# INSURANCE - LIFE INSURANCE - INSURERS RIGHT OF ACCESS TO INSUREDS' MEDICAL RECORDS: *Frenette* v. *Metropolitan Life Insurance Co.*

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*The Decision*

The decision of the Supreme Court of Canada in *Frenette* v. *Metropolitan Life Insurance Co.*[1] raised some interesting, important and yet troubling questions regarding doctor-patient confidentiality.

The facts of the case are relatively straightforward. On October 27, 1983, Patrick Frenette applied for a life insurance policy with Metropolitan Life Insurance Company (hereafter "Metropolitan"). The application included a standard authorization permitting Metropolitan "to have access to his [Frenette's] medical records '*[a]ux fins d'appréciation des risques et d'étude des sinistres*' ([trans.] '[f]or the purposes of risk assessment and loss analysis")".[2] The policy was issued on November 10, 1983 with a basic indemnity of $10,000 and a double indemnity rider in the case of accidental death. The rider contained several exclusions, notably suicide and death from a fatal reaction to unprescribed drugs.

On July 29, 1986, Frenette's body was found floating in the Rivière-des-Prairies. The coroner estimated that the body had been in the water for about five to seven days, although Frenette was last seen by his mother on July 25, 1986. Due to the state of the body, no tests were performed for traces of alcohol or other toxic substances.

Metropolitan paid the basic indemnity of $10,000 upon receipt of the claim but refused to pay the additional indemnity, claiming that Frenette's death was due to suicide.

On April 22, 1987, Frenette's father instituted action for the additional indemnity of $10,000. Metropolitan filed its defence alleging suicide and, additionally, past instances of chronic alcohol and drug abuse and a previous suicide attempt. Metropolitan based its defence on information it had obtained that, on July 23, 1986, Frenette had been rushed to the emergency ward of Jean Talon Hospital for a possible drug overdose.

Frenette's father was asked and refused to sign an authorization to permit Metropolitan to review Frenette's entire medical record. Metropolitan then

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[1] [1992] 1 S.C.R. 647, (1992) 89 D.L.R. (4th) 653.

[2] *Ibid.*, at pp. 653 (S.C.R.), 655 (D.L.R.).

attempted to obtain Frenette's medical record from Jean Talon Hospital using the original authorization (from the policy application) of October 27, 1983. The hospital refused in view of its practice requiring authorizations to be dated within the previous ninety days.

In view of the obstacles encountered, Metropolitan presented a motion to the court seeking permission to examine Frenette's entire medical record at Jean Talon Hospital, as well as an order compelling the Régie de l'assurance-maladie du Québec (hereinafter "the Régie") to provide them with a list of doctors Frenette had consulted in the past (and, presumably, to then ask for access to the files held by each of the doctors Frenette had consulted).

In first instance, Gagnon J. of the Court of Quebec dismissed Metropolitan's motion.[3] In his opinion, the authorization signed by Frenette prior to the issuance of the policy did not cover subsequent medical consultations. Furthermore, he did not believe that the Code of Civil Procedure[4] permitted the consultation of such records, especially in view of the confidentiality of medical records as embodied in the Charter of Human Rights and Freedoms,[5] the Medical Act,[6] and An Act Respecting Health Services and Social Services.[7]

The Court of Appeal,[8] in a majority decision, confirmed the judgment in first instance. (It did not deal with the order against the Régie since Metropolitan had renounced its request for such an order.) Baudouin J.A., writing for the majority, found that the court had discretion, under article 402 of the Code of Civil Procedure, to order the communication of medical records. However, he found the authorization to be ambiguous. In his opinion, it could refer to the medical records existing at the time of the application for the policy or to all medical records that existed at the time of the assured's death. Because of this ambiguity and the fundamental nature of the right to professional secrecy recognized by section 9 of the Charter, he applied the *contra proferentem* rule and found the authorization "limited, specific and particularized".[9] He then examined the provisions of the Code of Civil Procedure and the Charter, and found that any renunciation of the right of confidentiality must be "clear, precise and limited".[10] He called Metropolitan's motion a fishing expedition.[11]

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[3] C.Q. Montreal 500-02-2013407-874 (December 7, 1988).

[4] L.R.Q., c. C-25.

[5] L.R.Q., c. C-12.

[6] L.R.Q., c. M-9.

[7] L.R.Q., c. S-5.

[8] [1990] R.J.Q. 62, (1989), 34 Q.A.C. 143.

[9] *Ibid.*, at pp. 65 (R.J.Q.), 147 (Q.A.C.). (Translation by the Supreme Court).

[10] *Ibid.*, at pp. 67 (R.J.Q.), 150 (Q.A.C.). (Translation by the Supreme Court).

[11] He found it "... normal that an insurer have the right to gather information pertaining to the cause of death ... However, it does not appear to me possible to conclude that, by merely taking out a life insurance policy and being covered by a double indemnity clause, an individual has implicitly given up his right to professional secrecy and tacitly accepted that the insurer is entitled to rummage through his private life and require the production of all medical and hospital records amassed between the time the policy was issued and the time of death". *ibid.*, at pp. 67 (R.J.Q.), 149 (Q.A.C.). (Translation by the author).

In his concurring reasons, Gendreau J.A. generally agreed with his fellow judge. However, he found that the loss referred to in the term "loss analysis" contained in the authorization clearly referred to Frenette's death. Nevertheless, he also found Metropolitan's motion to be a "fishing expedition".[12]

Malouf J.A. dissented from his fellow judges, finding that the authorization was clear and unambiguous. Nevertheless, he held that the order sought by Metropolitan was too broad. Accordingly, he would have limited its access to the documents which "refer directly and indirectly to the events leading to [Frenette's] death".[13]

L'Heureux-Dubé J. wrote the unanimous decision of the Supreme Court of Canada. To her, the central problem was "the balancing process through which the courts must weigh an individual's right to privacy and confidentiality of his or her medical records against society's interest in an efficient administration of justice which encourages full disclosure of all material facts of a case at the pre-trial stage so as to give a defendant the opportunity to prepare a full and complete defence, and to allow a trial judge ... 'to find out the truth, and to do justice according to law'".[14]

She explained that, in contracts of insurance as in commercial contracts, the contract is the law of the parties and the rules of construction are similar. If the contract is clear and unambiguous, then it must be adhered to and there is no reason to apply the *contra proferentem* rule. In light of her analysis, she concluded that "in signing the [authorization, Frenette] could only but have consented to the release of his medical records to [Metropolitan] for the purpose of investigating the cause of his death so as to enable the insurance company to determine entitlement to the supplementary indemnity for accidental death according to the terms of the policy".[15] She concluded that Metropolitan was entitled to Frenette's *complete* medical records "[g]iven the clear and unambiguous terms of the waiver contained in the insurance policy".[16]

L'Heureux-Dubé J. then reviewed articles 5 and 9 of the Charter and the decisions under it. Article 9 states:

> Every person has a right to non-disclosure of confidential information.

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[12] "... the wording of the conclusions of the motion is, to say the very least, a veritable 'fishing expedition', to employ a colourful, often used and, in this case, entirely apt expression: the site to be searched is known, but not what will be found there or even if anything will be found there. Thus access to the entire private life of the insured is sought on the basis of vague allegations of drug use and attempted suicide; ... [Metropolitan] seeks 'communication of the complete medical file' and, as if that phrase were not sufficient, adds: 'including but without limiting the generality of the present, correspondence with doctors or hospitals, the laboratory reports, expert opinions, x-rays ...'", *ibid.*, at pp. 73 (R.J.Q.). 157 (Q.A.C.). (Translation by the author.)

[13] *Ibid.*, at pp. 71 (R.J.Q.), 154-155 (Q.A.C.) (Translation by the Supreme Court).

[14] *Supra*, footnote 1, at pp. 666 (S.C.R.), 665 (D.L.R.).

[15] *Ibid.*, at pp. 671 (S.C.R.), 669 (D.L.R.). Quaere, does this mean that, in policies without the supplementary indemnity for death, the authorization has another meaning.

[16] *Supra*, footnote 1, at pp. 673 (S.C.R.), 670 (D.L.R.).

> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, *unless he is authorized to do so by the person who confided such information to him or by an express provision of law.*
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> The tribunal must, *ex officio*, ensure that professional secrecy is respected.[17]

She cited with approval a judgment of Turgeon J.A. of the Court of Appeal in *Cordeau* v. *Cordeau*:[18]

> [Translation] Under the last paragraph of s. 9 [of the *Charter*], a judge has the discretionary power to protect a physician or require him to testify, depending on whether the judge considers it appropriate for the "sound administration of justice".
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> The interests of justice require that the truth be discovered. *This involves the obligation of a physician to be silent in a judicial proceeding, not his duty of secrecy to the public in general.* It is important to avoid making the physician an involuntary accomplice in the fraud committed by a party, as for example when the latter has made false statements in an insurance matter.

Adopting this approach may reverse the current trend in the Quebec Court of Appeal of giving article 9 of the Charter a broad interpretation when in conflict with the administration of justice.

According to L'Heureux-Dubé J., the question and the scope of access posed no problem in the instant case: Metropolitan was entitled to all medical records provided they were used for "risk assessment and loss analysis".[19] She even went so far as to say in *obiter* that, if there is a problem in a particular case (that is, no authorization), "a court must weigh the diverse interests in conflict".[20] In the instant case, however, in view of the clear, unambiguous and unrestricted authorization provided by Frenette, "the courts have no discretion, they *must* exercise their jurisdiction to ensure that all relevant documents be before them to properly and fairly determine the issues between the parties and be made accessible, at the pre-trial stage, to a party to a litigation to allow the latter to prepare a full and complete defence".[21]

In order to see what a court should do in a problematic case, L'Heureux-Dubé J. reviewed the jurisprudence relating to article 402 of the Code of Civil Procedure. There are three types of cases where access to medical records is sought: bodily injuries, medical malpractice and cases arising out of life (and/or health) insurance policies. When dealing with bodily injuries, the courts have generally granted access to medical records, but often defer to the judge at trial when requests for pre-injury records (which may relate to damages) are made. In medical malpractice cases, access is almost universally granted as the courts have found an implicit renunciation to the confidentiality of records, although

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[17] (Emphasis added by L'Heureux-Dubé J.).

[18] [1984] R.D.J. 201, at p. 205, cited, *supra*, footnote 1, at pp. 677 (S.C.R.), 673 (D.L.R.). (Emphasis added by L'Heureux-Dubé J.).

[19] *Supra*, footnote 1, at pp. 678 (S.C.R.), 674 (D.L.R.).

[20] *Ibid.*, at pp. 678 (S.C.R.), 680 (D.L.R.).

[21] *Ibid.*, at pp. 678-679 (S.C.R.), 675 (D.L.R.). (Emphasis added by L'Heureux-Dubé J.).

the access is generally limited to records directly related to the litigation.[22] In cases involving insurance policies, the courts have granted access to medical records in order to prevent fraud. However, with a unique exception, the courts have not found an implicit renunciation of patient confidentiality in these cases. Nevertheless, L'Heureux-Dubé J. states that the courts must find an implicit waiver "where the physical or mental integrity of the insured is an equally important issue".[23]

Based on the foregoing, L'Heureux-Dubé J. concluded that, had there been no authorization in the present case, she would have allowed access to Frenette's medical records since the state of Frenette's health "is the central issue of the case and ... there are no other means for ... [Metropolitan] to prove ... [its] case".[24]

In *obiter*, L'Heureux-Dubé J. reviewed the situation in the common law provinces, where access to medical records is generally granted. "[C]ommon law courts have traditionally accorded" strong protection to "the administration of justice and the adversarial justice system".[25] On the question of a doctor's privilege and the confidentiality of medical records, she cites the following passages with approval:

> *[O]nce in the witness-box, a physician is like any other witness and cannot claim privilege, that is to say he is compellable to testify about matters involving the patient even in the absence of the patient's consent.*[26]

> No doubt medical records are private and confidential in nature. Nevertheless, when damages are sought for personal injuries, the medical condition of the plaintiff *both before and after* the accident is ... the very issue in question. The plaintiff himself has raised the issue and placed it before the court. In these circumstances there can no longer be any privacy or confidentiality attaching to plaintiff's medical records.[27]

In *Dufault* v. *Stevens*,[28] which she also cites with approval, Craig J.A. stated that the party seeking communication of the document "must satisfy the court that the application is not in the way of a 'fishing expedition'". Craig J.A. went on to say:[29]

> If ... the document ... may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, *e.g.*, the document is privileged ...

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[22] A parallel can be drawn to professional malpractice cases against attorneys, where courts have also found an implicit waiver to the attorney's obligation of confidentiality in the fact that the ex-client has instituted action.

[23] *Supra*, footnote 1, at pp. 684 (S.C.R.), 679 (D.L.R.).

[24] *Ibid.*, at pp. 686 (S.C.R.), 680 (D.L.R.).

[25] *Ibid.*, at pp. 688 (S.C.R.), 681 (D.L.R.).

[26] *Ibid.*, at pp. 688 (S.C.R.), 682 (D.L.R.), citing *Hay* v. *University of Alberta Hospital* (1990), 69 D.L.R. (4th) 755, at pp. 757-758 (Alta. Q.B.). (Emphasis added by L'Heureux-Dubé J.).

[27] *Ibid.*, at pp. 689 (S.C.R.), 682 (D.L.R.), citing *Cook* v. *Ip* (1985), 52 O.R. (2d) 289, at pp. 292-293 (Ont. C.A.). (Emphasis added by L'Heureux-Dubé J.).

[28] (1978), 6 B.C.L.R. 199, at p. 203 (B.C.C.A.).

[29] *Ibid.*, at pp. 203-205, cited by L'Heureux-Dubé J., *supra*, footnote 1, at pp. 692 (S.C.R.), 684 (D.L.R.). (Emphasis added by L'Heureux-Dubé J.).

*Logically, there is no reason why an application under the rule relating to hospital records should not be dealt with on the same basis as an application relating to any other document ... [if they] relate to an issue in the action ...*

L'Heureux-Dubé J. then explained the judicial process worked out in the courts of British Columbia in the case of *Halliday* v. *McCulloch*.[30] She concluded by commenting on the similarity between the civil and common law systems and suggested that the "[c]ourts in Quebec should perhaps consider the British Columbia procedural approach when faced with similar requests".[31]

So ends the judgment, concluding that Metropolitan was entitled to the entire Frenette medical record at the Jean Talon Hospital in view of the authorization.

*Discussion*

There are problems with the judgment. No one will disagree with a desire for the sound administration of justice. But to say that the last paragraph of article 9 of the Charter accords discretionary power to the courts to "protect a physician or require him to testify" is to misread article 9. Unless the matter is covered "by an express provision of law", the only obligation of the tribunal is to "ensure that professional secrecy is respected".

No one wants to condone fraud or to permit it to perpetuate, but to interpret article 9 as the Supreme Court has done is tantamount to judicial legislation. The Supreme Court has now created "an express provision of law" called the "sound administration of justice". Regardless of the motives of the Supreme Court, the end does not always justify the means.

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[30] (1986), 1 B.C.L.R. (2d) 194 (B.C.C.A.). The procedure in British Columbia, as provided for in that case, is as follows:

1. A motion for discovery of documents is made;

2. A judge in chambers decides whether the case is one where access to medical records should be given. If so:

a. the hospital delivers to plaintiff or his counsel certified copies of the records in the same number as there are parties;

b. at the same time, the hospital delivers to all parties copies of the covering letter only;

c. plaintiff or his counsel compiles a list of documents from the records, including those for which there is:

i. a claim for privilege and the reasons therefor;

ii. a claim that a document is irrelevant;

d. plaintiff or his counsel delivers to all parties:

i. the list of documents;

ii. an affidavit, if required;

iii. a set of the certified copies of the documents other than those referred to in c.i. and c.ii.

[31] *Supra*, footnote 1, at pp. 694 (S.C.R.), 685-686 (D.L.R.).

It would appear from this judgment that Quebec courts tend to accord more protection to confidentiality than common law courts. Will the sound administration of justice be better served now that the Supreme Court has "legislated" the same law across Canada?

This judgment, in attempting to solve all problems, has caused many at least with regard to insurance policy claims. Fishing expeditions can now become commonplace: in order to obtain otherwise confidential medical records, an insurance company simply has to ensure that the state of its insured's health is the central issue of the case and that there are no other means for the insurer to prove its case. By virtue of this judgment, a court must then grant access to the medical records.

What of the request for an order compelling the Régie de l'assurance-maladie du Québec (or Ontario Health Insurance Plan, or the medical board in any other province) to provide a list of doctors consulted by the insured in the past? If the state of the insured's prior health (that is, a pre-existing condition) is made the central issue, and if there are no other means for the insurer to prove its case, must the court permit such a request? Where will it end?

What of a travel insurance policy with incidental life insurance coverage and generally an exclusion for a pre-existing condition? Can the insurance company, unhappy with a death soon after the issuance of the policy, request medical records because there *may* have been a pre-existing condition? As such, the medical records *may* relate to the matters at issue. If this is not a fishing expedition, what is?

What of a patient who tells his doctor of his fantasies of committing suicide? Are these medical records no longer privileged if suicide is a possibility? Where do we draw the line?

What part will a "new" illness play? For example, the definition of AIDS has changed on several occasions in the United States, as more is learned of this disease. At present, doctors consider that a person with a T-cell count below 250 has AIDS. However, in 1985, a person did not have AIDS until he met the original criteria (that is, developed opportunistic infections). Are these definitions and re-definitions retroactive? Doctors have not had to worry about this problem, which may become a headache for the courts.

What of the insured who answers a policy application honestly but whose answers are incorrect ten years later because the "definition" of his illness has changed? Is this grounds for nullity of the policy?

These are not easy questions, and there are no easy answers. The problems raised by this judgment are many. Were they caused by an over-enthusiastic court that attempted to create a uniform situation across the country? Is the situation too complex to be dealt with in one judgment? Is the field evolving too quickly? Only time will tell.

# Restitution - Compulsion - Municipality Paying for Support of a Juvenile Delinquent Pursuant to a Court Order - Order Made Under *Ultra Vires* Legislation - Municipality's Right to Recover: *The Regional Municipality of Peel* v. *Her Majesty The Queen in Right of Canada.*

David Stevens*

## *Introduction*

*The Regional Municipality of Peel* v. *Canada*[1] is an exceptional case, perhaps unique. Certainly, there has never been any thing quite like it in common law Canada, in the civil law of Quebec, nor, to my knowledge, in any of the other legal systems commonly referred to in Canadian decisional law.[2] Plaintiff's counsel had obvious difficulty finding a basis of claim in any of the standard restitutionary actions. They were forced to rely on novel doctrinal arguments in the law of restitution, on arguments founded on an as yet unrecognized general cause of action in unjust enrichment, and on arguments based on "good conscience" and "justice". The Supreme Court of Canada performed admirably in the face of difficult facts and arguments. Sadly, this may be the only aspect of the case of reassurance to Canadian taxpayers, since almost everyone involved in the dispute - the plaintiff, the two defendants and the various triers of fact and law - were governments or governmental bodies, and it took nearly twenty years and eleven judicial decisions to resolve the dispute. The cost of this litigation must have exceeded the $1.166 million at stake. Sadder still, not only was the outcome of the unjust enrichment / restitution argument reasonably predictable (although admittedly disputable) from the outset, it seems that no one involved thought to characterize the facts

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[1] [1992] 3 S.C.R. 762, (1992), 98 D.L.R. (4th) 140.

[2] It certainly surpasses in novelty another recent Supreme Court of Canada decision, *Canson Enterprises Ltd.* v. *Boughton & Co.*, [1991] S.C.R. 534, (1991), 85 D.L.R. 4th 129. *Boughton* is also, arguably, without precedent. In *Boughton*, the question was whether a fiduciary could be sued for damages and whether the test for damages in equity is the same as the test in tort law. The apparent novelty of these two cases and the difficulty faced by the Supreme Court of Canada in dealing with them is indicative of a fundamental failing in the common law. A mature system of private law should not have as much difficulty as the common law did in these two cases in identifying the nature of the dispute and characterizing the issues to be resolved.

as raising a problem in the law of wrongs, which may have offered the plaintiff a stronger prospect of success.[3]

The essential facts were these. Section 20(1) and (2) of the Juvenile Delinquents Act,[4] first enacted by the federal government in 1908, authorized courts dealing with a child adjudged to be a juvenile delinquent to take one or more courses of action, including: committing the child to the care or custody of a "... probationary officer or any other suitable person" (section 20(1)(d)); allowing the child to remain in his or her home (section 20(1)(e)); and placing the child in a foster home (section 20(1)(f)). Section 20(2) authorized courts making section 20(1) orders to require the parents of the child, or the municipality to which the child belonged, to contribute to the support of the child. Subsection 20(2) also gave a municipality affected by such an order the right to recover any sums paid from the parents of the child declared to be a juvenile delinquent.

Between 1974 and 1982, Family Court judges in the Peel District had been placing juvenile delinquents in group homes, purportedly pursuant to the provisions of section 20(1). The same judges had been ordering the plaintiff, the Regional Municipality of Peel (Peel) to pay the cost of these placements, purportedly pursuant to section 20(2). These facts led to three different sets of court proceedings, and eleven different judicial decisions.

The legal proceedings commenced in 1974. Peel argued, in a first set of proceedings, that the orders placing children in group homes were invalid, since placements in group homes and like institutions were not specifically authorized under section 20(1). This question was ultimately resolved in 1979 in Peel's favour by the Supreme Court of Canada in *Attorney General for Ontario* v. *Regional Municipality of Peel*.[5] In a second set of proceedings, Peel argued that section 20(2) was *ultra vires* Parliament, and therefore that the court orders made pursuant to that provision were invalid. This second question was ultimately resolved in 1982, also in Peel's favour, by the Supreme Court of Canada in *Regional Municipality of Peel* v. *MacKenzie*.[6] In a third set of

[3] In the decision of McLachlin J., the only reference to the possibility of a tort claim is a statement of the assumption - one presumes of all or most involved - that the tort characterization was obviously irrelevant: "It is established that the municipality cannot sue in tort: it has long been recognized that the enactment of legislation *ultra vires* a legislature's competence does not give rise to damages for breach of a 'duty of care'"; *supra*, footnote 1, at p. 774 (S.C.R.), 144 (D.L.R.). McLachlin J. cited *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957, (1970), 22 D.L.R. (3d) 470, in support of this proposition.

[4] R.S.C. 1970, c. J-3. Now see the Young Offenders Act, R.S.C. 1985, c. Y-1.

[5] [1979] 2 S.C.R. 1134, (1979), 104 D.L.R. (3d) 1. Peel also won at trial and on appeal. See, *Re Regional Municipality of Peel and Viking Homes* (1977), 16 O.R. (2d) 632, 36 C.C.C. (2d) 137 (Ont. H.C.), aff'd. (1977), 16 O.R. (2d) 765, 36 C.C.C. (2d) 337 (Ont. C.A.).

[6] [1982] 2 S.C.R. 9, (1982), 139 D.L.R. (3d) 14. The Court of Appeal decision is reported as *Re Regional Municipality of Peel and MacKenzie* v. *Viking Homes* (1980), 29 O.R. (2d) 493, 54 C.C.C. (2d) 444, 113 D.L.R. (3d) 350 (Ont. C.A.). The trial court decision of Van Camp J. is not reported.

proceedings, Peel argued that the $1.166 million that it had paid between 1974 and 1982 pursuant to the invalid orders was recoverable from either or both Canada and Ontario. This question was decided against Peel in the decision of the Supreme Court of Canada under comment. This litigation proceeded through the federal courts, where Her Majesty the Queen in Right of Canada was the defendant,[7] and through the Ontario courts, where Her Majesty the Queen in Right of Ontario was the defendant.[8] The trial court decisions in both instances were favourable to Peel, but the appellate courts decisions, like the final result, were not.

Should Peel have been entitled to recover the $1.166 million paid for the support of juvenile delinquents in compliance with court orders made pursuant to an *ultra vires* law? The arguments available, based on the law of restitution or the cause of action in unjust enrichment, were as follows: (1) Peel's payments were recoverable on the basis that they had been paid, under compulsion of law, to discharge Canada's and/or Ontario's obligation to support juvenile delinquents; (2) Peel's payments were recoverable because they were paid out of necessity - someone had to support the children - and, presumably, the primary obligation to support the children (after their parents) lay with either or both of the other levels of government; (3) Peel's payments were recoverable on a basis analogous to the recoverability of payments made under ineffective transactions, the *ultra vires* statutory provision here serving as the analogue of an *ultra vires* contract; and (4) Peel's payments were recoverable because they had been made at the request of the defendants. Although all these grounds figured in the arguments and the reasons for decision at most levels of decision, the only one that was thought to come close to a proper characterization of the facts was the first argument - legal compulsion. Thus, the body of doctrine dealing with restitution for money paid under legal compulsion - "recoupment" in the language of the law of restitution - became the focus of the arguments and of the reasons for decision.

The doctrine of recoupment is usually stated in the form of a four-part rule:

(1) there must have been some legal compulsion operating on the plaintiff at the time of payment;

(2) the plaintiff cannot have exposed himself or herself to the compulsion officiously;

(3) the plaintiff's payment must have discharged an obligation owed by the defendant; and,

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[7] *Canada* v. *Regional Municipality of Peel*, [1989] 2 F.C. 562, (1988), 55 D.L.R. (4th) 618, 89 N.R. 308, 41 M.P.L.R. 113 (F.C.A.), rev'g., [1987] 3 F.C. 103, (1986), 7 F.T.R. 213 (F.C.T.D.).

[8] *Peel* v. *Ontario* (1990), 1 O.R. (3d) 97, 75 D.L.R. (4th) 523, 42 O.A.C. 356, 2 M.P.L.R. (2d) 121 (Ont. C.A.), rev'g. (1988), 64 O.R. (2d) 298, 49 D.L.R. (4th) 759, 37 M.P.L.R. 314 (Ont. H.C.).

(4) as between the plaintiff and the defendant, the defendant was primarily liable on the obligation.[9]

The problem for Peel was that there was no obvious source of liability locating a primary obligation to support the children in either of the defendants; therefore, conditions three and four were not, apparently, satisfied on the facts. In the more direct language of the cause of action in unjust enrichment, it seemed that no benefit had been received by either of the defendants. The facts, thus, did not fit neatly into the doctrine of recoupment or the cause of action in unjust enrichment. Hence, the novelty of the case.

However, there may have been another range of arguments available to Peel, none of which, it appears, was canvassed to any significant extent in any of the proceedings.[10] There is clear authority for the proposition that taxes, and other payments to government authorities, paid to comply with an *ultra vires* demand can be recovered. This area of doctrine is generally styled "restitution claims against public authorities for *ultra vires* demands". It has three distinct facets, each with an independent rationale: payments made under colour of office, (namely, payments made to obtain the performance of a public duty that is due without charge); (other) payments made under practical compulsion;[11]

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[9] See *Owen* v. *Tate*, [1976] 1 Q.B. 402, at p. 407 (C.A.); see in particular, Scarman L.J., for an influential formulation. There are other formulations. Scarman L.J.'s statement in *Owen* was taken from the second edition of R. Goff and G. Jones, The Law of Restitution (1978). The third edition of that book (1986), now lists three conditions, conflating the third and fourth. Montgomery J., in the Ontario High Court decision in *Peel* v. *Ontario*, *ibid.*, altered the second condition by requiring that the payment not be made foolishly, as opposed to requiring that the exposure to liability not be made officiously. For thorough discussions of recoupment, see P. Maddaugh and J. McCamus, The Law of Restitution (1990), c. 29, and Goff and Jones (3d), c. 12 and 14.

[10] Peel came close to the alternative characterization suggested here in one of its arguments. Peel argued that restitutionary relief against the federal government was necessary to give practical effect to s. 52(1) of the Constitution Act, 1982. This argument is reminiscent of the Supreme Court's holding in *Amax Potash Ltd.* v. *Government of Saskatchewan*, [1977] S.C.R. 576, (1976), 71 D.L.R. (3d) 1, as well as aspects of Wilson J.'s dissent in *Air Canada* v. *British Columbia*, [1987] 1 S.C.R. 1133, (1989), 59 D.L.R. (4th) 161. It suggests that denying the right to recover a tax paid pursuant to an unconstitutional law is tantamount to permitting Parliament to do indirectly what it is not permitted to do directly. Without citing the reasons of La Forest J. in *Air Canada*, Lamer C.J.C. dismissed the possibility of suing for relief from the consequences of an unconstitutional law where the sole basis of claim is s. 52(1), holding that the only relief available under s. 52(1) is a declaration that the relevant law is unconstitutional, and therefore of no force or effect. Lamer C.J.C. held that *Peel*'s remedy, if any, had to be found in private law.

[11] *Steele* v. *Williams* (1853), 8 Exch. 625, 22 L.J. Ex. 225, 17 Jur. 464, 21 L.T. 106, 91 R.R. 673, is considered to be the leading case. Goff and Jones, *op. cit.*, footnote 9, p. 217 (3d ed.) describe the doctrine as follows:

> It is usual to speak of such payments as being demanded *colore officii*. The right of recovery has, however, been extended to include all cases where the defendant is in a quasi-public or monopolistic position and demands a money payment to which he is not entitled for the fulfilment of a duty owed by him. It is irrelevant that no protest was made or question raised at the time of payment by the plaintiff.

and payments made under mistake of law.[12] A fourth rubric, a recent invention of leading scholars in the law of restitution, attempts to unify these doctrines by identifying a more fundamental element present in all three.[13] Professor Peter Birks, for example, has suggested that all that is required is an *ultra vires* legislative or regulatory provision requiring the plaintiff to pay some tax, levy, impost, or other charge to the defendant. On Birks' view, there is no need to show compulsion or mistake. Interestingly, this area of law has been the subject of recent and diverging, even contradictory, decisions by the House of Lords and the Supreme Court of Canada.[14]

Might there have been refuge for Peel in this area of the law? Certainly, there was no colour of office argument available to Peel on the facts. Nor was mistake an appropriate ground: Peel objected to the constitutionality of the orders almost from the outset.[15] A compulsion argument might, however, have succeeded. So might an *ultra vires* demand argument. One serious difficulty

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Other English cases include *Morgan* v. *Palmer* (1824), 2 B. & C. 729, 107 E.R. 554 (K.B.); *Hooper* v. *Exeter Corporation* (1887), 56 L.J.Q.B. 457, and, more recently, *Attorney-General* v. *Wilts United Dairies Ltd.* (1921), 37 T.L.R. 884 (C.A.); *Brocklebank Ltd.* v. *The King*, [1924] 1 K.B. 647, [1927] 1 K.B. 52 (C.A.). In Canada, the leading case is thought to be *Eadie* v. *Township of Brantford*, [1967] S.C.R. 573, (1967), 63 D.L.R. (2d) 561. See, generally, R.D. Collins, Restitution from Government Officials (1984), 29 McGill L.J. 407; W.R. Cornish, Colour of Office: Restitutionary Redress Against Public Authority, [1987] J. of Malaysian and Comp. L. 41; P.B.H. Birks, Restitution from Public Authorities (1980), 33 Cur. Leg. P. 191; G. Jones, Restitution in a Public and Private Law (1991).

[12] The leading case in Canada is now *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161, rev'g (1986), 30 D.L.R. (4th) 24, [1986] 5 W.W.R. 385 (B.C.C.A.). La Forest J., writing for just half the members of the court in that case, held that the common law rule barring recovery for payments made under mistake of law no longer applied. He went on to hold, however, that there could be no recovery for payments made under a mistake of law where the payment was made to a government authority pursuant to an *ultra vires* statutory provision. He imposed this limit on the right to recover mistaken payments on the basis of a need to protect the public treasury. The two other members of the court required to constitute the majority in that case, Beetz J. and McIntyre J., declined to express an opinion on this particular aspect of La Forest J.'s holding. La Forest J.'s holding on this point, therefore, may or may not be good law in Canada. It is criticized in the dissenting judgment of Wilson J. See also Maddaugh and McCamus, *op. cit.*, footnote 9, p. 275. And it has been expressly rejected in England. See *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners*, [1992] 3 W.L.R. 366, at pp. 393-395 (H.L.) (per Lord Goff). If this aspect of La Forest J.'s decision is not followed, then what he and the other members of the court said in favour of recovery of payments made under a mistake of law will mean that that basis of claim may be pursued with confidence in these sorts of cases in the future. On mistake of law generally, see, J. McCamus, Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of law: *Ignorantia Juris* in the Supreme Court of Canada (1983), 17 U.B.C. Law Rev. 233.

[13] See P. Birks, Introduction to the Law of Restitution (1985), pp. 284-290. For a criticism, see A. Burrows, Public Authorities, Ultra Vires, and Restitution, in A. Burrows (ed.), Essays on the Law of Restitution (1991), p. 39.

[14] See *Air Canada* v. *British Columbia*, *supra*, footnote 12, and *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners*, *supra*, footnote 12.

[15] Perhaps it is better to characterize Peel's "state-of-mind" from 1974 to 1982 as merely one of doubt as to the validity of the legislation. For a good discussion of the role

with both of these characterizations is that the payments were not made *to* the defendants. Yet, the payments were made pursuant to unlawful demands, here, possibly, the orders made by the Family Court judges pursuant to *ultra vires* legislation of the federal government and were accompanied by implicit threats of serious consequences here, contempt of court proceedings for failure to comply with the court orders. Should the fact that the federal government did not actually receive the payments exempt the federal government from liability for the injury caused? In much simpler but analogous terms, if a defendant unlawfully threatens a plaintiff with harm unless the plaintiff pays money to a third party, is the defendant liable, even if he or she has received no benefit?

The answer to this question turns on what, exactly, the compulsion and *ultra vires* demand arguments are all about. We return to this question later in this comment.[16] We look first at the arguments raised by counsel for Peel and the response of the court.

*The Decision*

La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ. concurred in the reasons for decision of McLachlin J. Lamer C.J.C. also concurred in the reasons of McLachlin J., but dealt in more detail with two specific arguments made by Peel.

Four features of the reasons of McLachlin J. merit attention: her treatment of the question whether a legislative body owes a duty of care, to whomever, when making law; the methodology she adopted to find and state the law governing the case; her discussion of the kind of benefit required under the doctrine of recoupment and under the cause of action in unjust enrichment; and, her implicit acceptance of the notion "probable benefit". We shall look at each of these features of that judgment in turn.

(1) *A Lawmaker's Duty of Care?*

McLachlin J. commenced by dismissing out of hand the possibility of a claim in tort based on a duty in the federal government to take care not to exceed its legislative authority in enacting laws. She cited the Supreme Court of Canada's decision in *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*.[17] In that case, the City of Winnipeg had breached several manner and form requirements in enacting a by-law to amend a zoning regulation affecting a certain parcel of land. The plaintiff purchased the property concerned to develop it, relying on the validity of the amended zoning by-law. The plaintiff was prevented from developing the property when the by-law was declared void by the Supreme Court of Canada because the manner and

of doubt in a mistaken payment argument, see S. Arrowsmith, Submission to an Honest Claim, in Burrows, *op. cit.*, footnote 13, p. 17.

[16] *Infra*, at p. .

[17] *Supra*, footnote 3.

form requirements had been breached.[18] The plaintiff sued the City of Winnipeg in negligence for injuries suffered by it as a consequence of its reliance on the validity of the by-law. Writing for the court, Laskin C.J.C. rejected the plaintiff's claim in categorical terms. He stated that: "... the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported or the basis of a private duty of care."[19] This holding was justified by a distinction Laskin C.J.C. drew between governments acting at an "operating" level and governments acting at a "legislative or quasi-judicial" level. Only in the former case would a government or governmental body be subject to private law duties of care; in the latter case, the most that could be required of a government or governmental body is honesty and good faith. "It would be incredible", the Chief Justice concluded, "to say in such circumstances that it [the government or governmental body] owed a duty of care giving rise to liability in damages for its breach. Invalidity is not the test of fault and it should not be the test of liability!".[20]

It may be time to reconsider this rule. Law-making is, perhaps, possibly no more complex or difficult than open-heart surgery or directing and managing a large business enterprise. If the latter activities are subject to judicial surveillance through the imposition of private law duties on the surgeon and hospital staff or on the Board of Directors and officers,[21] to perform to a certain standard, then, *prima facie*, the case for a blanket immunity of law-makers from suit for negligent law-making is open to doubt.[22]

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[18] See *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, (1965), 51 D.L.R. (2d) 754.

[19] *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*, *supra*, footnote 3, at pp. 970 (S.C.R.), 478-479 (D.L.R.).

[20] *Ibid.*, at pp. 969 (S.C.R.), 478 (D.L.R.), citing K.C. Davis, 3 Administrative Law Treatise (1958), p. 487. The operational/legislative distinction has been applied in many leading cases and remains the accepted starting point of all cases dealing with the private law liability of public officials. See, generally, R.A. Macdonald, Jurisdiction, Illegality, Fault: An Unholy Trinity (1985), 16 R.G.D. 69; Ontario Law Reform Commission, Report on the Liability of the Crown (1989); *Dunlop* v. *Woolahra Municipal Council*, [1982] A.C. 158, [1981] 1 All E.R. 1202 (P.C. Aust.); *The Queen* v. *Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, (1983), 143 D.L.R. (3d) 9; *City of Kamloops* v. *Nielson*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641 (for a critical comment on this case, see B. Feldthusen, *City of Kamloops* v. *Nielsen*: A Comment on the Supreme Court's Modest Clarification of Colonial Tort Law (1985), 30 McGill L.J. 539); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.). The distinction is American in origin. See *Dalehite* v. *United States*, 346 U.S. 15, 92 L. ed 1427 (1953).

[21] The standard need not be too high. There is, for example, considerable latitude given directors for their business judgments under the American "business judgment" rule. See, for example, *Kamin* v. *American Express Co.*, 383 N.Y.S. 2d 809 (N.Y.S.C., 1976). See, generally, R.C. Clark, Corporate Law (1986), pp. 123-140, and J. Ziegel *et al.*, Cases and Materials on Partnerships and Canadian Business Corporation (1989), c. 6. Section 134(1)(b) of the Ontario Business Corporation Act, R.S.O. 1990, c. B-16 and s. 122(1)(b) of Canada Business Compensation Act, R.S.C. 1985, c. C-44, impose very high liability thresholds as well. But mere honesty and good faith do not suffice.

[22] This argument is not as facetious as it may seem. There are more than a few examples of recent statutes so badly conceived and/or badly drafted that they are going to result in

It appears that in *Peel*, however, a case for neglect of duty by the federal government was not available on the facts. For one thing, the question of the statute's validity was not an easy one to answer - the Ontario High Court and the Ontario Court of Appeal, for example, had decided this question against Peel. For another, the legislative provisions had been in force and had remained unchallenged for over seven decades, until they were declared *ultra vires* in a decision which itself may be open to criticism. It is therefore doubtful whether an argument that the law was passed or maintained on the statute books without due care as to its validity would have had much force.

(2) *Finding and Stating the Law*

McLachlin J. went on to make several general observations concerning the law of restitution. Some of these observations will prove helpful to lawyers and judges dealing with problems in the law of restitution. They are worthy of summary and brief comment.

She identified three tensions existing in the case law, and in the problem raised on the facts of *Peel*. The first tension is "theoretical". It arises out of the fact that there are two distinct approaches to any problem in the law of restitution. One approach starts with the traditional doctrine and works within the established categories of recovery,[23] while the other, a "principled" one, relies on the principle of unjust enrichment, as stated in any of its common formulations.[24] Peel, in its arguments, emphasized the "unjustness" of the payments, relying on its interpretation of the "principled" approach. The defendants countered that the only traditional category that could plausibly support Peel's claim was the doctrine of recoupment, and that that doctrine was obviously not available on the facts since no obligation of the defendants had been discharged by Peel's payments to the group homes.

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millions of dollars of wasted expenditures. One obvious example is Book Six of the Civil Code of Quebec on hypothecs and prior claims. For criticisms, see M. Boodman, A Functional Critique of the Regime for Enforcement of Secured Rights under the Civil Code of Quebec (1993), 53 Rev. du Bar. 317: "... [T]he regulation of post-default realization of secured rights under the new *Code* ... is the result of legislative inadvertence, ineptitude or ignorance regarding the nature and effects of secured transactions"; at p. 342. See also, R.A. Macdonald, Faut-il s'assurer qu'on appelle un chat un chat, in E. Caparros (dir.), Mélanges Germain Brière (1993), p. 527, and D. Stevens, The Reform of the Law of Immoveable Security in Quebec, [1989] Meredith Lectures, p. 419.

[23] This view is captured in Lord Diplock's famous statement in *Orakpo* v. *Manson Investments Ltd.*, [1978] A.C. 95, at p. 104, [1977] 3 All E.R. 1, at p. 7 (H.L.):

> My Lords, there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law.

[24] In Canada, see *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257, and *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, (1976), 10 N.R. 277. Perhaps it would be wise to adopt the civilian terminology of "unjustified enrichment" to emphasize the necessity of identifying some specific element in the transaction between the plaintiff and defendant that calls for intervention.

The second tension McLachlin J. identified is between the need for certainty and predictability in the rules of private law, on the one hand, and the need for justice in individual cases, on the other hand. On the facts of *Peel* the traditional categories - essentially recoupment - did not obviously point toward relief, yet justice seemed to require some remedy. McLachlin J. characterized the "justice" approach as one which emphasizes the "equities" of the case. The word "unjust" in the phrase "unjust enrichment", she observed, seems to encourage this approach.

The third tension is "philosophical" or "policy-oriented". McLachlin J. stated that the law traditionally has been reluctant to award recovery for benefits conferred outside a contract. This, she stated, is due to a "robust individualism" inherent in the inherited nineteenth-century case law. In *Peel*, the defendants argued that they had never consented to spend the money in issue, so they could not now be forced to pay. Peel maintained that that argument did not answer the injustice of letting the loss fall on it.

McLachlin J. proposed to follow a middle course through these three tensions, giving due weight to each pole in each pair.[25] With respect to the first tension, at least, this is the best way for courts in Canada to proceed, since both the traditional law of restitution and the cause of action in unjust enrichment remain deficient as sources of law. The traditional law lacks coherence and intelligibility, principally because of its origin in the law of contracts and in Equity. Neither contract nor Equity presents a suitable basis for understanding the law's intervention in restitution cases, the former because promising and promises are never directly relevant to a restitution argument, the latter because Equity does not identify a logic of intervention and, as a body of law, it is ladened with fictional and opaque doctrines as well as *ad hoc* inventions of questionable intelligibility.[26] On the other hand, the general principle of unjust enrichment does not yet provide a stable basis for argument or prediction since the meaning of "unjust" - or in the preferred phrase of the Supreme Court of Canada, "absence of

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[25] She put it this way, *supra*, footnote 1, at pp. 786, 788 (S.C.R.), 153, 154-155 (D.L.R.):

> ... we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery; one which charts a predictable course without falling into the trap of excessive formalism ...
>
> The tri-partite principle [of unjust enrichment] of general application which this Court has recognized as the basis of the cause of action in 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.

[26] The "constructive" trust is a fiction. The "right akin to subrogation" and "proprietary estoppel" (or "equitable acquiescence"), are opaque. Mistake in equity à la Denning L.J. in *Solle* v. *Butcher*, [1950] 1 K.B. 671 (C.A.) is an *ad hoc* invention of questionable intelligibility. Even in its central institution, the trust, Equity is deeply conceptually flawed. The express trust is traditionally conceived as categorically distinct from contract, but clearly it is not. See H.A.J. Ford and W.A. Lee, Principles of the Law of Trusts (1983), pp. 35-38, for a brief history of this error.

juristic reason"[27] - has yet to be stated with sufficient precision. There are several contending definitions, and there is a centre of gravity in the debate, but there remains enough doubt and controversy that the old law still proves very useful.

McLachlin J.'s formulation and discussion of the second and third tensions, however, are open to criticism. What she identified as the second tension - the certainty and predictability of the old versus the discretionary "equities of the case" of the new - is, with respect, cliched, and as a description of each pole of the tension, it is largely untrue. The old law is confusing and incoherent and, therefore, inadequate as a ground for prediction in any but the easiest of cases. And the aspiration of the new law, especially in the definition of what counts as "unjust", is not the fuzzy-minded "equities-of-the-case" approach that it is too frequently parodied as being. Rather, the objective is to identify the meaning of "unjust" so that that term can operate at the same level of concreteness as any other fundamental private law term, such as fault, or negligence, or consideration. Few people would construe it as a license to judges to do as they see fit and just. Certainly, nobody should do so.

McLachlin J.'s third tension - the contrast between the "robust individualism of the old law" and the fairness and justice of the new law - is also a mostly false caricature which, as such, may have been useful in the 1970s and 1980s as a way of awakening an interest in the need for a principle of unjust enrichment, but now merely obfuscates.[28] Every correct solution to a private law problem, *must* be justice for *both* the plaintiff and defendant; "individualism" by itself cannot, therefore, explain unjust preferences for defendants over plaintiffs. Stating the contrary - that judges in England in the nineteenth century got a lot of cases wrong because of their allegiance to a political ideology of *laissez-faire* capitalism or "robust individualism" - is pure and uninformed speculation on our part. Not only is it bad history and bad social theory,[29] it is bad law.[30] It is

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[27] *Pettkus* v. *Becker*, *supra*, footnote 24.

[28] It was used this way, for example, in the dissenting judgment of Dickson J. in *Hydro-Electric Commission of Nepean* v. *Ontario Hydro*, [1982] 1 S.C.R. 347, (1982), 132 D.L.R. (3d) 193.

[29] For treatments of the influence of philosophical thought on the development of legal doctrine in the nineteenth century, see J. Gordley, The Philosophical Origins of Modern Contract Doctrine (1991), c. 7. See also, M. Horwitz, Transformation of American Law (1977); P. Atiyah, The Rise and Fall of Freedom of Contract (1979); A.W.B. Simpson, The Horwitz Thesis and the History of Contracts (1979), 46 Univ. of Chi. Law Rev. 533; R.B. Ferguson, The Horwitz Thesis and Common Law Discourse in England (1983), 3 Oxford J. Legal Stud. 34.; G. Gilmore, The Ages of American Law (1977). Says Gordley: "Nineteenth-century jurists no longer claimed that their conclusions followed from larger philosophical principles. They said they were merely describing the law in force in their own countries. In England and the United States, they claimed to be interpreting the decisions of judges"; *ibid.*, p. 161. Gordley's story is more consistent with the thesis that the leading lawyers were influenced very little by philosophy. There is little evidence that even the best of them ever read, let alone adopted the prevailing philosophical opinion of their day. On the relationship between private law and political ideology, see K. Renner, The Institutions of Private Law and their Social Functions (1976, c. 1949).

[30] It is bad law because it undermines the theoretical and pragmatic projects of law by dismissing these projects as something to be explained by ideology or economics. Such scepticism in a lawyer doing law is self-defeating.

far more plausible that doctrinal errors occurred then for the same kinds of reasons that they occur now: errors (such as the connection between quasi-contract and contract, for example) are embedded in the language and the logic of doctrines that are propagated through the unreflective and uncritical practice of "precedent-law", and encouraged by a generally sceptical attitude towards greater theoretical understanding of private law or doctrine.[31] One need only read the famous turn-of-the-century restitution case *Sinclair* v. *Brougham*,[32] for example, to see that there was enough confusion in inherited nineteenth-century doctrines to mystify even the best and most learned of lawyers and judges in British society without any need for the operative effects of any supposed ideological predispositions. Moreover, most modern (reflective and critical) commentators on the law of restitution readily agree that a large majority of the nineteenth century cases were correctly decided. It is only the reasons provided in them that are now thought to be intellectually deficient.

This observation is offered for two reasons. First, we should not dismiss so quickly the nineteenth-century case-law experience, even if the reasons that go with it are inadequate, because it contains a vast store of judicial wisdom discernible in the holdings and much of the reasoning.Second, attempting to put aside the errors of others by "exposing" their "ulterior" motives, while implicitly praising ourselves for our more just and liberal vision, is a kind of self-deception that often merely leads to the same kind of uncritical complacency that is the root cause of most doctrinal errors. If we think it is nineteenth-century judges' political ideology that led them astray, and not their misguided allegiance to Equity or quasi-contract, we will miss the same or similar mistakes in our own reasoning.

I should hasten to add that this latter criticism does not apply to the reasons of McLachlin J. in *Peel* . But, as the argument below will show, it may apply to Peel's choice of recoupment as the appropriate characterization of its claim.

### (3) *"Benefit" under the Doctrine of Recoupment and under the Cause of Action in Unjust Enrichment*

The core issue in *Peel* was whether either or both of the defendants had received any benefit at the expense of *Peel*. McLachlin J. decided, correctly I

[31] An amusing (and arrogant, but half-true) insult from the pen of the German legal historian Waldemar Englemann seems appropriate here:

> Precedent-justice is not only illogical but pernicious, because it interferes with the wiser conclusion of a later judge through the "prejudice" of the earlier and serves the comfort of the indolent judge. Its sway marks a lack of legal culture. Precedent-justice rules where there is no scientific knowledge or theory to enrich or guide legal practice and legislation - it exists where legal practice teaches legal practice. Judges lacking independence favour it, since it is comfortable and saves effort, work and personal responsibility.

Quoted (for an entirely different purpose) in J. Dawson, Oracles of the Law (1968), p. 100.

[32] [1914] A.C. 398 (H.L.). For more modern and local examples, see *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14, and *Canson Enterprises Ltd.* v. *Boughton & Co.*, *supra*, footnote 2.

would submit, that neither the traditional doctrine nor the principle of unjust enrichment was capable of generating a positive answer to this question.

The traditional recoupment doctrine requires that the plaintiff have discharged some *legal* obligation owed primarily by the defendant. On the facts of *Peel* it was clear that there was no such legal obligation on the part of Ontario or Canada, since there was no obligation in either Ontario or Canada to support a child declared to be a juvenile delinquent. Peel tried several arguments in its *facta*, all of which failed:[33]

> (a) Peel argued that the primary responsibility to support the children lay in the province by virtue of the fact that, pursuant to several statutory schemes, the province had already undertaken responsibility for children whose parents did not support them. McLachlin J. responded that most, if not all, the statutory schemes pointed to by the plaintiff provided for a discretion in the relevant ministry to make grants to various types of institutions available for the care of such children. Thus, the schemes in question did not establish a *legal obligation.*
>
> (b) Peel argued that the source of the legal obligation in the province was its constitutional responsibility in respect of children, relying on the remarks of Duff C.J.C. in *Reference re Adoption Act.*[34] McLachlin J. pointed out that the responsibility referred to was a legislative competence, not a legal obligation: "... the power to legislate does not give rise to an obligation to legislate".[35]
>
> (c) Peel argued that the federal government had a legal or political responsibility to complete a legislative scheme that it had started or, alternatively, that the benefit to the federal government lay in the fact that federal "prisoners" were looked after. McLachlin J. responded that neither of these claims established the existence of any legal obligation.

Since none of these arguments prevailed, Peel sought refuge in what it clearly viewed as the less-demanding principle of unjust enrichment. Peel's contention was that the Canadian jurisprudence of unjust enrichment had gone beyond the traditional restrictions of the doctrine of recoupment by recognizing that the obligation discharged could be a political, social, or moral responsibility

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[33] It seems that all of the arguments advanced by Peel were conceded at the hearing to be of no avail. McLachlin J., *supra*, footnote 1, at pp. 791 (S.C.R.), 156 (D.L.R.), stated:

> The municipality acknowledges that it cannot meet the test for benefit in the category of payment under compulsion of law, nor indeed, in any of the traditional categories of recovery.

However, in his supplementary reasons for judgment, Lamer C.J.C. made a point of stating that all the plaintiff's arguments on the issue of legal obligation "fail to demonstrate that there was any obligation on either the federal or provincial governments to care for juvenile delinquents which is sufficient to satisfy the requirements of the applicable test" (*ibid.*, at pp. 771 (S.C.R.), 143 (D.L.R.), thus emphasizing that there was no such concession.

[34] [1938] S.C.R. 398, [1934] 3 D.L.R. 497.

[35] *Supra*, footnote 1, at pp. 791 (S.C.R.), 157 (D.L.R.).

of the defendant. In part, this argument was based on Peel's clearly mistaken analysis of the leading Supreme Court of Canada decision in the law of recoupment, *County of Carleton* v. *City of Ottawa*.[36] McLachlin J. observed, correctly, that the obligation discharged by the plaintiff in *Carleton* was a legal obligation imposed on the defendant by statute. Without that precedent, Peel had only the reputed "fuzzy-mindedness" of the unjust enrichment principle to rely upon. To the refutation of this argument, McLachlin J. devoted the greater part of the remainder of her judgment. What she said in that part of her judgment will prove useful in the further acceptance and development of the cause of action in unjust enrichment.

Peel deployed two recent doctrinal innovations to establish this aspect of its claim. One was the notion "negative benefit"; the other was the notion "incontrovertible benefit".[37] Each of these was intended by its inventors, and by those who think them useful, to express the idea that what can be counted as a benefit in the law of unjust enrichment need not be in the form of money or a tangible object. Rather, the concept "benefit" should include, in the appropriate case, a saved expense or a saved "inevitable" expense of the defendant. The second notion, in addition, is designed to refute the argument that whether a particular value received by the defendant is a "benefit" is purely a matter of subjective opinion for the defendant alone to decide, and therefore a matter about which a judge has no business expressing an opinion. The scholars who use the second notion mean to exploit this intolerance by arguing, in effect, that the court has the power in some cases to deem certain receipts to be benefits, even if they were not truly of benefit to the defendant *from the defendant's own point of view*.

This may or may not have been a plausible reading of the new doctrine of "incontrovertible benefit" on Peel's part. McLachlin J., none the less, rejected this reading, if not the doctrine itself, preferring instead the view that the defendant's receipt must truly be of benefit to the defendant, considered from the defendant's point of view. With respect, this view is right.[38] The existence of a benefit in the law of unjust enrichment should be judged exclusively from the defendant's point of view. The real question in difficult cases is whether the defendant is telling the truth on this point. A judge, as trier of fact, is entitled, indeed required, to express an opinion on this question of fact, and the defendant is permitted to controvert this, or any, allegation of fact.

*Peel* is an instructive illustration of the dangers inherent in adopting inappropriate innovations. The authors of the concept of "negative benefit" have given it a confusing, because self-contradictory, name. The authors of "incontrovertible benefit" have given it a misleading name since the notion

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[36] [1965] S.C.R. 663, (1965), 52 D.L.R. (2d) 220.

[37] See Goff and Jones, *op. cit.* (3d), footnote 9, pp. 16-23; McCamus and Maddaugh, *op. cit.*, footnote 9, pp. 42-44; Birks, *op. cit.*, footnote 13, pp. 16-124.

[38] The discussion here is dealing with "benefits" in the form of economic or patrimonial value. The claim that these concepts incorporate a subjective theory of value has no bearing on the existence of goods (such as life) having objective value.

presents itself as stating as a necessary truth ("there are incontrovertible benefits in the world"), something that is always a matter of contingent and therefore controvertible fact ("*this* defendant values *this* receipt in *this* particular way"). These new doctrines, unfortunately, also lend credence to the "fuzzy-minded" "equities of the case" reputation of the law of unjust enrichment. This is especially so with the second doctrine, since any decision a court might make about the existence of an "incontrovertible benefit" in any particular case would have to be based solely on impressions or on an ill-defined objective theory of value. The plaintiff was obviously drawn, fatally for its case, to these misleading features of the new doctrine.

McLachlin J.'s reasons, on this aspect of the case, then, are strong and persuasive. They will do much for the influence of the principle of unjust enrichment in Canadian law. She concluded that the principle of unjust enrichment is no more solicitous of plaintiffs than it is of defendants, that it is not a vague doctrine susceptible of discretionary application by judges minded to give relief to plaintiffs on the basis of some indeterminate and unarticulated feeling, but that, like the law of contract and the law of tort, its core concepts are capable of determinate application. And, like contract and tort, its objective is to do justice between two individuals.

### (4) *Probable Benefits*

McLachlin J. explicitly or implicitly accepted two extensions of traditional restitutionary doctrine. One extends the concept "benefit" to include saved inevitable expenses. This is a perhaps innocuous development provided that what is required to make out a case of "inevitability" is proof of some necessity imposing itself on the defendant. A legal obligation meets this criterion easily, and one can imagine as well a few limited cases of factual necessity, such as where an expenditure is made or a service performed to save the defendant's life.[39] There is little to object to here if not much more than this is intended.

The other development, however, is more suspect. At several points in her reasons, McLachlin J. appears to accept the principle that restitutionary liability can follow upon unjust receipts of benefits in the form of payments made that, from the defendant's point of view, were merely *probable* expenses. For example, she stated: "It was . . . [not] likely . . . that in the absence of a scheme which required payment by the municipality the federal or provincial government would have made such payments . . .."[40] Applying this notion, McLachlin J. held, with respect to the province, that Peel could not show that it was even probable that the children would have been placed in a provincially-supported institution. Moreover, even if that could have been shown, the province had already paid fifty per cent of the costs *ex gratia*, and a fifty per cent liability in the province would have been the most probable result of placements in the

[39] Such as in *Matheson* v. *Smiley*, [1932] 2 D.L.R. 727, [1932] 1 W.W.R. 758 (Man. C.A.).

[40] *Supra*, footnote 1, at pp. 798 (S.C.R.), (D.L.R.).

absence of section 20(2). With respect to the federal government, she held that there was not even the semblance of an argument of probable expense. The strongest argument available was that Peel's payment had advanced a legislative goal of the federal government. McLachlin J. regarded that sort of benefit as too ephemeral and incidental, a "blow-by".

The transition from a concept of "saved inevitable expense" to one of "saved probable expense", implicit in this line of reasoning, is a fundamental one. It ought not to be accepted lightly or too quickly. Its acceptance entails, I believe, a radical departure from the justice that the cause of action seeks to achieve. That justice, as currently understood, requires an *unjust enrichment*, namely an unjust receipt of value by the defendant that results in an overall enhancement of his or her patrimony. An enrichment is required in unjust enrichment in the same way and for the same reason that a promise is required in contract and fault is required in tort; without an enrichment, a promise or a fault, no defendant is identified. A probable enrichment therefore has as much going for it as basis of liability as a probable promise or a probable fault.

*The Alternative Argument*

If the unjust enrichment characterization of the claim was properly rejected, was there a basis of claim in the law of torts? In particular, what of the "payment under compulsion" and the "*ultra vires* demand" characterizations of Peel's claims?

For the sake of clarity in what follows, the expression "wrongful compulsion" and "compulsion" are used to designate the operative element in a claim where an amount has been paid by the plaintiff in response to an act of duress, an illegal threat, or some form of undue influence for which the defendant is responsible. Several features of the law in this area are currently, perhaps perennially, in debate. Two of these features are relevant to the present discussion.

First, how does the concept "wrongful compulsion" work to justify a case for relief?[41] Three views are current in the case law and literature. One position, the least preferable, claims that the act of wrongful compulsion creates an inequality in bargaining power that results in an unfair bargain.[42] The second view construes the act of wrongful compulsion as a factor "vitiating the consent" of the plaintiff, with the consequence that the agreement or payment made in response to the act of wrongful compulsion was not truly "voluntary" and is therefore void or voidable.[43] This view has been criticized, justly, as

[41] Common lawyers first became aware of this question in the early nineteenth century. Gordley, *op. cit.*, footnote 29, p. 141: "...[T]he theoretical problem of how fraud and duress affect consent was familiar to the natural lawyers but new to the common law ... [I]t is unlikely the common lawyers, left to themselves, would suddenly have become interested in the problem." The debate in the civil law tradition goes back at least to the late scholastics. See Gordley, *ibid.*, pp. 82-85, 181-184.

[42] This is Lord Denning's view in *Lloyd's Bank* v. *Bundy*, [1975] Q.B. 326 (C.A.). This view is usually criticized as being a too vague and general power of intervention. See G. Treitel, The Law of Contract (8th ed., 1991), pp. 371-373.

inaccurate since even in the case of the most harmful threat, the plaintiff acts voluntarily, choosing to avoid the harm threatened, rather than suffer it.[44] The third view, now preferred by most commentators and most courts, regards the wrongful compulsion as a violation of the plaintiff's right to be free in his or her deliberations from the unlawful threats of the defendant.[45] To the extent that any unlawful compulsion was a necessary part of the set of considerations that moved the plaintiff to promise or to pay, it is a wrong that has caused a harm that should, in justice, be reversed.

The second area of doubt concerns how the compulsion argument operates in the doctrine of recoupment. It will be recalled that that doctrine requires the plaintiff's payment to the third party be made under legal compulsion. This requirement is generally understood as the feature of the recoupment claim that places it within the ambit of the wrongful compulsion cases.[46] Expressed this way, however, the doctrine must be picking up the generally discarded "vitiated consent" / "involuntary act" understanding of compulsion, because this is the only way that legal compulsion and duress could be seen to instantiate identical concepts. In a recoupment case there is never any violation of any right of the plaintiff in the force deployed to make him or her pay that could bring that doctrine under the third, proper characterization of the wrongful compulsion claim.

If we abandon the "vitiated consent" / "involuntary act" understanding of the wrongful compulsion doctrines, as it appears we should, then all the cases currently classified as recoupment cases in the leading textbooks need to be re-analysed and reclassified. Most, if not all of them, are situations where the payment made to the third party is recoverable on some other ground, such as mistake (less frequently) or (most commonly) a statutory or contractual duty in the defendant to indemnify the plaintiff. In many of the cases concerned, these alternative grounds are stated or hinted at and, in many of the discussions of these cases in the journal articles and textbooks on the law of restitution, these

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[43] This is a formulation common in the 18th and 19th centuries, but less common now. *Skeate* v. *Beale* (1841), 11 A. & E. 983, 113 E.R. 688 (K.B.), is an older example. *The Siboen and The Sibotre*, [1976] 1 Lloyd's Rep. 293 (Q.B.D.); *North Ocean Shipping Ltd.* v. *Hyundai Construction Co. Ltd.*, [1979] Q.B. 705 (Q.B.D.), and *Pau On* v. *Lau Yiu Long*, [1980] A.C. 614 (P.C.), are recent cases where formulations like this are offered. For a criticism, see P. Atiyah, Economic Duress and the Overborne Will (1982), 98 Law Q. Rev. 197.

[44] Aristotle, Nichomachean Ethics Book III, ch. 1.

[45] See, Goff and Jones, *op. cit.* (3d), footnote 9, pp. 203-206; *Barton* v. *Armstrong*, [1976] A.C. 104 (P.C.).

[46] This is where it is placed in leading textbooks. See, for example, Goff and Jones, *op. cit.* (3d), footnote 9, where recoupment is grouped with duress, unconscionable bargains, and undue influence under the rubric "compulsion", which itself is offered, together with mistake and necessity, as an "unjust" factor (*ibid.*, *passim*, and p. 29). At the beginning of c. 12, in introducing recoupment, Goff and Jones initially give legal compulsion a more limited role. Here they say that it operates merely to identify those situations in English law where a stranger's payment can discharge a debtor's debt. (It will be recalled that the general rule seems to be the opposite: generally speaking, a stranger's

alternative grounds are almost always mentioned, and are often preferred. Reanalyzed in that manner, we would find that "recoupment" belongs mostly to the law of contracts, and has little, perhaps nothing, to do with the law of unjust enrichment. We would also see that the compulsion element and the benefit element are irrelevant or entirely secondary to the claim. To take the most common example to illustrate this point, a surety recovers from his or her debtor because that debtor *promised* to indemnify them.

Reading the doctrine of recoupment this new way makes it *entirely* irrelevant to *Peel*. This is so for two reasons. First, there clearly was no statutory or contractual obligation in either of the defendants to indemnify Peel for the payments, as there would need to be on this revised understanding of recoupment; and, second, if the statutory authorization in section 20(2) was *ultra vires*, then the compulsion applied in Peel was *on the face of things* wrongful or unlawful. Thus Peel should have sought refuge in the bodies of doctrine that deal with acts of *wrongful* compulsion or *ultra vires* public demands.

I say "on the face of things" because the persons threatening sanctions "unlawfully" in *Peel* were the Family Court judges in the District of Peel. Describing their presumably good faith but mistaken decisions as "wrongful compulsion" or as "*ultra vires* demands" would require further analysis since we think, naturally, that the only sanction available against judges who make errors in good faith is reversal on appeal. The common law on this point is that judges (and even governmental officials acting in a judicial or quasi-judicial capacity) are immune from liability in tort for the injuries that their errors, if honest and in good faith (or perhaps even if, simply, not made maliciously or in bad faith), have caused.[47] Perhaps the threats the Family Court judges made were not "unlawful" or "wrongful" or "*ultra vires*" in the requisite sense, even if they were based on a mistaken apprehension of the law.

Could the wrongful compulsion or *ultra vires* demand argument be made to apply against the federal authority that enacted the *ultra vires* law? Does the defence "honest error made in good faith" avail the legislative authority here in the same way that it avails the judge and quasi-judge?

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payment cannot discharge the obligation. See Goff and Jones, *ibid.*, p. 17, and Maddaugh and McCamus, *op. cit.*, footnote 9, p. 716. This particular rule is perhaps the origin of all the subsequent layers of doctrinal confusion.) However, this limited role for legal compulsion is set aside implicitly in subsequent discussion, where the authors trade on the sense of compulsion as an unjust factor. Maddaugh and McCamus, *ibid.*, use legal compulsion in the same sense, but in a more subtle way. They argue that the "officiousness" of a plaintiff's conduct in conferring a benefit constitutes a general ground for rejecting the plaintiff's claim in unjust enrichment, but go on to say that where the plaintiff is legally compelled to pay, there is no such officiousness. I would argue that this amounts to saying that the legal compulsion makes the payment involuntary, since there is no real distinction between "officious" and "voluntary" behaviour except that the former is a subset of the latter. Birks' approach is similar to that of Goff and Jones; see Birks, *op. cit.*, footnote 13, pp. 185-193.

[47] See sources cited, *supra*, footnote 20. See also H.P. Glenn, La responsabilité des juges (1983), 28 McGill L.J. 228.

Note, first, that it is not clear whether the "honest error made in good faith" argument is available generally in private law to people who make wrongful threats mistakenly thinking they are merely demanding what they are owed.[48] The exemption for judges and quasi-judges may thus be quite exceptional. In most situations this issue does not arise, since it is almost always clear that the threat - to break the contract or to pull the trigger - is known by the defendant to be unlawful. But it is possible that the wrong of "wrongful compulsion", like the tort of conversion, does not generally countenance the defence of "honest error made in good faith".[49] If not, what is the rationale, if any, that exempts the mistaken or ignorant legislature?

This is, perhaps, where *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*[50] comes in. Laskin C.J.C. thought that the possibility of liability for *negligent* law-making was preposterous. The case against the near-strict liability just suggested may therefore be an *a fortiori* one. But a fact situation like *Peel* shows that the bias against such a claim, however beneficial to Parliament, can lead to questionable results. Peel paid over $1 million during an eight-year period while the issue of the *vires* of the legislation was litigated. What could it have done to save itself from this ultimately unlawful imposition on its revenues? Was it not forced to pay, and was not that force applied without lawful warrant?

Lord Goff in his speech in *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners*,[51] was far more expansive - and therefore strict - in his description of the ground and basis of recovery in these sorts of cases. He accepted Professor Birks' *ultra vires* demand rationale as the true basis of this area of the law:[52]

> The revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and had to decide what to do. It is faced with the revenue, armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect.

Several sentences later he added:[53]

> Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that the tax be repaid, unless circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right.

Lord Goff thus founded the required liability on the simple fact "that the tax was exacted unlawfully", rejecting as a requirement that the plaintiff show he felt compelled by virtue of some unlawful demand or that the defendant knew the

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[48] In one of the leading original cases, *Astley* v. *Reynolds* (1731), 2 Str. 915, 93 E.R. 939 (K.B.), it appears that the defendant thought he was right.

[49] There is no case law experience.

[50] *Supra*, footnote 3.

[51] *Supra*, footnote 12.

[52] *Ibid.*, at p. 390.

[53] *Ibid.*, at p. 391.

demand was *ultra vires*. This is strict liability indeed. He did admit, however, that as a matter of policy it may be advisable to restrict this right of recovery, but he said this restriction would have to be imposed by legislation. He also stated that the standard restitutionary defences should be available to the defendant, such as the defence of change of position or compromise.

Lord Goff's strict liability doctrine might be thought inapplicable to the facts in *Peel* for the obvious reasons that the payments in *Peel* were not "taxes" and they were not paid *to* the defendant, and therefore *Peel* did not concern an enrichment gained through an *ultra vires* tax. There is also the (possibly relevant) fact that Lord Goff's doctrine speaks of "citizen" taxpayers (although the plaintiff in *Woolwich* was a very large building society), whereas the plaintiff in *Peel* was a governmental body. There are further obstacles in Canada of previous seemingly contrary authority in *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*,[54] and *Air Canada* v. *British Columbia*.[55] The former has already been mentioned. It will be recalled that in *Air Canada*, La Forest J., while recognizing there was no longer any prohibition against recovery of money paid under a mistake of law, went on to hold that, for reasons of public policy, no such recovery could be had against a public authority where the payment is made under an *ultra vires* legislative provision.

We should start with the *Welbridge* objection, since it is the most difficult. One way to deal with it is to accept the *Welbridge* principle - no recovery for injury caused by negligent lawmaking - without further question, but to ask whether it can be reconciled with the *Woolwich* principle - strict liability for taxes paid pursuant to an *ultra vires* public demand? There are three possible rationalizing strategies. We could argue that the difference between *Welbridge* and *Woolwich* is that the injury inflicted in *Welbridge* was, as an economic loss, too remote and therefore not like the loss of the money actually paid in *Woolwich* and *Peel*. Concomitantly, we could argue that *Welbridge* applies only where the wrong is negligence, not where it is wrongful compulsion or the enforcement of an *ultra vires* tax law. Alternatively, we could deploy Laskin C.J.C.'s distinction between government functioning at the legislative or quasi-judicial level and government functioning at the operating level, noticing that the defendant in *Woolwich* was the tax administration, whereas the defendant in *Peel* was the government itself. We could argue, finally, that the recovery in *Woolwich* was essentially restitutionary and therefore about the recovery of *ultra vires* taxes paid made *to* the defendant, whereas the cause of action in *Welbridge* was clearly tort.

The first of these strategies of reconciliation is perhaps the best. Applying it to *Peel*, we might say that the principle in *Welbridge* is not applicable on the facts of *Peel* since the injury in *Peel* was direct. Peel would win. The second strategy is probably unsound since the point of allowing recovery on the *Woolwich* principle is that the legislation impugned is *ultra vires*. Therefore,

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[54] *Supra*, footnote 3.

[55] *Supra*, footnote 10.

that government is functioning in its legislative mode is an essential part of the case. The third strategy is also weak, since the target of Lord Goff's doctrine is illegal laws or regulations that make people pay, and so it should not make any difference to his doctrine that the law in question is not *per se* a tax law, provided that it is just as coercive.[56] Likewise, it should not matter to his doctrine that the payment is made to a third party, nor that it was paid by a legal person as opposed to an individual citizen.

These arguments, admittedly tentative, suggest the possibility of a *Woolwich* type claim on the facts of *Peel* since, in reconciling *Woolwich* with *Welbridge*, we have also dealt with all the possible objections, save the one based on La Forest J.'s holding in *Air Canada*. And if the *Woolwich* principle is acceptable in Canada, then so might be the unlawful compulsion analysis, since the case for it is probably *a fortiori*.

That leaves La Forest J.'s restriction in *Air Canada* to address. Interestingly, McLachlin J. explicitly declined at the end of her reasons to deal with this question because she thought it was not relevant since the case had been argued and decided on the basis of whether the defendant received a benefit. It might be that La Forest J.'s treatment of the immunity issue in *Air Canada* is a valid departure from the English doctrine, since Lord Goff himself accepted the advisability of an immunity on the basis of policy. He would have required the lawmaker to compose it; La Forest J. was willing to find it in the common law. This difference of opinion is understandable, given the greater powers Canadian courts have in voiding statutory provisions.

*Conclusion*

The plaintiff in *Peel* was cheated by the law of restitution. The lack of understanding in the body of doctrine called "recoupment" as to how a "wrongful compulsion" argument works to justify intervention has generated a fundamental misconception rooted deeply in that doctrine. One result of this error is the misclassification of the doctrine as belonging to the law of unjust enrichment, rather than the law of contracts. Academics, instead of arguing to reverse this error, have compounded it by offering concepts that seek to broaden the types of benefits recognized by a doctrine which is not about reversing unjust benefits. This has only added another layer of confusion. These errors enticed Peel into a poor characterization of its claim, searching in vain for a benefit to the defendants. In the end, it was left arguing vaguely for "justice".

The thesis of this comment has been that the plaintiff in *Peel* was mining the wrong shaft. The line of cases which, in England, culminated in *Woolwich* offered more aid and would have been the source of a truer characterization of Peel's case for relief.

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[56] For a discussion of the limits of *Woolwich* in part supportive of the proposition advanced here, see, J. Beatson, Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the "Woolwich" Principle (1993), 109 Law Q. Rev. 401.

Restitution is one area of common law that would benefit enormously from a little friendly contamination from the civil law. The Supreme Court of Canada is one of the few judicial institutions in the world that is well-placed to manage that cross-pollination. Lord Dunedin's speech in *Sinclair* v. *Brougham*[57] is a classic example of some careful prodding by a civilian. As a rule of thumb, civilians should think that the more complicated a common law doctrine appears to be, the more likely it is error compounded by error, venerated as principle. The well-spring of these errors in the law of restitution is the historic origin of restitution doctrines in a fiction - quasi-contract - and in intuitive justice - Equity. What is missing is the discipline a doctrine of sources would impose, and if there is on thing the civil law has done well it is the articulation of a doctrine of sources.

[57] *Supra*, footnote 32.