay damages if you do not keep it — and nothing else": a view, he suggested, that "stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." See O.W. Holmes, "The Path of the Law" (1897) 8 Harv. L. Rev. 457 at 462.

of efficient breach has attracted criticism, however.\textsuperscript{74} The principal criticism of the theory is that the alleged efficiency gains are illusory in the sense that they require one to ignore the potential costs resulting from the likely dispute between the seller and the first purchaser. Further, it is suggested that the theory fails to recognize the general desirability of encouraging contract performance.\textsuperscript{75} A third argument made in support of the traditional approach is that the availability of an accounting of profits remedy might undermine the general principle requiring the victim of a breach to undertake reasonable efforts to mitigate resulting loss.\textsuperscript{76} In theory at least, the victim of a breach might be encouraged by the availability of such relief to decline to mitigate and eventually sue the seller either for the profit made on a resale or for the value of the goods at the date of trial.\textsuperscript{77} In particular fact situations, however, it may be that even purchasers who are aware of the rule might nonetheless adopt the prudent course of mitigating their losses.

The principal argument in favour of granting this form of relief in a contractual context is that some breaches of contract are as offensive or wrongful as many breaches of fiduciary obligation or breaches of confidence. Accordingly, just as the accounting of profits remedy is available in these other contexts, so it should be available in the context of a heinous or unusually wrongful breach of contract. A further and perhaps more persuasive argument in support is that courts will, in any event, order disgorgement of profits in a case of contract breach where any other result would be unjust, even in the absence of an explicit doctrine permitting the granting of such relief. Accordingly, explicit recognition of the doctrine would subject such cases to a more open and principled analysis.


\textsuperscript{75} The efficient breach analysis does not necessarily exclude entirely the possibility of an accounting of profits. Thus, where the breach is merely "opportunitistic" in the sense that through the seller, for example, profits through breach (by, for example, reinvesting the price paid by the purchaser) but the goods are not transferred to a third party willing to pay more for the goods, the breach is not efficient in the requisite sense and the accounting of profits ought to lie. Lionel Smith argues that this move "contradicts completely" the efficient breach theory by attacking the profit motive. See L. Smith, "Disgorgement of the Profits of Breach of Contract: Property Contract and Efficient Breach" (1994) 24 Can. Bus. L.J. 121 at 135.

\textsuperscript{76} See J.D. McCamus, The Law of Contracts, supra note 1, c. 22, Part F(3).

The latter argument draws support from the fact that a number of authorities decided prior to the decision in Blake have awarded what appears to be disgorgement relief, typically in circumstances where the expectancy damages calculation appears to offer an inadequate response to the defendant’s misconduct. The decision in British Motor Trade Association v. Gilbert is a leading illustration of this phenomenon. This case arose in the context of a regulatory scheme designed to control the resale prices of cars for a period of time in the context of a market shortage. Purchasers of cars agreed to resell them only to the plaintiff association at a controlled price. The defendant, however, breached this undertaking and sold his car on the black market, thereby profiting from his breach of contract. The expectancy rule could not reach those profits. If the defendant had performed his agreement, no profit would have been enjoyed. Under the expectancy calculation, then, the plaintiff association required no compensation in order to be put in the position it would have been in if the contract had been performed. Nonetheless, the court awarded the plaintiff the profits secured by the defendant through his breach of contract. The unconvincing reason offered by the court for this unusual result was that the plaintiff ought to be able to take into account, in calculating damages, the cost of substitution in the black market. A better explanation for the result would be that the accounting of profits was awarded because of the inadequacy of the damages remedy in this context. If the accounting remedy is not available, an agreement of this kind, evidently in the public interest, would simply not be unenforceable.

Similarly, in Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd., the relief awarded appears to effect a disgorgement of profits achieved through a breach of contract. In this case, a developer had purchased land which was subject to a restrictive covenant imposing limitations on use of the land for a residential development. Nonetheless, the developer proceeded with a project that ignored the restrictions. In response, the successors in title to the vendors sought to enjoin the project. Although that relief was refused, the plaintiffs were allowed a damages claim. Although the loss sustained by the plaintiff as a result of the breach was insubstantial in expectancy terms, they were allowed to recover a sum of money that would represent the amount the developer would likely have been required to pay for a relaxation of the covenant. Were such an award not made, the court held, the developer would be left “in undisturbed pos-

78 [1951] 2 All E.R. 641 (Ch.).
79 [1974] 1 W.L.R. 798 (Ch.) [Wrotham Park].
session of the fruits of their wrongdoings." To be sure, this decision does not offer unambiguous evidence of a disgorgement calculation. Such an award might be rationalized with the traditional principle on the basis that it offers compensation for the plaintiffs' lost opportunity to bargain for such a sum. Moreover, the decision remained controversial for some time. In Blake, however, the House of Lords confirmed the correctness of the decision in Wrotham Park and placed the result squarely on the basis of a disgorgement principle. Indeed, Lord Nicholls identified Gilbert, Wrotham Park, and other similar cases as important precursors of a more explicit recognition of the principle that disgorgement relief can be made available in a breach of contract setting.

The facts of the Blake decision made it an appealing context within which to consider recognition of disgorgement relief. The defendant Blake was a traitor who had betrayed his country by divulging valuable secret information to the Soviet Union acquired during his service in the Security Intelligence Service in the period following the Second World War. Uncovered as a spy in 1961, he was convicted of spying and given a lengthy sentence. In 1966, however, he escaped from Wormwood Scrubs, eventually making his way to Moscow where he proceeded to write a memoir entitled No Other Choice, which was eventually published in September of 1990. Some of the information in the book pertained to his activities as an intelligence officer. By the time of publication, however, the information, in part no doubt because of the revelations of other former spies, was no longer confidential nor was its disclosure damaging to the public interest. Nonetheless, the writing and publication of the memoir constituted a clear breach of an undertaking Blake had given when taking up employment in the security service not to divulge any official information acquired during the course of his employment as an intelligence officer. By the time the Attorney General became aware of the publication, the publisher had already paid Blake £60,000 under the publishing contract. The Attorney General commenced an action,
however, to recover the £190,000 which was still to be paid and was therefore, as a practical matter, potentially recoverable. Obviously, if Blake had performed his agreement, no book of this kind would have been written. Thus, under the expectancy principle, the damages suffered by the Crown were non-existent. An attractive opportunity was thereby afforded for the consideration of the appropriateness of granting an accounting of profits remedy for breach of contract. 86

In the leading opinion, Lord Nicholls canvassed the various non-contractual contexts in which disgorgement relief is traditionally awarded and, as well, the contract cases such as Gilbert and Wrotham Park in which disgorgement relief was awarded without explicit consideration of a principled basis for disgorgement. Lord Nicholls concluded that there was no reason in principle why an account of profits could not be awarded in a contract case. He emphasized, however, that “[n]ormally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract” 87 and, indeed, that it is only in cases where such “remedies are inadequate” 88 that an accounting of profits should be awarded. Lord Nicholls declined, however, to offer more specific guidance as to when the remedy might be appropriate. He explained as follows:

No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity and, hence, in depriving him of his profit.

It would be difficult, and unwise, to attempt to be more specific. 89

The facts of Blake itself offer an illustration of the application of this principle. Obviously, the Crown had a legitimate interest in preventing the type of activity at issue in this case. Further, Lord Nicholls placed con-

87 Blake, supra note 71 at 285.
88 Ibid.
89 Ibid.
siderable emphasis on the importance of confidentiality in the work of the security service and on the fact that Blake’s activities threatened to jeopardize the very effectiveness of an important public institution. Although Blake’s writing career did not constitute a breach of fiduciary obligation to the Crown, the situation was “closely akin”\textsuperscript{90} to a fiduciary relationship, a context in which an accounting of profits is the standard remedy. The conduct also involves the commission of a criminal offence. Thus, this particular breach of contract is very similar to the kinds of activities that traditionally engage the accounting remedy.\textsuperscript{91}

Beyond this, however, Lord Nicholls merely suggested some factors that would not give rise to the accounting of profits remedy. Following the lead of the Court of Appeal,\textsuperscript{92} Lord Nicholls agreed that the mere fact that a particular breach was cynical and deliberate would not constitute a basis for disgorgement relief. Further, Lord Nicholls indicated that the mere fact that the breach was undertaken in order to enjoy a more profitable contract with a third party would not, in itself, provide a basis for disgorgement. Thus, the Blake decision preserves the traditional position that the remedy for a so-called efficient breach remains compensatory damages. Lord Nicholls rejected, however, a suggestion made in the Court of Appeal that the disgorgement remedy would be particularly appropriate in cases of “skimmed performance.” Cases of skimmed performance are those in which the defendant has promised to provide a particular service and even though the defendant skimmed on the level of service provided, no harm resulted.\textsuperscript{93} In such cases, in Lord Nicholls’ view, a simple claim in damages would be sufficient. Lord Nicholls also rejected the Court of Appeal’s suggestion that disgorgement should be allowed in any case where the defendant breached an undertaking to not do something. In his view, to allow disgorgement in any case of a negative undertaking would make the remedy too broadly available.\textsuperscript{94}

In sum, then, the Blake decision adopts a rather open-textured or open-ended principle as a basis for awarding disgorgement relief for contract breach. The doctrine has been applied on a few occasions in

\textsuperscript{90} Ibid. at 287.

\textsuperscript{91} See generally Maddaugh & McCamus, supra note 36, c. 5-400.

\textsuperscript{92} Attorney General v. Blake, \textsuperscript{1998} 1 All E.R. 833 at 845 (C.A.).

\textsuperscript{93} See for example City of New Orleans v. Firemen’s Charitable Association, 9 So. 486 (La. 1891) (defendant provider of fire fighting services skimmed on the contractually required number of firefighters, horses and length of hose — no fire occurred — nominal damages awarded).

\textsuperscript{94} Blake, supra note 71 at 286.
England and it appears likely that the doctrine will be accepted into Canadian common law as well. A number of pre-Blake Canadian decisions have awarded relief in the disgorgement measure. In Jostens Canada Limited Ltd. v. Gibsons Studio Ltd., for example, the defendant, a school photographer who had served for years as the local representative of the plaintiff national firm, was required to disgorge profits made by wrongfully negotiating contracts on its own account to supply services to various schools. The Blake doctrine itself has been applied in a recent authority and, indeed, the Supreme Court of Canada itself appears to have accepted the existence of such a doctrine.

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95 Esso Petroleum Co. Ltd. v. Niad Ltd., [2001] 1 All E.R. (D) 324 (Ch. D.) (defendant service station participates in “Pricewatch” program, receiving discounts on oil purchases from plaintiff Esso in return for a promise to lower prices to consumers on order from the plaintiff — the defendant profits by not lowering prices — excess profits recoverable), Experience Hendrix v. PPX Enterprises Ltd., [2003] EWCA Civ. 323 (unauthorized licensing of master recordings — damages calculated with reference to defendant’s gain).


97 Ameritek Inc., supra note 67, cited to S.C.J.

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