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Unjust Enrichment, Existing Categories and Kerr v. Baranow: A Reply to Professor McInnes

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UNJUST ENRICHMENT, “EXISTING CATEGORIES” AND KERR v. BARANOW: A REPLY TO PROFESSOR McINNES

by John D. McCamus*

I. INTRODUCTION

In a recent note1 on the important decision of the Supreme Court of Canada in Kerr v. Baranow,2 Professor McInnes argued, not for the first time,3 that the decision of the Supreme Court of Canada in Garland v. Consumers’ Gas Co.4 effected a complete transformation of the Canadian law of restitution into a single rule, drawn from the civilian tradition, that restitutionary recovery is invariably granted unless there is “no juristic reason” or an “absence of basis” for the initial transfer of wealth from plaintiff to defendant. The “old” common law approach under which the plaintiff must explain why recovery is appropriate on the basis of existing precedents has, in his view, been simply rejected and replaced by this new civilian doctrine. Much to my surprise, however, he also claims in his recent note that this rather radical thesis has been clearly adopted by the Supreme Court in the recent Kerr v. Baranow decision. My respectful view, simply stated, is that I could not disagree more with the account Professor McInnes has offered of the significance of this decision.

Professor McInnes begins his note with a statement of his views as to the significance of Garland. For McInnes, a plaintiff in a restitution case should now simply ignore the “old” common law and advance a claim on the basis of the “absence of juristic reason” analysis set forth in Garland. Indeed, he asserts that his view of the significance of Garland now represents “orthodoxy” and that the Supreme Court’s alleged embrace of the McInnes thesis in Kerr is an exercise in “re-establishing orthodoxy.”5 Professor McInnes then caught my attention by describing my own views to the

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5. McInnes, supra, footnote 1, at p. 276.
contrary as “startling.” Further he indicated that my views are “bereft of judicial support, wrong in principle, and potentially disastrous in practice.” I beg to differ on all points. I do not think my views are “startling.” Nor are they at all original or eccentric. I believe they simply reflect the traditional common sense of the common law. I do not believe that they are bereft of judicial support. More particularly, I believe that Kerr reaffirms that the role of the Garland analysis is more limited than McLlnnes suggests. I am not aware of a “principle” that demonstrates that my views are wrong in principle. Nor do I think my views are “potentially disastrous in practice.”

II. MY “STARTLING” VIEWS

Simply stated, my view is that in a restitution case, as in a contract or tort or, indeed, any other kind of private law case, a plaintiff should rely upon and present to the court existing authorities which demonstrate that on the alleged facts, the plaintiff is entitled to the relief sought. In short, in a restitution claim, the plaintiff would at least begin by attempting to establish that on the existing authorities or, one might say, on the existing law, the plaintiff is entitled to recover. In the law of restitution, there is quite a lot of existing law for the plaintiff to consider. The existing authorities, which number in the thousands and stretch back over the last several centuries, establish an elaborate body of rules dealing with such matters as the recovery of benefits conferred under mistake, under duress and under transactions which are ineffective for various reasons, in response to emergencies and, as well, benefits acquired by the defendant through various forms of wrongdoing. The rules relating to the recovery of benefits conferred by mistake, for example, set out the tests for determining the kinds of mistakes that ground recovery, the types of benefits for which recovery is permitted, the defences available to a defendant in a mistake case and so on. The rules on necessitous intervention specify the types of emergencies and the types of benefits conferred that ground relief. The rules relating to duress set out the tests for the kinds of threats that constitute duress, the forms of relief available, the defences and so on.

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6. Ibid., at p. 280.
7. This very large body of common law doctrine is restated at length in the standard texts on restitution, including P.D. Maddaugh and J.D. McCamus, The Law of Restitution (looseleaf ed.) (Toronto, Canada Law Book, 2011).
Similarly, large bodies of black letter rules are set out in the authorities dealing with the various other types of claims that are commonly gathered together by treatise writers as forming the content of the substantive law of restitution. If the plaintiff successfully establishes that the facts are as alleged and that the alleged facts engage one of the existing rules for granting restitutionary relief — for example, the threats uttered by the defendant constitute a recognized form of duress — restitutionary relief will follow. It is this reliance on existing authority, of course, that gives the common law much of its stability and predictability. I confess that this seems so obvious to me that I have difficulty understanding why Professor McInnes would disagree.

What then is the role of the general principle against unjust enrichment which is said by many, myself included, to be the general principle underlying the great bulk of the restitutionary doctrine affording restitutionary relief in various factual contexts? It is well accepted that in addition to the virtues of stability and predictability, the common law has an inherent capacity to evolve and adjust over time. Sometimes the evolution of doctrine reflects a rationalization of existing rules in order to achieve consistency of approach to the resolution of similar conflicts. Often, however, the common law will evolve in light of changing social and economic conditions or changing perceptions of the just result. Such change occurs across our private law generally. Tort law is not beyond the capacity to recognize new forms of tort liability, even, as we have seen, in recent years. Similarly, significant changes to the law of contracts occur from time to time.

In the context of restitution, it is plainly recognized by the Supreme Court of Canada that the unjust enrichment principle will provide a basis for grounding or justifying gradual evolution and change of this kind. Thus, a plaintiff who is concerned that the existing authorities may be unavailing, will typically add a plea that the defendant has been simply unjustly enriched and attempt to persuade a court that notwithstanding the lack of any support for the claim in the existing authorities, restitutionary relief ought to be available. In other words, resort to the general principle provides a basis for reforming or extending existing doctrine or recognizing new types of restitutionary claims. Resort to the general principle for these purposes is well illustrated by the

decisions of the Supreme Court of Canada in the *Air Canada*\(^9\) case (in which the rule denying recovery of monies paid under mistake of law was overruled) and in the famous decision in *Pettkus v. Becker*\(^10\) (in which a new type of claim for recovery of a share of wealth accumulated during cohabitation was recognized). Although the role of general underlying principles in other more well-established areas of the law, such as contract and tort, is similar in nature, it has been well understood by scholars of restitution that this doctrinal evolution would likely occur with more frequency in the context of restitutionary law which, historically, has been much less studied and written about than the other two more familiar branches of the law, contract and tort. Indeed, apart from the American *Restatement of Restitution*,\(^11\) book-length studies of the law of restitution did not begin to appear in other common law jurisdictions until the latter part of the 20th century.

In sum, it is my view that in a restitution case, one begins by trying to fit the facts in issue into the rules established by the existing authorities. One may resort, however, to the underlying general principle as a basis for correcting or extending the existing law or recognizing new types of fact situations in which relief should be allowed. I do not think this is a startling position. Indeed, I think it is consistent with the views of all of the authors of the mainstream treatises of restitution in the common law world. At the risk of being considered tendentious, let us call this the “Traditional Approach.”

By way of contrast, the thesis advanced by Professor McInnes is that in Canada the unjust enrichment principle has simply replaced all the prior law. In *Pettkus v. Becker*,\(^12\) Dickson J. famously restated the unjust enrichment principle in his own terms as requiring a conferral of benefit, a corresponding deprivation of the plaintiff and an absence of a “juristic reason” for the transfer. There is simply no reason whatsoever to think that Dickson J. imagined that he was, in so doing, replacing all prior restitutionary law with his version of the unjust enrichment principle.

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Readers familiar with the 2004 decision of the Supreme Court of Canada in *Garland v. Consumers' Gas*\(^\text{13}\) will recall that in *Garland*, the court offered a reformulated “two-step” version of the unjust enrichment principle. Step one, oddly, requires the plaintiff to establish a *prima facie* case by disproving the existence of a long list of defences that would otherwise be available to the defendant; step two then permits the defendant to raise open-textured defences of “reasonable expectations” or “public policy.” Professor McInnes argues that the intention of the Supreme Court of Canada in *Garland* was, again, simply to replace the old common law with its new version of the unjust enrichment principle. On this view, in a mistake or duress or necessitous intervention case, for example, one would not rely on the existing rules on these types of claims. Rather, one would simply advance the *Garland* two-step version of the unjust enrichment principle as the rule or basis for the plaintiff’s recovery. I have argued elsewhere\(^\text{14}\) that this reading of the *Garland* decision is neither necessary nor sound and that to give *Garland* this radical effect is quite inconsistent with the common law method of gradual evolution of existing doctrine. As I have there suggested, adopting this approach to the law of restitution simply involves “making the law up from scratch”\(^\text{15}\) and is likely to lead to the creation of an unpredictable and unknowable body of doctrine. Indeed, as I there noted, to the extent that some courts have simply applied the *Garland* two-step analysis and ignored prior or existing law, the decisions in question live up to this rather dire prediction.

One must ask, then, why Professor McInnes favours so radical an interpretation of the *Garland* decision. The answer appears to be that Professor McInnes is a devoted follower of the later views of the late Oxford Professor Peter Birks. In his last work, *Unjust Enrichment*,\(^\text{16}\) Professor Birks recanted all of his earlier work\(^\text{17}\) and offered a bold new vision for the English law of restitution. Birks described the existing common law in which the plaintiff is

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\(\text{13. Supra, footnote 4.}\)

\(\text{14. J.D. McCamus, “Forty Years of Restitution: A Retrospective” (2011), 50 C.B.L.J. 474. See also Maddaugh and McCamus, supra, footnote 7, at pp. 3-35 to 3-38.}\)

\(\text{15. Ibid., at pp. 494-498.}\)


\(\text{17. Ibid., at p. xii (“Almost everything of mine now needs calling back for burning”).}\)

One scholar has described this later work of Birks as having been written in a “more dogmatic and less compelling” phase of his career. See G. McMeel, “What Kind of Jurist was Peter Birks?” (2011), 19. Rest. L. Rev. 15, at p. 28.
required to establish that a claim advanced falls within one of the established rules permitting restitutionary relief as the "unjust factors" approach. He argued that the English "unjust factors" approach ought to be rejected. Indeed, he argued that it had already been authoritatively rejected by the House of Lords in favour of a single rule drawn from the civil law which would allow recovery in any case where there was an "absence of basis" for the transfer of value to the defendant. Other than Birks, no one seriously suggests that English courts have, indeed, rejected the existing common law and replaced it with a civilian rule of this kind. It simply has not occurred nor does there appear to be any likelihood that it will occur in the future. Professor McInnes appears to believe, however, that the Pettkus/Garland version of the unjust enrichment principle has brought this Birksonian revolution to the shores of Canadian common law and has replaced all existing doctrine with a civilian-inspired absence of basis or absence of juristic reason approach. If the idea of replacing all of the existing common law with a civilian rule that is little understood within common law jurisdictions seems preposterous to some, such sceptics may not be much reassured by the notion that the Canadian law of restitution should now be rewritten by Birksite academics in a new version of the law inspired by Birksonian/civilian notions. Notwithstanding, my great admiration for the academic branch of the profession, I hope that I am not alone in thinking that this does not constitute a sensible plan for the Canadian law of restitution.

As far as I know, the only scholar who has actually attempted to work out in some detail how the new Birksonian/civilian scheme would apply to some standard fact situations covered by the existing law is Professor Andrew Burrows, a leading English restitution scholar and the author of an excellent text on the subject. Burrows demonstrates that, when applied to particular fact situations, the Birksonian model "is no easier to apply than the common law approach." Although the initial statement of the absence of basis rule appears more elegant than the common law, "that elegance is superficial." Once one begins to analyze each situation with a view to determining the correct result, a number of subtle analyses come into play (which, by the way, we shall

19. Ibid., at p. 100.
20. Ibid.
essentially have to invent). Burrows observes that the Birksian approach appears to be “elegant and straightforward only because it pushes out of sight many of the difficult questions of law that are dealt with ‘up front’ by the common law.”21 Burrows concludes this exercise with the observation that “there is no good reason to abandon the common law approach.”22 I quite agree.

We may note in passing that if someone were to make a similar suggestion to the effect that the existing common law be replaced by its underlying principle with respect to a more well-understood body of private law doctrine, such as the law of contracts, the idea would not be taken seriously. For example, Professor Swan is of the view that the underlying principle of the law of contracts is that the law should give effect to the reasonable expectations of the parties.23 No one, including Professor Swan, would suggest that the existing law of contracts ought to simply be replaced by a new rule that in every case the plaintiff should claim that the relief sought is necessary to “give effect to the reasonable expectations of the parties.” Professor Swan would urge, surely, that in reforming and adjusting the law of contracts, courts should attempt to align the rules with this underlying principle. The idea that the existing doctrines of the law of contracts could be simply replaced by the underlying principle, however, would not be seriously entertained by anyone. It would be easily seen that this would create considerable instability and unpredictability in the law of contracts. It would also be easily seen that to turn the underlying principle into a new black letter rule that would replace all the existing black letter rules involves what might be referred to as a category mistake. It confuses the role of underlying principle with the need for detailed rules that enable the profession to discern rights and liabilities at the level of particularized factual circumstances and disputes. In my view, there is no good reason to make a similar category mistake in the context of the law of restitution. Indeed, the need for some stability and predictability in the law heavily weighs against doing so. Similarly, and at the risk of stating the obvious, a proposal to replace the existing common law of contracts with a new rule based on a civilian-inspired general principle would be given short shrift.

21. Ibid., at p. 111.
22. Ibid., at p. 112.
23. A. Swan, Canadian Contract Law, 2nd ed. (Toronto, LexisNexis, 2009), c. 1.3.
III. "BEREFT OF SUPPORT"

McInnes claims that the Traditional Approach that the plaintiff in a restitution claim must establish why he or she is entitled to recover on the basis of the existing rules granting relief is "bereft of judicial support." I do not agree.

We may put to one side the many thousands of cases, both in Canada and in other common law jurisdictions, that apply the Traditional Approach and that form the raw jurisprudential data from which the modern law of restitution has been constructed. The essential claim made by McInnes is that all of this traditional law has been replaced by the Garlandized version of the Pettkus statement of the unjust enrichment principle. In rebuttal, three points should be made.

First, the view that the role of the unjust enrichment principle is to provide a basis for reforming the existing doctrine or extending relief beyond that available under existing law in novel situations draws very strong support from recent decisions of the Supreme Court of Canada including, as we shall see, Kerr v. Baranow itself. An illuminating discussion of the relationship between the existing law which defines various categories of cases in which relief is allowed and the general principle is to be found in the opinion of McLachlin J., as she then was, in the 1992 decision of the Supreme Court of Canada in Peel (Regional Municipality) v. Ontario.24 In Peel, McLachlin J. identified two alternative approaches to the analysis of restitutionary cases — the Traditional Approach and an approach based on the unjust enrichment principle — as complementary modes of analysis. McLachlin J. described the two approaches as follows:

The first is the traditional "category" approach. It involves looking to see if the case fits into any of the categories of cases in which previous recovery has been allowed, and then applying the criteria applicable to a given category to see whether the claim is established. The second approach, which might be called the "principled" approach, developed only in recent years. It relies on criteria which are said to be present in all cases of unjust enrichment: (1) benefit to the defendant; (2) corresponding detriment to the plaintiff; and (3) the absence of any juridical reason for the defendant's retention of the benefit.25

The existing "categories" of claims are obviously these recognized by the existing law, i.e., the body of existing doctrine referred to by

Birks as the "unjust factors." In her further discussion of the relationship between the two approaches, McLachlin J. clearly indicates that the role of the principled approach is that of providing a basis for extending recovery beyond the traditional categories of recovery. She explained, as follows:

The tri-partite 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 perceptions of justice.

It follows from this that the traditional categories of recovery, while instructive, are not the final determinants of whether a claim lies. In most cases, the traditional categories of recovery can be reconciled with the general principles enunciated in *Pettkus v. Becker*... But *new situations* can arise which do not fit into an established category of recovery but nonetheless merit recognition on the basis of the general rule.26

The unjust enrichment principle, it seems, provides a check on the existing categories of recovery which remain instructive but are not the final determinants of liability as "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."

In *Peel* itself, McLachlin J. identified a number of traditional categories of recovery (or "law") that might apply to the fact situation at hand. In her view, however, the plaintiff failed to establish that a genuine benefit had been conferred on the defendant in this case and accordingly, the question of which, if any of the existing categories of recovery was applicable to the *Peel* facts was not necessary to resolve. In sum, the discussion in *Peel* appears to be quite consistent with the view that the role of the unjust enrichment or principled approach is to provide a basis for extending the law beyond the existing categories of relief to "new situations."

Second, it is worth emphasizing that McLachlin J.'s discussion of the relationship between the existing categories of relief and the role of the principled approach in extending relief in new situations and "allowing the law to develop in a flexible way as required to meet changing perceptions of justice" has been referred to on subsequent occasions by the Supreme Court itself, notably in *Garland* and, indeed, in *Kerr v. Baranow*. I will not repeat here the

analysis I have offered elsewhere for the conclusion that the better reading of the decision of the Supreme Court of Canada in *Garland* is that the court did not intend to replace all prior law with the *Garland* two-step version of the unjust enrichment principle. In addition to the fact that the court did not plainly state that it was replacing the existing common law with a rule drawn from civil law, an important source of support for a less radical interpretation of *Garland* is that Iacobucci J. in that case placed reliance on the foregoing passages from *Peel* and indicated that his elaboration of the unjust enrichment principle was simply an application or explication of the *Peel* analysis.

Third, a real test for the McInnes thesis would be to find a recent decision in which the restitutionary dispute before the Supreme Court of Canada plainly was covered by an existing category of relief and observe whether the court applied the existing substantive law or, rather, simply abandoned the existing doctrine and applied the *Garland* two-step version of the unjust enrichment principle. Such an opportunity arose in the recent decision of the Supreme Court in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*. *B.M.P. Global* involved a claim to recover a mistaken payment. The recovery of mistaken payments is a central illustration of the law of restitution or unjust enrichment at work. Birks himself claimed that it was a “core case” and asserts as a working definition of the law of unjust enrichment that it is “the law of all events materially identical to the mistaken payment of a non-existent debt.” One simply could not have a better test case as to whether Canadian law has abandoned the existing law and moved to a civilian absence of basis rule. In its very interesting judgment in *B.M.P. Global*, the Supreme Court of Canada applied the existing law of mistaken payments. Indeed, it confirmed that the existing Canadian common law pertaining to the mistaken

27. McCamus, *supra*, footnote 14, at pp. 489-494. See also, Maddaugh and McCamus, *supra*, footnote 7, at pp. 3-35 to 3-38.2.
29. McInnes draws support for his radical thesis from the occasional case such as *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate* (2007), 289 D.L.R. (4th) 385, [2007] 3 S.C.R. 679, where the court denies relief on the basis that the benefit was transferred on the basis of an existing and enforceable agreement. This existing and well-recognized principle is as old as the law of restitution itself. The fact that the court in applying the principle says that the contract provides a juristic reason for the transfer is neither surprising nor, in my view, evidence that the court has simply abandoned all prior common law in favour of the juristic reason/*Garland* two-step analysis.
payments rule is consistent with the modern English reformulation of the same rule.\(^3^2\) Interestingly, the court made no reference to the \textit{Garland} two-step analysis nor did it suggest that recovery was based on a civilian absence of basis principle. It is therefore clearly established Canadian law that in a mistaken payment case — again, a core case of unjust enrichment — the plaintiff must come forward and affirmatively prove that the payment was caused by a mistake. In turn, the defendant may seek to defend the claim by establishing a defence of change of position. The court did not suggest that the defendant was restricted to defences based on considerations of “reasonable expectations” or “public policy.”

\textit{B.M. P. Global} is thus an extremely inconvenient authority for Professor McInnes. Simply stated, it is completely inconsistent with his vision of the new Birksian Canadian restitutionary doctrine. It is therefore of interest to note McInnes’ reaction to the case. McInnes describes the Supreme Court’s failure to refer to the \textit{Garland} analysis as “anomalous”\(^3^3\) and appears to blame counsel for the fact that the parties, “somewhat surprisingly,”\(^3^4\) failed to refer to either \textit{Garland} or the two-step analysis. With respect, this is not entirely convincing. First, though it is true that the factums filed in the case do not refer to the \textit{Garland} analysis, there is some reference to “unjust enrichment” both in the decision below of the British Columbia Court of Appeal and in one of the respondents’ factums. More importantly, Supreme Court of Canada watchers well know that the court’s current practice is not to feel constrained by the arguments or lists of authorities supplied by counsel when authoring a judgment in a particular case.

Indeed, more surprisingly to me, neither the parties nor the courts below made extensive reference to the body of law pertaining to the recovery of moneys mistakenly paid on a forged instrument, authorities which, for the most part, were mentioned for the first time in this particular case in the judgment of the Supreme Court of Canada. Surely, if the members of the Supreme Court were of the view that the existing law of restitution has been replaced by the \textit{Garland} two-step analysis, the court would have made reference to \textit{Garland}, notwithstanding the failure of the parties to do so. The more likely explanation for the fact that the court simply applied the existing law relating to the recovery of


\(^{33}\) McInnes, \textit{supra}, footnote 3, at p. 119.

\(^{34}\) \textit{Ibid.}
moneys paid by mistake is that this is the body of existing doctrine that applies to a fact situation of this kind.

In fairness to McInnes, it must be conceded that on at least one occasion, the Supreme Court of Canada has analyzed an unjust enrichment claim on the basis of the Garland two-step analysis without reference to the existing law. As I have argued elsewhere, however, the lesson that might be taken from that exercise is that it is not particularly helpful for the court to simply ignore existing doctrine in this fashion. Although the result of the case is, in my view, perfectly satisfactory, the rule pronounced by the court is based on an unprecedented notion of mutual mistake that is likely to cause confusion in future cases. The more important point for present purposes is that McInnes is surely incorrect in observing that the Traditional Approach as to the relationship between the traditional or existing law and the general principle against unjust enrichment is “bereft of judicial support.”

McInnes reassures the reader, however, that, essentially, no harm has been done in B.M.P. Global. Thus, as he says, “while the analysis certainly should have been brought up to date, the outcome would have been the same in either event.” In proving the “unjust factor” of mistaken payment, the claimant also showed, in his view, that the defendants’ enrichment lacked a juristic reason. “The rogue’s forgery both caused a mistake . . . and nullified the apparent basis of the transfer . . .” Failure to refer to the Garland two-step, it seems, was a matter of professional sloppiness. It is unfortunate, he noted that “some members of the profession have failed to keep abreast of recent developments.”

If, as McInnes suggests, the proving of an unjust factor has the serendipitous effect of also proving an absence of juristic reason for the transfer, the debate as to whether the existing law has been replaced by the absence of juristic reason analysis may seem a bit sterile to the casual professional observer. We shall return to this point.

38. Ibid.
39. Ibid., at p. 120.
IV. "REJECTED IN KERR v. BARANOW"

More surprising to me, however, is McInnes' claim that the Traditional Approach to the relationship between the existing law of restitution and the Garland two-step has been "clearly rejected" in Kerr v. Baranow. After making reference to the difference of opinion he and I have with respect to the significance of the Garland two-step and its relationship to the existing doctrine, McInnes pronounces, that, in light of the Kerr decision, "[t]he debate accordingly is over."\(^{40}\) The "civilian-inspired model"\(^{41}\) reigns. "The unjust factors no longer directly determine the availability of restitution under any circumstances."\(^{42}\) I must say that I find these claims rather puzzling. In Kerr, the court appears to confirm that the existing law is to be retained but that the principled Garland absence of juristic reason analysis can be employed by courts to extend relief in situations not covered by the traditional categories of recovery.

The critical passage from the judgment of Cromwell J. from which one may draw support for this view states as follows:

At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: . . . For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request . . .

Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: . . . By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice."\(^{43}\)

It seems to me that the meaning of this passage is rather clear. Cromwell J. speaks of "retaining" the existing categories. The

\(^{40}\) McInnes, supra, footnote 1, at p. 281.
\(^{41}\) Ibid.
\(^{42}\) Ibid.
\(^{43}\) Kerr v. Baranow, supra, footnote 2, at paras. 31 and 32, (references deleted, emphasis added). The last quoted phrase, of course, is from the opinion of McLachlin J. in Peel, quoted above at footnote 25.
existing categories, as the illustrations in the previous paragraph of his judgment indicate, constitute the existing doctrines of the law of restitution that are referred to by Birks as the “unjust factors.” The existing categories are “retained.” Cromwell J. does not say that they are replaced, supplanted, abolished or overruled by the Garland two-step version of the tri-partite unjust enrichment principle. Rather, he suggests that Canadian law recognizes, in addition to the “existing categories” of claims, “other claims” that fall within the “principles underlying unjust enrichment.” New claims, it should be emphasized, consistent with underlying principles can, in his view, be recognized.

What kind of argument, then, would one expect counsel to make in the case of the mistaken payment? Such a claim comes within an existing category of relief. I assume the plaintiff would come forward and attempt to demonstrate that the fact situation meets all of the elements of the mistaken payment rule articulated so recently and elegantly by the Supreme Court of Canada itself, as noted above, in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*.44 Similarly, in a duress claim, I assume that the plaintiff would come forward and try to demonstrate that the kinds of threats made by the defendant are those that have been previously held by Canadian courts to constitute duress in the existing jurisprudence. In a necessitous intervention case, one would expect plaintiff’s counsel to rely on the existing jurisprudence dealing with this question. And so on. In a case where plaintiff’s counsel wanted to extend the law and assert a claim other than those recognized by the established categories of claims, presumably plaintiff’s counsel would try to persuade the court that the particular claim fell “within the principles underlying unjust enrichment,” as Cromwell J. explained in *Kerr*.45 This is, of course, the Traditional Approach.

To give McInnes his due, however, it must be said that the *Kerr* opinion does elaborate at some length on how the tri-partite principle should apply to a claim for the division of wealth accumulated during cohabitation once that relationship has come to an end. This is, of course, a *Pettkus v. Becker*-type46 claim and it is therefore perhaps not surprising that the court saw fit to apply the tri-partite principle articulated for the first time by Dickson J. in that case. It is, in my view, however, important to examine the court’s actual analysis of the claim and note where the law now

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44. *Supra*, footnote 30.
45. In the passage quoted in the text above at footnote 43.
stands as a result of *Kerr* with respect to restitutionary claims of this kind.

In the *Kerr* decision, the Supreme Court articulated at considerable length the nature of the elements of this type of claim and the types of evidence that should be led by a plaintiff seeking to establish such a claim. In brief, the court explained that such a claim lies for a portion of wealth jointly created by cohabiting parties in circumstances where the relationship between them constitutes a "joint family venture." In such a relationship, the parties' social and economic lives are intertwined to an extent giving rise to an expectation on their part that the parties will share the fruits of their joint labours on into the indefinite future. When, contrary to their expectations, the relationship comes to an end, it is unjust for one party to retain all of the wealth created by their joint effort and team work. In a lengthy analysis which is both illuminating of the nature of the claim and helpful to counsel attempting to lead evidence to establish such a claim, Cromwell J. elaborated at considerable length on the various factual elements that might be considered to support a finding that the particular circumstances of the relationship between the parties constitutes a "joint family venture," thus giving rise to a claim for a share of jointly created wealth upon dissolution of the relationship.

In a claim of this kind, then, we may ask what it is that the plaintiff would seek to establish in persuading the court that such an entitlement arises on the particular facts. Would the plaintiff's counsel simply rely on the *Garland* two-step analysis and assert and then prove that there exists an absence of all of the potential "juristic reasons" for the "transfer" and thereby establish the *prima facie* case with the burden then shifting, in the second step, to the defendant to assert a defence based on reasonable expectations and/or public policy? Or, rather, would the plaintiff assert the existence of a joint family venture and then proceed to lead evidence, of the kind described at length by Cromwell J. in *Kerr*, in an attempt to establish a basis for a finding that the joint family venture concept is applicable to relationship to the parties? In my view, the answer to this question is obvious. Plaintiff's counsel would be well advised to affirmatively claim and then establish the factual basis for the existence of a joint family venture.

In sum, the effect of the *Kerr* decision is to recognize what Birks would no doubt describe as a new "unjust factor" that a plaintiff

47. For an extensive account of this decision and its implications for this type of claim, see Maddaugh and McCamus, supra, footnote 7, chapter 34.
may affirmatively assert as a basis for restitutionary relief. It appears to follow from the Kerr analysis, then, that the court’s view of the role of the unjust enrichment tri-partite analysis is to facilitate the recognition of new unjust factors or, speaking more plainly, new situations in which a restitutionary claim is appropriate rather than to simply obliterate and replace all of the existing unjust factors jurisprudence. Perhaps, indeed, this is what Cromwell J. is alluding to in the following passage in his Kerr opinion:

Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. . . . Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.48

Once the court has done so and indicated the particular factual context giving rise to a successful restitution claim in a new “subject area,” it seems rather likely that the court intends that plaintiff’s counsel would plead such facts and attempt to assert them rather than to simply engage in the Garland two-step, absence of juristic reason, analysis. Certainly in a Petkus-type claim, plaintiff’s counsel would be well advised, after Kerr, to assert the existence of a joint family venture and affirmatively attempt to persuade the court that such a relationship exists on the facts of the parties’ relationship.

Perhaps an even more striking feature of the Kerr decision is that at no point in the judgment does the court actually apply the Garland two-step analysis. That is to say, the first step in the Garland two-step requires the plaintiff to establish the negative proposition that there exists no contract, gift, or other statutory, common law or equitable basis to explain the transfer. Under the Garland two-step, once the plaintiff establishes this negative proposition, a prima facie case to recover is established and the burden shifts to the defendant to establish defences based on “reasonable expectations” and “public policy.” Again, at no point in the opinion does the court actually indicate that the plaintiff has attempted to discharge the burden of proving this negative proposition and conclude that the burden has been successfully discharged. It is not mentioned that the plaintiff has disproved the existence of contract and gift.49

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49. Indeed, an attempt by the plaintiff to prove the absence of a gift intention might
of the statutory, common law or equitable reasons for a transfer of which the plaintiff has disproven the existence. In short, as a practical matter the first step of the Garland two-step is simply ignored by the court.

Perhaps, however, I have misunderstood the nature of the first step of the Garland two-step. Perhaps it is sufficient for the plaintiff to simply assert that he or she is not aware of any contract, gift, statutory, common law or equitable basis for the transfer thereby shifting the burden to the defendant to engage in a step-two defence. Even if one assumes, however, that the first step of Garland two-step is essentially a meaningless ritual of this kind, it is similarly noteworthy that it is never mentioned by the court in Kerr that the plaintiff successfully engaged in such a ritualistic endeavour. But surely McInnes would argue that it could not have been the intention of the court in Garland to impose a meaningless ritual on the plaintiff when relying on the two-step analysis. Surely the test was meant to impose an evidentiary burden of some kind on the plaintiff. There is no evidence in the Kerr judgment that, in the court’s view, the plaintiff successfully discharged whatever that burden might be. Consistently with the view that what the court actually did in Kerr was to recognize the existence of a new “unjust factor,” it is not surprising, from my perspective at least, that the court did not engage in an extensive articulation of the first step of the Garland analysis and hold the plaintiff to a proof of the absence of all of the enumerated factors.50

In sum, then, it is my view that both in its explicit reasoning with respect to the Garland principle and in the actual analytical model developed by the court for granting relief in the particular fact situation, the Kerr decision does not abolish, reject or supplant the existing Canadian common law of restitution with a simple application of the Garland two-step test. With respect to its explicit reasoning concerning the general test, Cromwell J. plainly indicates that the “existing categories” of recovery are “retained” rather than abolished, overruled, supplanted or replaced. As far as the actual analysis of the plaintiff’s claim in Kerr is concerned, the court plainly develops what will function in the future as a new

50. Indeed, I think it is true that in none of the post-Garland cases is the first step actually applied in this sense. It would be a substantial achievement for a plaintiff to enumerate, not to say disprove, the existence of all the potential juristic reasons for a transfer. One of the many problems with the Garland test, surely, is the impracticality of actually imposing such a burden on the plaintiff.
unjust factor in cases of this kind — the establishment of a joint family venture followed by dissolution of the relationship. Further, the court never actually applies the specifics of the Garland two-step analysis to the plaintiff’s claim. The court does not identify the factors that either were or should have been enumerated by the plaintiff as part of that first step nor does it make a finding that the burden of disproving their existence was successfully discharged by the plaintiff.

V. “WRONG IN PRINCIPLE” AND “BAD FOR PRACTICE”

For the sake of brevity, I will comment only briefly on Professor McInnes’ allegations that my views are both “wrong in principle” and “bad for practice.” With respect to the former point, as intimated above, I am simply not aware of any principle, nor does he mention one, which indicate that the Traditional Approach is “wrong in principle.” On the contrary, it seems to me that the view that a plaintiff should try to base a successful claim on existing precedents and resort to the unjust enrichment principle when seeking a modification or extension of prior law is an approach that is both sound in principle and consistent with the approach taken in our private law generally. It is implicitly and sometimes, as in Pettkus v. Becker,51 explicitly adopted in restitution cases that effect modifications of the existing law.52

It is unclear to me what it is that Professor McInnes is getting at in suggesting that the Traditional Approach is “bad for practice.” If Professor McInnes is suggesting that the Traditional Approach renders the law uncertain and unstable, I would suggest the contrary. Continuing to apply the existing authorities where applicable could only have the effect of rendering the law more stable and predictable. Thus, for example, applying the existing law of mistaken payments to the claim in B.M.P. Global, rather than simply applying the Garland two-step and making the law up

51. Supra, footnote 10.
52. The traditional relationship between existing precedents and the underlying unjust enrichment principle is explicitly acknowledged in the recently published Restatement Third. The detailed existing rules imposing restitutionary liability (or “unjust factors”) occupy most of the Restatement’s two volumes. Section I sets out the general principle against unjust enrichment and then cautions that the list of detailed liability rules cannot be considered to be exclusive, for “cases may arise that fall outside every pattern of unjust enrichment [i.e., the ‘unjust factors’] except the rule of the present section.” See American Law Institute, Restatement of the Law Third: Restitution and Unjust Enrichment (St. Paul, American Law Institute Publishers, 2011), p. 4.
from scratch renders the analysis of the problem, in my view, much easier to predict. The attraction of the Garland two-step analysis for the busy practitioner, no doubt, is that it appears to reduce the entire law of restitution to a simple formulaic rule that can be easily memorized and trotted out in professional conversation. The problem with it, however, is that, at the end of the day, it does not tell one very much about how cases of the kind at hand have been decided in the past and how they are likely to be decided in the future.

Be that as it may, it is, surely, rather difficult to decide which approach—the Traditional Approach or the Garland two-step—is bad for practice. Practitioners are very able to deal with uncertainty in the law. Perhaps the real loss suffered from instability and uncertainty in the law is borne by its consumers, those who seek advice with respect to their legal rights and obligations. At the present time, one who writes an opinion on a difficult point of restitution law must write an opinion—I have had the opportunity to do so myself on a number of occasions—in two parts. The first part will typically analyse the problem in light of the existing authorities and offer a view as to the likely analysis of the client's position on the basis of existing doctrine. As in other areas of the law, where the existing law appears anomalous or ripe for modification, a properly crafted opinion would indicate the possibilities for such modification of the doctrine as might well occur. In light of the instability in the contemporary law of restitution introduced by the Garland two-step analysis, one must go on, however, to opine that a court could simply apply the Garland two-step analysis to the situation at hand and that, in that case, the outcome of the analysis is even more difficult, perhaps impossible, to predict. I doubt that anything is to be gained, from a practical point of view, by rejecting the Traditional Approach and omitting the first part of such opinions.

VI. THE BIRKSIAN PYRAMID SCHEME

One suspects that Birks himself appreciated that a simple abandonment of the existing law or "unjust factors" and its replacement by an "absence of basis" principle drawn from the civil law would not gain wide or easy acceptance. Perhaps for this reason, Birks proposed in Unjust Enrichment53 a "limited reconciliation" of the two approaches. The reconciliation, in his

53. Supra, footnote 16.
view, would be constituted by a layered pyramid with abstract notions of unjust enrichment at the top, absence of basis in the middle and a base constituted by the unjust factors themselves. Some sense of the subtlety of this concept is conveyed in the following passages from his work:

The previous pages show that a limited reconciliation between the two approaches lies in making the intent-based unjust factors subservient to absence of basis, which itself then becomes an intermediate generalization between the unjust factors and unjust. The pyramid can be constructed in which, at the base, the particular unjust factors such as mistake, pressure, and undue influence become reasons why, higher up, there is no basis for defendant’s acquisition, which is then the master reason why, higher up still the enrichment is unjust and must be surrendered. There is no room at the base of this pyramid for policies dictating restitution. The logic of the pyramid is that a policy which does not invalidate the basis of an enrichment has no relevance at all, and a policy which does destroy that basis is irrelevant, since the invalidity is sufficient in itself, without regard to the reason for it. Hence, “policies dictating restitution” becomes “any other reason for invalidity”, where “other” means “other than non-voluntariness”.

The base of the pyramid thus consists of all the categories of deficient intent (no intent, impaired intent, and qualified intent) together with all other causes of invalidity. All these work through “absence of basis”. A single proposition covers every case: an enrichment at the expense of another is unjust when it is received without explanatory basis.54

Lifted out of context and without further explanation, it is not possible to portray the full complexity of the Birksian Pyramid Scheme. For present purposes, it is sufficient to note that the basic idea is that the unjust factors (or some of them) are buried at the bottom of the pyramid under propositions of increasing levels of abstraction.

In his note and in another recent article,55 McInnes, second to none in his enthusiasm for the later writing of Professor Birks, embraces the Birksian Pyramid Scheme and, indeed, somewhat improbably, appears to claim that it is now an established feature of the Canadian law of restitution.56 For those of us who feel that it would be simply foolish to abolish the existing common law and replace with a civilian rule little understood in common law jurisdictions, there should be good news in this. The existing law has not disappeared. It has just moved into the basement of the

54. Ibid., at p. 116.
56. Ibid., at pp. 194-196.
Birksian pyramid. As McInnes explains, “the historical cases concerning doctrines like mistake and necessity remain not only relevant, but indispensable.”

There are a number of problems with this approach, however, not the least of them being it is not at all clear what it means at a practical level. Birks and McInnes appear to believe that the existing law — the “unjust factors” — no longer serve as rules of law. McInnes offers us as illustrations of the operation of the pyramid scheme a case in which an aunt transfers money first, by mistake and secondly, as a result of undue influence exercised upon her. In each case, as best I can understand, the money is recoverable because of the absence of a juristic reason for the transfer. But, apart from incanting that “rule,” one must delve deeper into the situation and discover that the money was paid, in the first instance, by mistake. This is not to say, however, that the court is simply applying the existing rule relating to the recovery of mistaken payments. That would be inconsistent with the Birksian pyramid and its replacement of the existing common law with the absence of basis rule. McInnes explains:

The unjust factor of mistake traditionally drew upon the common law’s accumulated wisdom — countless cases heard by countless judges over hundreds of years — regarding the reversibility of benefits conferred in error. In the same way, the juristic reason analysis now draws upon the policies and principles historically collected under the rubric of “mistake”.58

Similarly, in the second instance — payment by an aunt under undue influence — a court would apply the rule granting recovery in the absence of a juristic reason for the transfer but “it would invoke the concept of ‘undue influence’ not as an unjust factor per se, but rather as a means of drawing upon the underlying analysis. That label, like ‘mistake’, imports a sensitive balance, struck between competing interests, over the course of centuries.”59

And so, if I understand McInnes correctly, the existing law of mistake and undue influence is no longer to be considered to constitute law in the sense of “rules” but, rather, a source of guidance to a court applying the absence of juristic reason “rule” drawing from the historical wisdom of the common law.

57. Ibid., at p. 194.
58. Ibid., at p. 195. It is not clear that Birks would agree. In his elaboration of the new civilian absence of basis scheme, he maintained that in a mistake case, “[t]he mistake of the claimant has nothing to do with it.” It’s the absence of basis that is determinative. See Birks, supra, footnote 16, at p. 132.
Accordingly, if at long last the Supreme Court of Canada were to clarify some of the difficulties in the existing doctrine (or whatever we are now to call it) of undue influence, this would not be a change in the law or rules of undue influence. This would be a change in the historic advice to be derived from the common law in applying the rule allowing recovery in the absence of a juristic reason for the transfer. Similarly, the clarification made of the mistaken payment rule (I beg forgiveness for using the term “rule” but I am not sure what other term to use) in the B.M.P. Global case is not a change in a legal rule or test but, rather, a revision in the wisdom emerging from the mistake corner of the basement of the Birksian Pyramid Scheme.

I hope that I am not alone in thinking that this is altogether too clever by half. Three brief points may be made. First, in response to the suggestion that the Birksian Pyramid Scheme is now part of the Canadian law of restitution, I see no evidence for this. I am not aware of any suggestion of this kind being made in the cases. I doubt very much that many judges have heard of the Birksian Pyramid Scheme or, indeed, have applied their minds to the delicate shift of such doctrines as mistake or undue influence from their status as “rules of law” to sources of guidance or advice in applying higher level and more abstract rules of law. I suspect that Canadian judges, as B.M.P. Global indicates, will continue to apply the doctrines of mistake and undue influence, for example, as if they form part of the fabric of Canadian “law” in the traditional sense. Moreover, in those cases in which courts apply the absence of juristic reason test as if it were a new comprehensive rule of law, they typically simply ignore the existing law and make up the rules from scratch. In so doing, they run the risk of creating a bewildering body of doctrine.

Second, it is not at all obvious that this transformation of “rules” of law into sources of “guidance” is at all helpful to the profession. In an undue influence case, for example, I expect that Canadian common law lawyers and judges will continue to feel comfortable applying the familiar doctrines of undue influence and

60. See, e.g., Kosaka v. Chan (2010), 312 D.L.R. (4th) 32 (B.C.C.A.), in which the court applies the juristic reason test, ignores the substantial body of existing law on point and articulates a new rule that rests on a misunderstanding of the nature of this type of liability. For discussion, see Maddaugh and McCamus, supra, footnote 7, section 21:200.25, “Must the Anticipated Agreement be Fully Formed?” See also, Harraway v. Harraway (2009), 315 D.L.R. (4th) 182 (B.C.C.A.), in which the existing and applicable law of resulting trusts is simply ignored.
mistake as if they constitute rules of law rather than embracing the Birksian Pyramid Scheme. In no other area of private law have we taken the existing rules and doctrines and converted them into some sort of nether world of advice or guidance that is neither law nor non-law. I must say that I cannot conceive of a good reason for doing so and cannot imagine making a persuasive case for this kind of exotic doctrinal transformation to the profession at large. As noted above, I quite agree with Professor Burrows that there is simply “no good reason to abandon the common law approach”\(^{61}\) and replace it with the Birksian Pyramid Scheme.

Third, however well McInnes may consider that the Birksian Pyramid Scheme works with respect to bodies of doctrine (or whatever) concerning mistake and undue influence, the analytical model does not work nearly as well with other aspects of restitutionary law. It is difficult to jam into the Birksian Pyramid Scheme cases permitting recovery of benefits conferred, for example, in response to an emergency. In the context of other types of claims such as benefits conferred in anticipation of agreement or compulsory discharge of another’s liability, the problem is not so much that they could not be made to fit within the Procrustean Bed, but, rather, that the “no juristic reason analysis” is likely to mislead.\(^{62}\)

Moreover, both Birks and McInnes would agree, presumably, that the Birksian Pyramid Scheme simply could not apply to that vast body of restitutionary law that facilitates the recovery of benefits acquired through wrongful conduct of various kinds. In his later phase, Birks would justify this on the basis that “unjust enrichment” must be narrowly confined to cases that fit the pyramid model, thereby expelling from the subject of “unjust enrichment” much of the content of modern treatises on the law of

\(^{61}\) Supra, footnote 18, at p. 112.

\(^{62}\) See, e.g., Kosaka v. Chan, supra, footnote 60. In my view, McInnes himself falls prey to this difficulty with one of his illustrations of the different results that might obtain under the new Birksian/civilian order he favours. McInnes believes that the English decision in Deutsche Morgan Grenfell Group plc v. I.R.C., [2007] 1 A.C. 558 (H.L.), would be decided differently in post-Garland Canada. The plaintiff mistakenly paid a tax earlier than required on the basis of an invalid provision requiring early payment of an otherwise legitimate tax. The plaintiff successfully recovered the value conferred by paying the amount due earlier than required on the basis that this was a mistakenly conferred benefit. McInnes disagrees on the basis that since the tax itself was legitimate there existed a statutory juristic reason for the transfer and the claim should be denied. But surely, as the decision holds, the legitimacy of the tax shouldn’t preclude recovery of the value mistakenly conferred by early payment. See McInnes, supra, footnote 55, at p. 192.
restitution. Thus, for example, undue influence is part of the law of unjust enrichment in this narrow sense but fiduciary obligation is not. This is, in my view, an approach which is also unsatisfactory for various reasons but that is another and longer story. The fact that fiduciary duty and undue influence are related concepts — both arising in the context of relationships of “trust and confidence” — offers a clue as to the unsatisfactory nature of the Birksian narrow view of “unjust enrichment.”

VII. CONCLUSION

Notwithstanding the triumphant tone of the note by Professor McInnes, I am not yet persuaded that the Canadian law of restitution has reached a stage where it has, alone in the common law world, either abolished all existing common law and replaced it with a civilian doctrine of the kind recommended by Professor Birks or that it has followed Professor Birks in adopting the Birksian Pyramid Scheme. More particularly, I think it is a misreading of the Garland decision to take the view that it either intended or has achieved such a radical transformation of Canadian law. Further, and this is really the point of this note, I think that Professor McInnes misleads readers when he claims that the recent decision in Kerr v. Baranow has rejected the existing common law in favour of a simple civilian rule of general application.

In my view, the Kerr opinion is quite consistent with what I have described above as the Traditional Approach of applying the existing and detailed rules of law and resorting to the tri-partite unjust enrichment principle when seeking to modify those rules or to extend liability in new types of claims. As noted, Cromwell J. specifically states that the “existing categories” of liability, i.e., the existing law, are “retain[ed].” They have not been abolished, supplanted, overruled or replaced by a new civilian rule. Resort to the general principle against unjust enrichment as formulated in Pettkus and Garland appears to be intended by the court to be utilized when “new situations . . . arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule.” As Cromwell J. stated in Kerr.

63. Supra, footnote 4.
64. Supra, footnote 2.
65. Ibid., at para. 32.
66. Peel, supra, footnote 24, at p. 789.
67. Supra, footnote 2, para. 32.
quoting in part McLachlin J. in Peel, 68 "[b]y retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able ‘to develop in a flexible way as required to meet changing perceptions of justice.’" 69

As noted above, I believe that it is also important to carefully observe the actual reasoning of the court in Kerr. In effect, the Kerr court, relying to be sure to some extent on the unjust enrichment principle, developed a detailed analysis of what might now be referred to as the "unjust factor" in a dispute concerning property division on dissolution of cohabitation, i.e., the Pettkus-type claim. In proving such a claim in the future, it is clearly the case that the plaintiff will be well advised to affirmatively alleges and attempt to prove, leading evidence of the kind identified by Cromwell J., that the relationship between the parties constituted a "joint family venture" in which the parties had expectations of sharing jointly-produced wealth on into the indefinite future. The Kerr court did not suggest that in such a case in the future the plaintiff should simply rely on the absence of juristic reason test. Moreover, as a practical matter, at no point in the Kerr opinion was the Garland two-step analysis actually applied to the plaintiff's claim. There was no suggestion that the plaintiff had at any point either articulated or, having done so, proved the absence of the existence of all possible juristic reasons for the transfer of value as a method of establishing a prima facie case for restitutionary recovery. It seems clearly to be the view of the Kerr court that the Garland two-step analysis is useful when attempting to recognize new types of claims but does not replace the existing law relating to established heads of restitutionary liability.

Finally, in my view, the McInnes plan of burying the existing common law in the basement of the Birksian Pyramid beneath layers of Birksian abstraction simply adds unnecessary complexity and confusion to a body of law that suffers, to a greater degree than contract and tort, from a lack of familiarity and understanding by the profession at large. The great achievement of the original Restatement of Restitution 70 and the main stream treatises that flowed in its wake was to make a vast body of private law that had been much ignored by 19th-century treatise writers available in

68. Supra, footnote 24.
69. Kerr, supra, footnote 2, at para. 32, quoting Peel, supra, footnote 24, at p. 788.
an accessible form to the profession. I do not doubt that there has been a very substantial increase in the familiarity of the profession generally with restitutionary law and concepts over the last several decades in common law jurisdictions. Burying the existing law and its easily understood and easily explained categories of claims under layers of Birksian obscurantism runs the risk, in my view, of undoing this substantial advance in professional knowledge and understanding of our private law.

71. If we were to start, as I think we should, with the proposition that it ought to be possible to explain with relative ease the basic liability rules to the ordinary mortals who are subject to them — as we can in contract and tort — we would not end up by replacing the existing law of mistake, duress, undue influence, etc., with a difficult to describe civilian absence of juristic reason test and/or the Birksian Pyramid Scheme.