

## REVIEW ARTICLE: REFLECTIONS ON THE CANADIAN LAW OF UNJUST ENRICHMENT: LESSONS FROM ABROAD

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### *Introduction*

As Canadian courts [have] waded further into the uncharted waters of the new concept of restitution, they [have] encountered shoals and sink-holes they had not anticipated. ... Having ventured into the waters of unjust enrichment, we in Canada are bravely trying to deal with problems such as these. As might be expected in uncharted waters, we sometimes flounder. Sometimes, we take a wrong step, find ourselves in too deep, and have to step back. Sometimes we start out one way, run up against a rock, and find we must backtrack and take a different course. ... Yet in Canada, lawyers, academics and the public (to the extent this can be gauged) seem to approve of the venture, if not each step that the courts take. ... But there is also an increasing awareness that the time has come to tackle in earnest the task of working out the details of how the new concept of unjust enrichment relates to the multitude of factual situations to which it may potentially be applied.<sup>1</sup>

Justice McLachlin's frank comments are to be applauded. They obviously are welcome in so far as they acknowledge the need for further development of

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\*\* This commissioned essay on the work of our final court is the first in a series which will anticipate the Supreme Court's 125<sup>th</sup> Anniversary in September 2000. EV.

<sup>1</sup> Justice McLachlin, "Restitution in Canada" in *Restitution: Past, Present & Future*, W. Cornish, et al. (eds.) (Oxford: Hart Publishing, 1998) at 275-76.

the complex principle of unjust enrichment. Perhaps even more significantly, however, they implicitly recognize that judges cannot be expected to undertake that project alone. Left to its own devices, an overburdened judiciary is unlikely, on a case-by-case basis, to devise a coherent and fully integrated theory of liability. The proper evolution of a difficult area such as unjust enrichment requires a collaborative effort: the judge must rely on the jurist to explore perilous waters, identify shoals and sinkholes, and suggest safe lanes of passage.<sup>2</sup>

Unfortunately, notwithstanding notable exceptions,<sup>3</sup> such scholarly explorations too seldom are undertaken in Canada. The body of domestic literature simply is not as large as might be hoped. The reasons for that fact are not entirely clear. Certainly, they do not lie in a lack of practical relevance. Unjust enrichment is sufficiently important to find its way on to the Supreme Court of Canada's crowded docket several times each year, even though one suspects that potential claims often are overlooked by counsel lacking familiarity with the area. More likely, the explanation turns on a matter of timing. Prior to the Supreme Court's seminal decision in 1980 in *Pettkus v. Becker*,<sup>4</sup> the subject lacked the spark needed to intellectually catalyze a large and sophisticated body of literature. And after 1982, the *Canadian Charter of Rights and Freedoms* galvanized a generation of academics around issues of public law and social justice. So too, in the same period, Canadian faculties and law journals have shifted toward the American focus on critical theory and multi-disciplinary research.<sup>5</sup> It is no coincidence, then, that the most recent generation of Canadian scholars in the essentially black letter subject of unjust enrichment generally has both trained and written overseas.<sup>6</sup>

The situation in England is far different. The recent explosion of unjust enrichment scholarship in that country is truly phenomenal: indeed, it is difficult to identify another instance in which the volume and sophistication of writing has increased so dramatically in such a short period. The leading journals regularly publish articles on the law of restitution and the subject has even spawned its own law review. Moreover, the intellectual environment within the

<sup>2</sup> See also Justice La Forest, "Who Is Listening to Whom? The Discourse Between the Canadian Judiciary and Academics" in B. Markesinis (ed.), *Law Making, Law Finding, and Law Shaping: The Diverse Influences* (Oxford: Oxford University Press, 1997) at c. 6.

<sup>3</sup> See e.g. G.H.L. Fridman, *Restitution* (2<sup>nd</sup> ed.) (Toronto: Carswell, 1992); P.D. Maddaugh & J.D. McCamus *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990); *Symposium on Restitution* (1999) 37 *Alberta L. Rev.* (forthcoming).

<sup>4</sup> (1980) 117 D.L.R. (3<sup>rd</sup>) 257.

<sup>5</sup> Interestingly, in the United States, the law of unjust enrichment is virtually ignored by all but a handful of committed scholars. As Professor Langbein explains, American private law generally has been marginalized by the twin forces of realism and economic analysis, both of which are "inhospitable" to doctrinal subjects such as unjust enrichment: "The Later History of Restitution" in *Restitution: Past, Present & Future*, *supra* note 1 at 61-62.

<sup>6</sup> See e.g. R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1996); L.D. Smith *The Law of Tracing* (Oxford: Clarendon Press, 1997).

English judiciary is particularly receptive to that literature. The presence of unjust enrichment scholars on the House of Lords<sup>7</sup> and the physical proximity of London, Cambridge and Oxford facilitate an enviable degree of intercourse between bar, bench and academy. Consequently, as Professor Burrows notes, “few judges deciding a restitution case, or practitioners arguing a restitution case, would think it sensible to proceed without knowing what the restitution scholars have to say.”<sup>8</sup> And while that is not to say that English law invariably is beyond reproach,<sup>9</sup> the cooperative effort between the various parts of the profession in that country has produced a set of rules that is arguably healthier and more coherent than is found in Canada.

The differences between the principle of unjust enrichment as it is formulated in the two countries<sup>10</sup> preclude our courts from blindly adopting the English literature where the Canadian scholarship is insufficiently developed. Nevertheless, the similarities between the two jurisdictions are such that Canadian judges, acting carefully, very often can profitably draw upon the English literature. The purpose of this review essay is to explore that proposition in light of three recent texts: *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*,<sup>11</sup> *Restitution and Banking Law*<sup>12</sup> and *Restitution: Past, Present & Future*.<sup>13</sup> Of course, it is impossible in this essay to do justice to everything contained in the those volumes; at something over eight hundred pages, the works cumulatively require selective treatment. Accordingly, following a brief description of each book, the discussion will focus on four issues with respect to which the English literature casts revealing light on Canadian law.

*Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* contains eight essays by Professor Andrew Burrows on the law of civil obligations: three deal exclusively with the law of unjust enrichment and two others consider the relationship between unjust enrichment, tort and contract. Most of the papers previously have been published and are presented as “lightly-updated versions.” *Restitution and Banking Law* consists of eleven papers delivered at a conference sponsored by the Society of Public Teachers

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<sup>7</sup> The effect of Lord Goff’s recent retirement from the House of Lords has been tempered by the presence of Lord Nicholls and the elevation of Sir Peter Millett from the Court of Appeal: see e.g. Lord Nicholls, “Knowing Receipt: The Need for a New Landmark” and Sir Peter Millett “Restitution and Constructive Trusts” in *Restitution: Past, Present & Future*, *supra* note 1 at c. 15, 13.

<sup>8</sup> A. Burrows, “Restitution: Where Do We Go From Here?” in *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart Publishing, 1998) at 114.

<sup>9</sup> See e.g. *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669 (H.L.); *Kleinwort Benson v. Birmingham C.C.*, [1998] 4 All E.R. 513 (H.L.).

<sup>10</sup> M. McInnes, “The Canadian Principle of Unjust Enrichment: Comparative Insights Into the Law of Restitution” (1999) 37 *Alberta L. Rev.* (forthcoming).

<sup>11</sup> *Supra* note 8.

<sup>12</sup> F. Rose (ed.) (Oxford: Mansfield Press, 1998).

<sup>13</sup> *Supra* note 1.

of Law in September of 1997. The title is slightly misleading. While the essays certainly focus on discrete areas in banking law, they also address issues of general importance and should appeal to unjust enrichment lawyers of all stripes. And finally, *Restitution: Past, Present & Future* reproduces the papers and commentaries presented at a conference in January of 1998 honouring Professor Gareth Jones, who recently retired as the Downing Professor of the Laws of England at Cambridge University. As every student of the subject appreciates, and as many of the contributors to the volume acknowledge, the very existence of the modern law of unjust enrichment is largely attributable to Professor Jones' collaboration with Lord Goff in producing the first edition of *The Law of Restitution*<sup>14</sup> in 1966.

### I. *The Nature and Scope of the Subject*

It is a curious feature of the law of unjust enrichment that the nature and scope of the subject often are, to a degree that would strike tort and contract lawyers as intolerable, matters of intense debate. The explanation for that fact is largely historical. Following the abolition of the writ system during the latter part of the nineteenth century, the law of private obligations initially was dichotomized into actions in tort and contract. Claims for restitutionary relief were treated under the misleading label of "quasi-contract" and were thought to fall within the law of contract.<sup>15</sup> Only relatively recently have such actions been expressly organized around the principle in unjust enrichment. It was not until 1954 that the Supreme Court of Canada placed the subject on that footing<sup>16</sup> and it was not until 1980 that the Court authoritatively articulated the elements of that guiding principle.<sup>17</sup> English law adopted a similar position even later, in 1991.<sup>18</sup> Consequently, a great deal of structural work remains to be done in both jurisdictions. The historical precedents, buried beneath language that no longer is easily understood,<sup>19</sup> must be reinterpreted in light of the modern principle of unjust enrichment. And the inherent logic of the modern principle, still in its infancy, must be rigorously analyzed and fully realized. In the words of Justice

<sup>14</sup> (London: Sweet & Maxwell, 1966).

<sup>15</sup> *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.).

<sup>16</sup> *Degelman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785.

<sup>17</sup> *Petkus v. Becker*, *supra* note 4.

<sup>18</sup> *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 458 (H.L.).

<sup>19</sup> Proper interpretation is no simple matter. For example, few modern readers have a firm grasp of the "action for money had and received." And those readers who do recognize that that phrase refers to a common count historically available under the action of *indebitatus assumpsit* also recognize that it is inherently ambiguous. As Professor Baker explains in "The History of Quasi-Contract in English Law" (*Restitution: Past, Present & Future*, *supra* note 1 at 48-53), an action for money had and received might pertain to a claim that would be characterized today as lying either in autonomous unjust enrichment for restitution or in tort for disgorgement of the defendant's wrongful gain: *United Australia Ltd v. Barclays Bank Ltd.*, [1943] A.C. 1 (H.L.).

McLachlin, “[t]he bold first steps have been taken. The time for consolidation and refinement is at hand.”<sup>20</sup>

a) *The Autonomous Action in Unjust Enrichment*

Much of the ground work for that project already has been accomplished academically. In 1966, the first edition of Lord Goff and Professor Jones’ pioneering text<sup>21</sup> served the function of drawing together many seemingly disparate authorities awarding restitutionary relief. Two decades later, Professor Birks provided a sophisticated exegesis of the underlying principle.<sup>22</sup> The combined result has been the emergence of what might be called the orthodox position. According to that view, the principle of unjust enrichment typically is relevant in so far as it constitutes (or at least explains<sup>23</sup>) a cause of action in unjust enrichment. That action requires proof by the plaintiff that the defendant received an enrichment from her in circumstances that render his enrichment unjust. If successful, the plaintiff invariably is entitled to the remedy of restitution: the defendant is compelled to give back the enrichment in question or its value.<sup>24</sup>

The orthodox approach generally is adopted in this country. Unfortunately, that fact is semantically obscured. In England, the principle of unjust enrichment is said to consist of: (i) an enrichment acquired by the defendant, (ii) at the plaintiff’s expense, (iii) as a result of an unjust factor, (iv) in the absence of a recognized defence.<sup>25</sup> In contrast, the Canadian formulation of the same principle is said to contain three elements: (i) an enrichment to the defendant, (ii) a corresponding deprivation to the plaintiff, and (iii) the absence of any juristic reason for the enrichment.<sup>26</sup> The third element under the domestic version is problematic in so far as it appears to mirror the fourth, rather than the third, element of the English formulation. It is on that basis that Professor Beatson’s contribution to *Restitution: Past, Present & Future*, “Restitution in Canada: Commentary,”<sup>27</sup> reiterates the belief, commonly encountered abroad, that the Canadian action in unjust enrichment merely requires the claimant to prove

<sup>20</sup> “Restitution in Canada” in *Restitution: Past, Present & Future*, *supra* note 1 at 276.

<sup>21</sup> *The Law of Restitution*, *supra* note 14. In Canada, a similar function was served by G.H.L. Fridman & J.G. McLeod, *Restitution* (Toronto: Carswell, 1982) and Maddaugh & McCamus *The Law of Restitution*, *supra* note 3.

<sup>22</sup> *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985).

<sup>23</sup> *Woolwich Equitable Building Society v. I.R.C.*, [1993] A.C. 70 at 178-79 *per* Lord Goff (H.L.); *Pavey & Matthews Pty. Ltd. v. Paul* (1987), 162 C.L.R. 221 at 257 *per* Deane J. (H.C.A.).

<sup>24</sup> The mistaken payment of money provides the paradigm example. To recover such a payment, the plaintiff need merely establish the constituent elements of the autonomous action in unjust enrichment: *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581.

<sup>25</sup> See *e.g. Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1998] 1 All E.R. 737 at 740 *per* Lord Steyn (H.L.).

<sup>26</sup> See *e.g. Pettkus v. Becker*, *supra* note 4 at 273-74, *per* Dickson J. (S.C.C.).

<sup>27</sup> *Restitution: Past, Present & Future*, *supra* note 1 at 298.

the defendant's enrichment and her own corresponding deprivation. On that view, the plaintiff need not provide a reason as to why restitution should be awarded; rather, the defendant must provide a reason as to why such relief should not be awarded. If that is correct, the scope of relief in Canada is very generous indeed - restitution is presumptively available upon the mere transfer of value.

In fact, however, that description is inaccurate. Granted, as Beatson notes, the Supreme Court of Canada's formulation of the third element of the principle of unjust enrichment is similar to the equivalent element of the civilian doctrine of unjustified enrichment. In Quebec, relief is available upon proof of, *inter alia*, (i) an enrichment, (ii) a correlative impoverishment, and (iii) the absence of justification for the enrichment. And, significantly, while the plaintiff bears the onus with respect to the first two elements, it falls upon the defendant to satisfy the court that there is *not* an "absence of justification."<sup>28</sup> Consequently, in Quebec, a benefit must be returned unless a recipient can prove that it should be retained. In that respect, however, the similarity between the doctrines of unjust enrichment and unjustified enrichment is semantic, rather than substantive. It is clear that whatever words they use to express the third element of the principle of unjust enrichment, Canadian judges in common law jurisdictions typically follow their English colleagues in requiring proof by the plaintiff of a positive reason for the imposition of liability.<sup>29</sup> Admittedly, it is true that some courts, including the Supreme Court of Canada, occasionally appear to relieve the plaintiff of the need to prove an unjust factor.<sup>30</sup> However, in the leading case of *Pettkus v. Becker*, Dickson J. clearly stated that, in contrast to the civil law, "[t]he common law has never been willing to compensate a person on the sole basis that his actions have benefited another. ... It must, in addition, be evident that the retention of the benefit would be 'unjust.'"<sup>31</sup> Accordingly, the lesson to be drawn from Beatson's comments is not that Canadian law differs from English law, but rather that the Canadian principle of unjust enrichment is formulated in an ambiguous, if not misleading, manner. It ought to be re-drafted so as to clarify the placement of the burden of proof.

#### b) *Restitution for Wrongs*

The principle of unjust enrichment contains more than the cause of action in unjust enrichment that was discussed in the preceding section; according to orthodox theory, it also accommodates the concept of restitution

<sup>28</sup> *Cie Immobilière Viger Ltée. c. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67; *Civil Code of Quebec*, S.Q. 1991, c. 64, art. 1493-1496; J.G. Challies *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (2nd ed.) (Montreal: Wilson & LaFleur, 1952); J.-L. Baudouin *Les Obligations* (4<sup>e</sup> éd.) (Cowansville, Que.: Yvon Blais, 1993) at 344-45.

<sup>29</sup> See e.g. *Toronto Dominion Bank v. Carotenuto* (1997), 154 D.L.R. (4<sup>th</sup>) 627 at 636 (B.C.C.A.).

<sup>30</sup> See e.g. *Peter v. Beblow* (1993), 101 D.L.R. (4<sup>th</sup>) 621 *per* McLachlin J. (S.C.C.).

<sup>31</sup> (1980), 117 D.L.R. 257 at 274 (S.C.C.).

for wrongs.<sup>32</sup> In that respect, however, the principle only plays a secondary role. It merely indicates that, having established a cause of action *other* than the cause of action in unjust enrichment, a claimant may be entitled not only to the usual remedy of compensation for her own loss, but also to the exceptional remedy of restitution<sup>33</sup> of the defendant's gain. The paradigm illustration generally is thought to arise in the context of fiduciary obligations.<sup>34</sup> While notoriously difficult to ascertain in Canadian law,<sup>35</sup> the elements of the cause of action in breach of fiduciary duty clearly are not determined by the principle of unjust enrichment. Rather, as Laskin J. recognized in *Canadian Aero Service Ltd. v. O'Malley*,<sup>36</sup> that principle arises only in a remedial sense, once the cause of action has been established, by revealing that even if the claimant suffered no loss as a result of the breach, the defendant may be compelled to disgorge his ill-gotten gains. Significantly, however, to the extent that a claimant pursues compensation for her own loss, as opposed to restitution of the defendant's gain, the principle of unjust enrichment is logically irrelevant. Unless the plaintiff seeks to attach herself to the defendant's *gain*, she simply has no basis for invoking the reasoning of unjust *enrichment*.

Curiously, Justice McLachlin ambiguously suggests otherwise in "Restitution in Canada." She appears to argue that the law of fiduciaries is entirely subsumed within the law of unjust enrichment, regardless of the nature of the relief sought by the plaintiff. Granted, certain passages in her paper recognize the incongruity of using the terminology of "unjust enrichment" and "restitution" to address situations in which the claimant does not seek to divest the defendant of his ill-gotten gains.<sup>37</sup> But elsewhere in the same discussion, McLachlin J. employs those very terms to characterize the Supreme Court of Canada's decisions in *M.(K.) v. M.(H.)*<sup>38</sup> (involving a claim for compensatory damages arising from incest), *Guerin v. The Queen*<sup>39</sup> (involving a claim for

<sup>32</sup> Cf. Birks "Misnomer" in *Restitution: Past, Present & Future*, *supra* note 1 at c. 1.

<sup>33</sup> "Disgorgement" may be a preferable term. Talk of "restitution," which means "give back," is appropriate in the context of autonomous unjust enrichment because such an action requires proof that the defendant's gain was subtracted from the plaintiff. In contrast, *gain*-based relief may be available under other causes of action even if the defendant's enrichment was obtained from a third party as a result of a wrong committed against the plaintiff. Consequently, it may be better in such circumstances to talk of "disgorgement," which means "give up": L.D. Smith, "The Province of Restitution" (1992) 71 *Can. Bar Rev.* 672 at 699.

<sup>34</sup> See e.g. *Keech v. Sandford* (1726) Sel. Cas. T. King 61, 25 E.R. 223; *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.).

<sup>35</sup> J.D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 *Can. Bus. L.J.* 107; L. Hoyano "The Flight to Fiduciary Heaven" in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) at c. 8.

<sup>36</sup> (1974), 40 D.L.R. (3<sup>rd</sup>) 371 (S.C.C.).

<sup>37</sup> *Supra* note 1 at 278, citing *McInerney v. MacDonald* (1992), 93 D.L.R. (4<sup>th</sup>) 415 (claim for access to medical files); *Norberg v. Wynrib* (1992), 92 D.L.R. (4<sup>th</sup>) 229 *per* McLachlin J. (claim for compensation for abuse of physician-patient relationship).

<sup>38</sup> (1992), 96 D.L.R. (4<sup>th</sup>) 289.

<sup>39</sup> (1984), 13 D.L.R. (4<sup>th</sup>) 321.

compensatory damages arising from the government's failure to negotiate a favorable lease of reserve land on behalf of an Indian band), and *Canson Enterprises Ltd. v. Boughton & Co.*<sup>40</sup> and *Hodgkinson v. Simms*<sup>41</sup> (each involving a claim for compensation of financial losses sustained as a result of a breach of fiduciary duty). In none of those cases did the relevant remedial claim pertain to the defendant's gain;<sup>42</sup> in none of those cases did the principle of unjust enrichment properly arise.

McLachlin J.'s troubling choice of terminology is open to two interpretations. On the more benign reading, the explanation is semantic, rather than substantive. In *Guerin*,<sup>43</sup> *Canson*<sup>44</sup> and *Hodgkinson*,<sup>45</sup> the Supreme Court of Canada, without any intention whatever to invoke the principle of unjust enrichment, used the word "restitution" to mean "compensation" when describing the plaintiff's right to seek reparation for losses inflicted through a breach of fiduciary duty.<sup>46</sup> La Forest J.'s comments in *Hodgkinson* are illustrative.

It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the [plaintiff] is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the [plaintiff] is entitled to be restored to the position he was in before the transaction.<sup>47</sup>

In that passage, the term "restitutionary" is not used to refer to a remedy by which the wrongdoer, regardless of any loss to the plaintiff, is compelled to give up an enrichment that he received as a result of his breach. Rather, it is used to refer to a remedy by which the wrongdoer, regardless of any gain to himself, is compelled to indemnify his victim for the losses that she sustained. In essence, La Forest J. employed the term "restitution" in fiduciary law in much the same way that the Court uses the phrase *restitutio in integrum* in tort law.<sup>48</sup>

That use of the term is unfortunate. As Professor Birks persuasively argues in "Misnomer,"<sup>49</sup> "restitution" and "compensation" should not be treated synonymously. Such a practice courts the risk of mis-aligning causes of actions

<sup>40</sup> (1991), 85 D.L.R. (4th) 129.

<sup>41</sup> (1994), 117 D.L.R. (4th) 161.

<sup>42</sup> *Hodgkinson v. Simms* involved claims for both compensation of the plaintiff's loss and disgorgement of the defendant's gain. The case nevertheless is controversial in so far as La Forest J.'s majority opinion used the term "restitution" to refer to the former head of recovery.

<sup>43</sup> *Supra* note 39 at 365-66, *per* Wilson J; *cf.* 342 *per* Dickson J. (restitutionary relief inapplicable because "the Crown has in no way been enriched by the surrender transaction, whether unjustly or otherwise").

<sup>44</sup> *Supra* note 40 at 137, 138, 141, 145 *per* La Forest J., 157-59 *per* McLachlin J.; *cf.* 143 *per* La Forest J. ("restitution" defined in terms of "disgorgement"), 165 *per* Stevenson J. ("This case is not one of profit making and restitutionary concepts do not fit").

<sup>45</sup> *Supra* note 41 at 199, 201, 202, 206, 208, *per* La Forest J.

<sup>46</sup> No such language appears in *M.(K.) v. M.(H.)*.

<sup>47</sup> *Supra* note 41 at 199.

<sup>48</sup> See *e.g.* *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3rd) 452 at 462 (S.C.C.).

<sup>49</sup> *Restitution: Past, Present & Future*, *supra* note 1 at c. 1.

and remedies.<sup>50</sup> “There is a real danger, if the words are used interchangeably, that it will be assumed that every set of facts which gives rise to restitution (of benefits received) will justify an award of compensation”<sup>51</sup> and vice versa. Some actions, such as breach of fiduciary duty, do support both forms of relief. But many do not. For example, while the victim of a breach of contract can claim compensation for her loss, she generally cannot compel the wrongdoer to disgorge his ill-gotten gains (if any).<sup>52</sup> Conversely, the cause of action in unjust enrichment can only possibly support restitutionary relief. The whole gist of the action is that the defendant has something that he ought not to have; having determined that a benefit was transferred from the plaintiff to the defendant as a result of an unjust factor, the only logical response open to a judge is to direct the defendant to return the enrichment or its value.<sup>53</sup> And yet, the Supreme Court of Canada’s tendency to substitute “restitution” for “compensation” might appear to support the imposition of a duty to compensate the plaintiff’s losses.

The second interpretation of Justice McLachlin’s conflation of unjust enrichment and fiduciary obligations is even more worrisome. In Beatson’s opinion, the Canadian principle of unjust enrichment fulfils a dual role. First, it allows a claimant to compel a defendant to either give back an enrichment that he acquired from her as a result of an unjust factor or give up an enrichment that he acquired as a result of committing a wrong against her. That function simply reflects the cause of action in unjust enrichment and the concept of restitution for wrongs, and as such is uncontroversial.<sup>54</sup> Second, however, the Canadian principle of unjust enrichment is said to further serve as a sort of legal panacea. “[A] defendant who has behaved badly, i.e. wrongfully but who would not be liable to a monetary or specific remedy under one of the traditional categories of the law is regarded as unjustly enriched.”<sup>55</sup> Unjust enrichment, in that sense, is a residual category of liability, motivated by policy and unfettered by principle, that is available for the purpose of achieving justice as the perceived need arises from time to time.<sup>56</sup>

<sup>50</sup> Ironically, elsewhere in the same article, Birks defines the term “restitution” in a manner that courts that very risk: see M. McInnes, “Restitution, Unjust Enrichment and the Perfect Quadrature Thesis” [1999] *Restitution L. Rev.* (forthcoming).

<sup>51</sup> *Ibid.* at 12.

<sup>52</sup> *Tito v Waddell (No. 2)*, [1977] 1 W.L.R. 798 (P.C.); cf. *Attorney General v. Blake*, [1998] 1 All E.R. 833 (C.A.); A. Burrows “Reform of the Remedies for Breach of Contract” in *Understanding the Law of Obligations*, *supra* note 8 135 at 141-45. Of course, restitutionary relief often is imposed in a contractual context on the basis of an action in unjust enrichment, rather than an action in breach of contract: see e.g. *Deglman v. Guaranty Trust Co. of Canada*, *supra* note 16.

<sup>53</sup> M. McInnes, “At the Plaintiff’s Expense: Quantifying Restitutionary Relief” (1998) 57 *Cambridge L.J.* 472.

<sup>54</sup> Cf. J. Beatson, “The Nature of Waiver of Tort” in *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991) at c. 8.

<sup>55</sup> “Restitution in Canada: Commentary” in *Restitution: Past, Present & Future*, *supra* note 1 at 299-300.

<sup>56</sup> For example, Justice McLachlin defends the instrumental invocation of the restitutionary and fiduciary principles in *M.(K.) v. M.(H.)* as a means of evading limitation periods and securing higher measures of relief: “Restitution in Canada” in *Restitution: Past, Present & Future*, *supra* note 1 at 285-86.

If Beatson's contention is correct, then McLachlin J.'s purported connection between unjust enrichment and fiduciary liability becomes more understandable, though no less troubling - both concepts are simply species of a larger genus of palm tree justice. And indeed, the Canadian law of fiduciaries often is excoriated as a malleable instrument of social fairness. The High Court of Australia, for example, has derided the Canadian approach to fiduciary obligations as being marked by "assertion rather than analysis" which while capable of "effectuat[ing] a preference for a particular result ... does not involve the development or elucidation of any particular doctrine."<sup>57</sup> Interestingly, while expressing enthusiasm for the great remedial potential of the fiduciary principle as it has been developed by the Supreme Court of Canada, Justice McLachlin comes close to conceding that criticism. "[S]till unable to define the beast, we claim to be able to recognise it when we see it."<sup>58</sup>

That statement sits uncomfortably within the rule of law and serves as a damning indictment of the Canadian law of fiduciaries. Fortunately, it generally need not be repeated with respect to our principle of unjust enrichment. Contrary to Beatson's suggestion, 'unjust enrichment' is not merely another amorphous rubric under which Canadian courts impose intuitive notions of social fairness; in most instances, the beast can be clearly described in advance. As Birks explains, the issue of justice looks downward to the cases, rather than upward to the sky.<sup>59</sup> And in looking downward to the cases, judges are typically guided by a body of precedents and principles that have been refined over centuries of litigation. Consequently, while the categories of recovery certainly are susceptible to incremental and analogical evolution, they do not constitute an open invitation to a broad exercise in good conscience.<sup>60</sup>

There is, however, an important line of authority that does support Beatson's view. And ironically, it is a line of authority that, in many respects, has come to

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<sup>57</sup> *Breen v. Williams* (1996), 186 C.L.R. 71 at 95 *per Dawson & Toohey JJ.* Gaudron & McHugh JJ. (at 113) similarly rejected the Supreme Court of Canada's tendency to view fiduciary obligations as both "proscriptive and prescriptive" and to apply the fiduciary concept expansively "so as to supplement tort law and to provide a basis for the creation of new forms of civil wrongs."

<sup>58</sup> "Restitution in Canada: Commentary" in *Restitution: Past, Present & Future*, *supra* note 1 at 283.

<sup>59</sup> *An Introduction to the Law of Restitution*, *supra* note 22 at 19.

<sup>60</sup> See *e.g. Deglman v. Guaranty Trust Co.*, *supra* note 16 (free acceptance/failure of consideration); *County of Carleton v. City of Ottawa* (1965), 52 D.L.R. (3<sup>rd</sup>) 220 (S.C.C.) (mistake); *Storthoaks v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3<sup>rd</sup>) 1 (S.C.C.) (mistake); *Pettkus v. Becker*, *supra* note 4 (free acceptance); *Nepean Hydro Electric Commission v. Ontario Hydro* (1982), 132 D.L.R. (3<sup>rd</sup>) 193 (S.C.C.) (mistake); *Sorochan v. Sorochan* (1996), 29 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) (free acceptance); *Air Canada v. British Columbia* (1989), 59 D.L.R. (4<sup>th</sup>) 161 (S.C.C.) (mistake *per* La Forest J., *ultra vires* demand *per* Wilson J.); *Peel (Regional Municipality) v. Canada*, *supra* (1992), 98 D.L.R. (4<sup>th</sup>) 140 (S.C.C.); *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4<sup>th</sup>) 193 (S.C.C.) (mistake); *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4<sup>th</sup>) 411 (knowing receipt); *Gold v. Rosenberg* (1997), 152 D.L.R. (4<sup>th</sup>) 385 (S.C.C.) (knowing receipt).

define the Canadian principle of unjust enrichment. As discussed in the next section, while bearing the language of unjust enrichment, the Supreme Court of Canada's decisions in cohabitational property disputes arguably have little to do with restitutionary relief and much to do with the Court's desire to achieve fairness between former parties to spousal-like relationships.

## II. *Free Acceptance*

Goff and Jones coined the phrase "free acceptance" in 1966<sup>61</sup> and now formulate that test as follows.<sup>62</sup>

[A defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been *unjustly* enriched.

As that quotation suggests, the concept of free acceptance potentially serves a dual role. First, it may provide one means of settling the question of whether or not the plaintiff conferred a legally relevant enrichment upon the defendant. The issue is not as simple as might be thought. In restitutionary terms, the inquiry pertains not to enrichment *per se*, but rather to freedom of choice. Intuitively, the courts have always allowed the recipient of an objective benefit to have recourse to the argument of "subjective devaluation." Regardless of market value, for example, a person probably will not be considered legally enriched if, to her surprise, she awakes to find that her shoes were shined while she slept. Even if she is delighted with the service, she likely will be entitled to resist liability on the grounds that she did not choose to pay for the benefit and, services being irretrievable, she cannot return them *in specie*. In the words of Baron Pollock, "One cleans another's shoes; what can the other do but put them on?"<sup>63</sup> An act of free acceptance, however, may preclude a defendant from arguing subjective devaluation. For instance, as a matter of fairness, if a person fails to avail herself of a reasonable opportunity to reject the offer of a shoeshine for which she knows that payment is expected, she arguably should be considered enriched even though she does not positively exercise a choice to receive the service. Given her silent acquiescence, she should bear the financial burden of the misadventure. Similar reasoning underlies the second facet of free acceptance. Arguably, satisfaction of the test not only settles the element of enrichment, it also provides proof of an unjust factor. Simply stated, free acceptance is thought to justify the reversal of a subtractive enrichment on the basis of the defendant's unconscientious behavior.

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<sup>61</sup> *The Law of Restitution*, *supra* note 14 at 30.

<sup>62</sup> G. Jones, *Goff & Jones, The Law of Restitution* (5<sup>th</sup> ed.) (London: Sweet & Maxwell, 1998) at 18.

<sup>63</sup> *Taylor v. Laird* (1856), 25 L.J. Exch. 329 at 332.

### a) *A Critique of Free Acceptance*

Notwithstanding its superficial appeal, free acceptance is a deeply troubled concept. Once the darling of unjust enrichment enthusiasts in England,<sup>64</sup> it has now fallen into disrepute and seems unlikely to ever be adopted by the English judiciary. In “Free Acceptance and the Law of Restitution,”<sup>65</sup> Professor Burrows, its chief antagonist, presents a slightly revised version of a paper that initially revealed the concept’s shortcomings.<sup>66</sup> For reasons discussed below, that essay should be required reading for all Canadians working in the area.

The concept of free acceptance arises when a party, hoping for remuneration, confers a benefit despite knowledge that it had not been requested.<sup>67</sup> Burrows’ essential point, however, is that regardless of the recipient’s “free acceptance,” there is no injustice in denying restitutionary relief to the claimant who voluntarily risked non-payment. Succinctly stated, as a matter of policy, the defendant’s refusal to pay does not outweigh the plaintiff’s gamble. Moreover, there often is nothing unconscionable in the defendant’s refusal to provide remuneration with respect to services in which he acquiesced. The *receipt* of services is not unconscientious unless, at the outset, the recipient had: (i) a fixed intention to refuse payment, and (ii) knowledge that if that intention had been made known, the person about to provide the services would have refrained from doing so. Absent the first criterion, the recipient had no reason for refusing the services; there is nothing unconscionable in receiving benefits for which payment was intended. And absent the second criterion, the recipient had no reason to express an intention to refuse payment; the services would have been rendered regardless. Moreover, there is nothing unconscientious in the *retention* of services, despite a refusal of payment, if those services were received in good conscience. Once rendered, services can not be restored; unconscientiousness involves a bad faith exercise of choice, but upon receipt, the time for choice has passed.

<sup>64</sup> The rise and fall of free acceptance can be charted through Birks’ scholarship. While championing the concept in *An Introduction to the Law of Restitution* (*supra* note 22 at c. 8), Birks subsequently conceded a large measure of ground to its critics and now supports only a severely limited version of free acceptance: “In Defence of Free Acceptance” in *Essays on the Law of Restitution*, A. Burrows (ed.), (Oxford: Clarendon Press, 1991) at c. 5.

<sup>65</sup> In *Understanding the Law of Obligations*, *supra* note 8 at c. 4.

<sup>66</sup> “Free Acceptance and the Law of Restitution” (1988) 104 L.Q.R. 576. See also G. Mead “Free Acceptance: Some Further Considerations” (1989) 105 L.Q.R. 460; M. Garner “The Role of Subjective Benefit in the Law of Unjust Enrichment” (1990) 10 Oxford J. of Legal Studies 42.

<sup>67</sup> See *e.g.* Birks, *An Introduction to the Law of Restitution*, *supra* note 22 at 266. The situation is different if the party conferring the benefit did not voluntarily assume the risk of non-payment. If, for example, the benefit erroneously was provided to the wrong person or was provided in the ultimately disappointed expectation of a reciprocal benefit, a claim will lie in unjust enrichment on the basis of, respectively, mistake and failure of consideration. Significantly, however, while restitutionary relief may be warranted in such circumstances, proof of free acceptance is unnecessary to establish the injustice of the recipient’s enrichment.

b) *Free Acceptance and Cohabital Property Disputes in Canada*

Canadian courts overlook or disregard the logic inherent in those arguments. Indeed, in this country, free acceptance has come to play a central role in the principle of unjust enrichment. The reasons for that development inextricably are tied to the Supreme Court of Canada's resolution of cohabitational property disputes. The story is familiar and for present purposes need merely be sketched in outline.<sup>68</sup>

Historically, the relief available to a non-titled partner upon the dissolution of a relationship was severely limited. A resulting trust was extended over family assets only upon proof that both parties shared a common intention that beneficial title would be held jointly. As illustrated by *Murdoch v. Murdoch*,<sup>69</sup> that rule frequently served as an engine of inequity. Although she labored for over fifteen years as a ranch hand on the couple's properties, the plaintiff wife was denied recompense upon separation because she was unable to establish a common intention to share. Cramped legal doctrine allowed the husband to enrichment on the basis of his wife's work.

The patent unfairness of the Court's decision in *Murdoch v. Murdoch* in 1973 generated a public cry for reform that could not be ignored - Canadians no longer would condone the inequitable division of cohabitational assets. Statutory redress began to be introduced, but that process was frustratingly slow and piecemeal. Something more, in the form of a common law action, was thought necessary. By 1980, a majority of the members of the Supreme Court of Canada were willing to take up that challenge in *Pettkus v. Becker*.<sup>70</sup> They were, however, seemingly constrained by precedent. As previous case law indicated, the relief sought by non-titled partners did not generally fall within any of the pre-existing categories of recovery. Dickson J. attempted to overcome that hurdle by adopting Laskin J.'s dissenting suggestion in *Murdoch v. Murdoch* that, regardless of the traditional rules governing resulting trusts, a remedy in the form of a constructive trust could be extended on the basis of the principle of unjust enrichment. Firmly entrenched in Canadian law since 1954,<sup>71</sup> that principle also appeared to possess the flexibility needed for the proper resolution of cohabitational disputes.<sup>72</sup>

Dickson J.'s reasoning in *Pettkus v. Becker* was hailed by many as a triumph of common law evolution. It might be better characterized as a

<sup>68</sup> See generally B. Hovius & T.G. Youdan, *The Law of Family Property* (Scarborough: Carswell, 1991) at c. 7.

<sup>69</sup> (1973), 41 D.L.R. (3<sup>rd</sup>) 367 (S.C.C.).

<sup>70</sup> *Supra* note 4.

<sup>71</sup> *Degelman v. Guaranty Trust Co. of Canada*, *supra* note 16.

<sup>72</sup> In *Pettkus v. Becker*, Dickson J. described the constructive trust that responds to unjust enrichment in cohabitational cases as "a broad and flexible equitable tool which permits Courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine the beneficial entitlement": *supra* note 4 at 270.

distortive exercise in judicial legislation. Notwithstanding the invocation of the “unjust enrichment” label, his analysis cannot be reconciled with restitutionary principles. Indeed, while heretical to suggest, it might have been more honest for Dickson J. to have expressly created a *sui generis* cause of action to meet the unique concerns arising from the breakdown of familial relationships.

The root of the problem lies in Dickson J.’s use of free acceptance.

[W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.<sup>73</sup>

While the circumstances of the case undeniably called out for some form relief, it is difficult to see how the test of free acceptance was satisfied on the facts. The parties maintained a spousal-like relationship for twenty years, during which time several properties were acquired in the defendant’s name alone. There is no doubt that those assets represented the fruits of a joint effort. Significantly, however, Dickson J. found it impossible to impose a resulting trust - the plaintiff simply could not prove that she and the defendant had held a common intention to share the beneficial interest. Indeed, the evidence was strongly to the contrary. Throughout the relationship, Lothar Pettkus quite clearly indicated his intention to exclude Rosa Becker from enjoying a share of the accumulated assets. And yet, Dickson J. further held that restitutionary relief was available to the plaintiff on the ground that the defendant had freely accepted her services in the knowledge that she held a reasonable expectation of receiving a property interest. Given the impoverished state of the law during the relevant period, and in light of the defendant’s manifestly selfish conduct, it is difficult to see how the plaintiff could have entertained such a view. Moreover, returning to Burrows’ critique of free acceptance, if the defendant accepted the plaintiff’s services on the basis that they were being rendered gratuitously, there was nothing unconscientious in his *receipt*; he was under no obligation to refuse an apparent gift. Likewise, having acquired the services in good conscience, there was nothing unconscientious in his *retention* of their profits; he never agreed to pay for the services and, having received them, he could not possibly restore them *in specie*. The fact that the defendant was a cad cannot alter the fact that his actions did not fall within the scope of the free acceptance principle.

In some cohabitational cases, it might be possible to prove a claim in unjust enrichment without having recourse to the troublesome concept of free acceptance. For example, the element of enrichment might be established on the basis of an incontrovertible benefit and the unjust factor might consist of a

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<sup>73</sup> *Ibid.* at 275.

failure of consideration.<sup>74</sup> Significantly, however, even a properly constituted claim in unjust enrichment cannot yield the measure of relief commonly awarded to non-titled partners. The Canadian fixation with the concept of free acceptance, and its touchstone of reasonable expectations, has led the Supreme Court of Canada to issue orders that fulfil (purported) expectations, rather than effect restitution. The distinction is important. The fulfilment of expectations looks forward by placing the plaintiff in the position that she expected to occupy as a result of providing services to the defendant. Restitution, in contrast, looks backward by compelling the defendant to return (the value of) an enrichment received at the plaintiff's subtractive expense - nothing more and nothing less.<sup>75</sup> Only the latter can properly flow from the cause of action in unjust enrichment.<sup>76</sup>

The Supreme Court of Canada's desire to fulfil expectations in the context of cohabitational disputes is not surprising. Very often, truly restitutionary relief cannot adequately redress the consequences of a failed

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<sup>74</sup> In "Free Acceptance and the Law of Restitution," Burrows re-analyzes a number of English cases occasionally said to support the concept of free acceptance and illustrates how they are better explained on other grounds: *Understanding the Law of Obligations*, *supra* note 8.

<sup>75</sup> The difference can be illustrated by two cases, one decided on either side of *Pettkus v. Becker*. In *Degelman v. Guaranty Trust Co. of Canada* (*supra* note 16), a woman promised to leave a house to her nephew if he rendered household services for her during her lifetime. Although he dutifully performed, he was disappointed upon his aunt's death to learn that she had not drafted a will containing the promised provision. His claim in contract failed under the *Statute of Frauds* for want of written memorandum, but the Supreme Court of Canada allowed his claim in unjust enrichment. Significantly, although the nephew clearly had a reasonable expectation of receiving the house, the Court awarded relief on a strictly restitutionary basis. The aunt's estate was merely required to restore the market value of the enrichment received from the nephew: \$3000. That seems both legally correct and socially appropriate. As the parties did not share a cohabitational relationship, there was no reason to distort principle to protect the nephew.

In *Sorochan v. Sorochan* (*supra*, note 60), the defendant owned a farm at the time of entering into a spousal-like relationship with the plaintiff. For the next forty-two years, the claimant raised the couple's six children, ran the household and contributed a substantial amount of labour to the farming enterprise. When the relationship broke down, she sought relief on the basis of *Pettkus v. Becker*. Dickson C.J. invoked the concept of free acceptance, found that the man had been unjustly enriched by the woman's services and granted, *inter alia*, a constructive trust over one-third of the farm land. Significantly, while insisting that there be "a clear link between the [plaintiff's] contribution and the disputed asset," (at 8) the Chief Justice determined the appropriate remedy in light of: (i) "the need to ensure equitable and fair relief in the myriad of familial circumstances," (at 10) (ii) the plaintiff's purported "reasonable expectation" in receiving an interest in the property, and (iii) the longevity of the parties' relationship. It is difficult to see how those factors are relevant to the restitutionary exercise of effecting the restoration of the enrichment received at the claimant's subtractive expense. Certainly, they do not speak directly to the value of the defendant's enrichment or the plaintiff's corresponding deprivation.

<sup>76</sup> Birks, "Misnomer" in *Restitution: Past, Present & Future*, *supra* note 1 at 12. See also McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis," *supra* note 50.

relationship. The dissolution of a family unit constitutes more than the frustration of a financial venture; it manifests a wide range of social and economic inequities that frequently inhere in sexual relationships. Likewise, the real purpose of a *Pettkus v. Becker* claim typically is not merely the recovery of benefits conferred; it extends to the equitable distribution of assets generally. As rigorous analysis shows, however, such a distribution cannot properly be achieved by means of the principle of unjust enrichment or the concept of free acceptance.

### III. *Knowing Receipt*

For historical reasons, Equity and Law often employ substantially different approaches to essentially similar problems. With respect to claims traditionally sounding in Equity, judges tend to blindly follow rules derived from the Courts of Chancery; with respect to claims traditionally sounding in Law, judges tend to blindly follow rules derived from the King's Courts. That is an intolerable state of affairs. More than one hundred years after the *Judicature Acts*, like cases surely should be decided alike, regardless of jurisdictional happenstance, unless a difference is specifically justified.<sup>77</sup> Accordingly, one of the great challenges facing restitution scholars lies in the reconciliation of the two streams of justice. "[I]ntegrating equity' is the law of restitution's 'unfinished business.'"<sup>78</sup> The key to such integration, as Professor Burrows notes, is the principle of unjust enrichment. Properly understood, that principle contains an inherent logic that is capable of identifying and eradicating inconsistencies and anomalies that historically arose because of the division between Equity and Law. Unfortunately, Canadian courts have not fully realized the analytical potential of unjust enrichment.

#### a) *Fault-Based Liability in Equity*

Perhaps the clearest illustration of the need for integration arises with respect to cases of "knowing receipt." If a trustee wrongfully transfers trust property to a third party, the beneficiary of the trust may enjoy an equitable action not only against the trustee, but also against the third party. That option often proves invaluable, especially if the trustee has become insolvent by the time of judgment. Traditionally, however, successful prosecution of the third party action was complicated by persistent uncertainty regarding the requisite elements of proof. In two recent decisions, the Supreme Court of Canada

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<sup>77</sup> Cf. *Canson Enterprises Ltd. v. Boughton & Co.*, *supra* note 40 (justifying differences in the computation of damages at law and in equity).

<sup>78</sup> Burrows, "Restitution: Where Do We Go From Here?" in *Understanding the Law of Obligations*, *supra* note 8 at 115, quoting Beatson, *The Use and Abuse of Unjust Enrichment*, *supra* note 54 at 244.

resolved that issue, but in so doing, regrettably failed to integrate the equitable rules within the general principle of unjust enrichment.

As the Court employed essentially the same reasoning in both *Citadel General Assurance Co. v. Lloyds Bank Canada*<sup>79</sup> and *Gold v. Rosenberg*,<sup>80</sup> it will suffice for present purposes to focus upon the former case. The plaintiff insurer hired a company named "Drive On" to act as its agent for the purpose of collecting premium payments. Under the terms of that arrangement, the agent was to hold all such funds in trust for the insurer. Drive On and its parent company, IWC, both held habitually overdrawn accounts at the defendant bank. On instructions from IWC, the defendant bank made nightly transfers from the subsidiary's account (which held the premiums that had been collected on the plaintiff's behalf) into the parent's delinquent account. That practice failed to sustain IWC and eventually both it and its subsidiary ceased operations. By that time, Drive On owed more than \$600,000 to the plaintiff. An action was successfully brought against the agent in breach of fiduciary duty, but for reasons of insolvency, judgment could not be satisfied. The insurer accordingly sought relief from the bank.

La Forest J. distinguished between three types of claims potentially available against a stranger to a trust. First, a stranger may be liable as a trustee *de son tort* if it improperly assumes the role of a trustee for the purpose of administering trust assets. There was no basis for applying that theory to the defendant bank on the facts of *Citadel*. Second, a stranger may be liable for "knowing assistance" if it knowingly participates in a dishonest and fraudulent breach of trust.<sup>81</sup> Once again, the facts did not support such a claim. In *Air Canada v. M&L Travel Ltd.*,<sup>82</sup> the Supreme Court of Canada held that "[t]he knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice."<sup>83</sup> In *Citadel*,

<sup>79</sup> (1997), 152 D.L.R. (4th) 411 (S.C.C.).

<sup>80</sup> (1997), 152 D.L.R. (4th) 385 (S.C.C.).

<sup>81</sup> The issue of "knowing assistance" generally is considered in terms of equitable rules. However, in "Assisting a Breach of Duty by a Fiduciary, the Common Law and Money Laundering," Michael Tugendhat considers the possibility of common law liability: *Restitution and Banking Law*, *supra* note 12 at c. 9.

<sup>82</sup> (1993), 108 D.L.R. (4th) 592 (S.C.C.). The Supreme Court of Canada appears to have difficulties with issues pertaining to third party liability. In a number of respects, *M&L Travel* compares unfavorably with the Privy Council's decision in *Royal Brunei Airlines v. Tan*, [1995] 2 A.C. 378 (P.C.). In particular, there appears to be no justification for the Canadian requirement that the defendant's knowing assistance pertain to a "dishonest and fraudulent" breach by the trustee. As Lord Nicholls explained in *Royal Brunei*, the gravamen of the claim is the defendant's wrongful behavior. If that party knew that it was participating in a breach of trust, it should not matter that the trustee's actions were merely negligent, rather than "dishonest and fraudulent." The trustee's state of mind cannot diminish the defendant's culpability.

<sup>83</sup> *Ibid.* at 608.

however, the bank was fixed with “constructive knowledge” only; while it should have made inquiries given the suspicious circumstances of the nightly transfers from Drive On’s account to IWC’s account, it did not actually know that its actions furthered a breach of trust. Third, a stranger may be liable in “knowing receipt” if it: (i) receives trust property for its own benefit, (ii) in a manner that renders its receipt reversible. It was on that ground that the insurer was entitled to relief against the bank.<sup>84</sup>

The Supreme Court of Canada disposed of the preliminary question of beneficial receipt on the basis that the nightly transfers into IWC’s account reduced that company’s overdraft and thereby constituted an economic enrichment to the bank.<sup>85</sup> With respect to the more interesting question regarding the requisite degree of knowledge, La Forest J. noted two traditional lines of authority. The first holds that liability in “knowing receipt,” like liability in “knowing assistance,” should be premised upon proof of the defendant’s actual knowledge of the breach of trust.<sup>86</sup> The second holds that liability in “knowing receipt” should be based on the lower threshold of constructive knowledge.<sup>87</sup> La Forest J. preferred the latter on the ground that “knowing assistance” and “knowing receipt” represent different theories of liability which demand different standards of proof. The gist of the action in “knowing assistance” is the furtherance of fraud. For that reason, relief may be ordered even if the third party took no benefit from the trustee’s breach of trust. But by the same token, the courts

<sup>84</sup> The nature of the relief is problematic. Traditionally, a recipient of misdirected trust funds has been said to be a “constructive trustee.” Such language inappropriately suggests that the remedy is proprietary. In fact, the purported trust is merely a vehicle for the imposition of personal orders: Sir Peter Millett, “Restitution and Constructive Trusts” in *Restitution: Past, Present & Future*, *supra* note 1 at 200; Lord Nicholls, “Knowing Receipt: The Need for a New Landmark” in *Restitution: Past, Present & Future*, *supra* note 1 at 232-33, 243-44; *Citadel General Assurance Co. v. Lloyds Bank of Canada*, *supra* note 79 at 438. Unfortunately, in *Gold v. Rosenberg*, Iacobucci J. appears to hold otherwise: *supra* note 80 at 399 (the claim in “knowing receipt” is said to be “simply a question of who has a better claim to the disputed asset”).

<sup>85</sup> As Dr. Bryan notes, in a banking context, the issue of beneficial receipt may not be as simple as the Court’s analysis in *Citadel* suggests: “Recovering Misdirected Money From Banks: Ministerial receipt at Law and in Equity” in *Restitution and Banking Law*, *supra* note 12 at 161. See also M. Bryan “The Receipt-Based Constructive Trust: A Case Study of Personal and Proprietary Restitution in the Supreme Court of Canada” (1999) 37 *Alberta L. Rev.* (forthcoming).

<sup>86</sup> See e.g. *Re Montagu’s Settlement Trusts*, [1987] 1 Ch. 264 (Ch.); *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769 (C.A.); *Canadian Imperial Bank of Commerce v. Valley Credit Union Ltd.*, [1990] 1 W.W.R. 736 (Man. C.A.); *Bullock v. Key Property Management Inc.* (1997), 33 O.R. (3d) 1 (Ont. C.A.).

<sup>87</sup> See e.g. *Selangor United Rubber Estates Ltd. v. Craddock (No. 3)*, [1968] 2 All E.R. 1073 (Ch.); *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265; *Cowan de Groot Properties Ltd. v. Eagle Trust plc*, [1992] 4 All E.R. 700 (Ch.); *El Ajou v. Dollar Land Holdings Ltd. plc*, [1993] 3 All E.R. 717 (Ch.); *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 112 D.L.R. (3d) 88 (S.C.C.).

properly refuse to impose liability in the absence of clear proof that the defendant acted wrongfully. In contrast, the gist of the action in “knowing receipt” is unjust enrichment. Stated in terms of the three part principle, analysis reveals that as a result of the trustee’s breach of trust, (i) the third party received an enrichment, (ii) that constituted a corresponding deprivation to the beneficiary of the trust, (iii) in circumstances calling for the reversal of that enrichment. La Forest J. further explained that:

... in “knowing receipt” cases, which are concerned with the receipt of trust property for one’s own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient who, unlike the accessory, is necessarily enriched at the plaintiff’s expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as a basis for liability. ... This lower threshold of knowledge is sufficient to establish the “unjust” or “unjustified” nature of the recipient’s enrichment.<sup>88</sup>

It is probably correct to classify “knowing receipt” as a category of recovery in unjust enrichment.<sup>89</sup> Moreover, it is undoubtedly appropriate to apply a lower threshold with respect to a third party who receives property as a result of a breach of trust. A claim to judicial intervention is strongest when a defendant not only causes a loss to the plaintiff, but also acquires a benefit for itself.<sup>90</sup> The Supreme Court of Canada appears to have erred, however, in its formulation of the relevant unjust factor. The logic inherent in the principle of unjust enrichment demands that, regardless of actual or constructive knowledge, a third party who receives property in breach of trust *prima facie* should be liable to make restitution to the beneficiary of the trust.

#### b) *Strict Liability and the Logic of Unjust Enrichment*

The English position regarding the elements of “knowing receipt” remains unsettled. Neither the House of Lords nor the Privy Council has recently addressed the question and, as La Forest J. noted in *Citadel*, lower court decisions conflictingly support both a requirement of actual knowledge and a requirement of constructive knowledge. Judging from several papers contained

<sup>88</sup> *Supra* note 79 at 434. While La Forest J. referred to the standard of actual knowledge in “knowing assistance” cases as fault-based, he referred to the standard of constructive knowledge in “knowing assistance” cases as “receipt-based”: at 433; see also *Gold v. Rosenberg*, *supra* note 80 at 398-99. The latter characterization is misleading. Constructive knowledge is a type of fault; liability is imposed because the defendant should have, but did not, conduct inquiries appropriate to the circumstances: Lord Nicholls “Knowing Receipt: The Need for a New Landmark” in *Restitution: Past, Present & Future*, *supra* note 1 at 235.

<sup>89</sup> But see below at Section IV.

<sup>90</sup> L.L. Fuller & W.R. Perdue “The Reliance Interest in Contract Damages” (1936) 46 *Yale L.J.* 52 at 56.

in the texts under review, however, it seems likely that liability eventually will be placed on an entirely different footing: strict liability.<sup>91</sup>

In “The Burden on the Bank,”<sup>92</sup> Professor Birks provides the groundwork for a compelling case against any knowledge requirement in the equitable action. As he notes, restitutionary liability at law generally is strict. If Pam mistakenly pays \$500 to David, her common law claim in unjust enrichment will succeed regardless of her carelessness or his innocence.<sup>93</sup> He was enriched at her subtractive expense as a result of her mistake. And significantly, Pam’s mistake serves as an unjust factor simply because it establishes that her intention in making the payment was vitiated by error. It is enough for her to prove that she did not really mean to do it - she need not also prove that David somehow was at fault. Precisely the same analysis applies in law with respect to three party situations. If Xavier secretly steals Pam’s \$500 and provides it to David as a gift, it is clear that Pam enjoys a right, *inter alia*, to claim restitution from David.<sup>94</sup> Her ignorance serves as an unjust factor simply because it establishes, even more clearly than a mistake, that she had no intention of benefiting David. And once again, it is irrelevant that he may have been entirely oblivious to the wrongful source of his gift. Given his receipt of Pam’s money, David is properly held liable according to the minimal threshold of strict liability.

In “Knowing Receipt: The Need for a New Landmark,”<sup>95</sup> Lord Nicholls adopts that reasoning and persuasively argues that the differences between law and equity are indefensible. Whether a claim lies in law or in equity, the gist of the plaintiff’s claim is precisely the same: someone took her wealth and gave it to the defendant without her consent. And in either event, the defendant’s position is precisely the same: he received the plaintiff’s wealth by means of an intermediary. Given those similarities, there is no principled reason why liability should be premised upon a higher threshold if the claimant held equitable, rather than legal, title to the property in question. Regardless of jurisdictional considerations, it should be enough that the plaintiff had no intention of enriching the defendant.<sup>96</sup>

<sup>91</sup> See A. Burrows “Restitution: Where Do We Go From Here?” in *Understanding the Law of Obligations*, *supra* note 8 at 115; M. Bryan “Recovering Misdirected Money from Banks: Ministerial Receipt at Law and in Equity” in *Restitution and Banking Law*, *supra* note 12 at 181; C. Harpum “Knowing Receipt: The Need for a New Landmark: Some Reflections” in *Restitution: Past, Present & Future*, *supra* note 1 at 249.

<sup>92</sup> *Restitution and Banking Law*, *supra* note 12 at c. 11.

<sup>93</sup> *Kelly v. Solari* (1841), 9 M. & W. 54 (Exch.).

<sup>94</sup> See e.g. *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 48 (H.L.); *Jones (F.C.) & Sons (a firm) (Trustee of the property of) v. Jones*, [1997] Ch. 159 (C.A.).

<sup>95</sup> *Restitution: Past, Present & Future*, *supra* note 1 at c. 15.

<sup>96</sup> In *Gold v. Rosenberg*, Iacobucci J. stated that “unlike knowing assistance, there is no finding of fault, no legal wrong done by the defendant” in an action for “knowing receipt”: *supra* note 80 at 399. Unfortunately, he also agreed with La Forest J.’s decision in *Citadel* to require proof of constructive knowledge under the latter type of claim. Constructive knowledge is, of course, a species of fault. While it may be less blameworthy than actual knowledge, its function is to justify the imposition of liability on the ground that the defendant did something that he ought not to have done - i.e. receive an enrichment without first conducting an appropriate inquiry.

Accordingly, Lord Nicholls employs the logic of the unjust enrichment principle and proposes reconciling law and equity by resolving *all* restitutionary claims<sup>97</sup> against third party recipients on a strict liability model.<sup>98</sup>

In *Citadel*, La Forest J. specifically considered and rejected a strict liability model. His explanation, however, is difficult to accept.

[A test of strict liability] may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly *deprived* but, rather, because the defendant has been unjustly *enriched*, at the plaintiff's expense. To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind, not the plaintiff's knowledge or lack thereof. Indeed, without any constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received.<sup>99</sup>

As there is nothing inherent in the logic of La Forest J.'s comments that confines his reasoning to equitable claims for "knowing receipt," it must be assumed that he was introducing a fault requirement into actions in unjust enrichment generally. And yet, only three months prior to *Citadel*, the Supreme Court of Canada had reiterated the orthodox view that restitutionary liability generally is strict. In *Air Canada v. Ontario (Liquor Control Board)*,<sup>100</sup> the plaintiff mistakenly paid gallonage fees to the defendant with respect to in-flight alcoholic drinks. Although neither party recognized that mistake for several years, the defendant eventually realized that such fees were not actually applicable in the circumstances. It nevertheless continued to collect payments from the plaintiff for five years. The lower courts granted restitutionary relief, but only with respect to money that the defendant received after it had become aware of the plaintiff's error. In the Supreme Court of Canada, Iacobucci J. properly extended the scope of recovery to all mistaken payments on the basis that "Canadian law has never required a showing of bad faith as a precondition to the recovery of monies collected by the government under an inapplicable law."<sup>101</sup> At law, the same historically has been true of all mistaken payments,

<sup>97</sup> Consistent with the suggestion that the lower standard of proof is warranted to the extent that the defendant received an enrichment that had been subtracted from the plaintiff, Lord Nicholls insists that while restitutionary liability should be strict, compensatory liability should be fault-based. Accordingly, if, as a result of a breach, a beneficiary suffers a loss that is not matched by a third party's gain, the third party should be responsible for providing compensation only if it had actual knowledge of the wrongfulness of the trustee's actions.

<sup>98</sup> The proposal is not entirely novel. Anomalously, equity has long imposed strict liability with respect to assets wrongly misdirected during the administration of an estate: *Re Diplock*, [1948] Ch. 465 (C.A.), *affd. (sub nom) Ministry of Health v. Simpson*, [1951] A.C. 251 (H.L.).

<sup>99</sup> *Supra* note 79 at 435.

<sup>100</sup> (1997), 148 D.L.R. (4<sup>th</sup>) 193 (S.C.C.). See also *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 121 D.L.R. (4<sup>th</sup>) 53 (Ont. C.A.).

<sup>101</sup> *Ibid.* at 214.

regardless of the defendant's character as a government agent.<sup>102</sup> Given the defendant's receipt of an enrichment, the plaintiff's mistake alone is sufficient to justify the imposition of liability; a recipient's enrichment is "unjust" simply because the claimant did not truly intend a transfer of wealth.

In arguing to the contrary, La Forest J. appears to have been motivated by the belief that strict liability could prove "unfair" to the recipient of misdirected trust assets. As Lord Nicholls and Professor Birks stress, however, the proposed model of liability is strict, not absolute.<sup>103</sup> Accordingly, even if a plaintiff establishes the elements of a *prima facie* claim in unjust enrichment, the defendant will be relieved of liability to the extent that he honestly changed his position in reliance upon his receipt. Moreover, he will have a complete defence if he acquired a legal interest in the enrichment as a bona fide purchaser for value without constructive knowledge of the underlying breach of trust. And likewise, as Dr. Bryan explains in "Recovering Misdirected Money from Banks: Ministerial Receipt at Law and in Equity,"<sup>104</sup> a defendant should not be subject to liability if, having received an enrichment as an agent, he paid the benefit over to his principal in good faith. Consequently, evidentiary difficulties aside, there is very little danger that the honest recipient of a trust asset would be prejudiced by a regime of strict liability. Generally, he would be required to return the enrichment to the beneficiary of the trust only if, at the time when he knew or should have known of the breach of trust, he retained (the value of) property that he received as a gratuity. And in that situation, there surely is nothing "unfair" in requiring him to give back (the value of) an enrichment that he never should have acquired.

### c) *Unjust Enrichment and Equity's Conversion*

As the claimant need not prove that the recipient *knew* of the breach of trust under a regime of strict liability, the preceding analysis appears to suggest that the phrase "*knowing receipt*" should be abandoned. However, while conceding that liability should be strict *if* the action lies in unjust enrichment, Dr. Smith insists that the notion of "*knowing receipt*" is sound and should be retained. In "Tracing and Electronic Funds Transfers,"<sup>105</sup> he argues that the claim in question is not a species of unjust enrichment, but rather is the equitable analogue of the common law action in conversion; its gist is not that the

<sup>102</sup> After previously suggesting that mistaken payments may be subject to special rules in a government context, the Supreme Court of Canada recently has indicated an intention to apply the same rules uniformly across all defendants: *Air Canada v. British Columbia* (1989), 59 D.L.R. (4<sup>th</sup>) 161, *per* La Forest J. (S.C.C.); *cf. Re Eurig Estate*, (1998) 165 D.L.R. (4<sup>th</sup>) 1 at, *per* Major J.

<sup>103</sup> "Knowing Receipt: The Need for a New Landmark" in *Restitution: Past, Present & Future*, *supra* note 1 at 236-39; "The Burden on the Banks" in *Restitution and Banking Law*, *supra* note 12 at 206-14.

<sup>104</sup> *Restitution and Banking Law*, *supra* note 12 at c. 10.

<sup>105</sup> *Restitution and Banking Law*, *supra* note 12 at c. 8.

defendant received wealth subtracted from the plaintiff, but rather that he interfered with her pre-existing property rights. Smith defends his argument largely on the ground that whereas a cause of action in unjust enrichment generally requires mere proof that the defendant received an enrichment at her subtractive expense, the action in “knowing receipt” further requires the plaintiff to establish a proprietary interest in the relevant asset.<sup>106</sup> It is difficult to reconcile such a requirement with the logic underlying a simple claim in unjust enrichment.<sup>107</sup>

If Smith is correct in characterizing “knowing receipt” as the equitable wrong of misappropriation, he probably is correct in defending the requirement of fault, as well. After all, civil wrongdoing generally requires some form of fault.<sup>108</sup> It may be, however, that an exclusive choice between fault-based liability in wrongdoing and strict liability in unjust enrichment is unnecessary. As Birks argues in “The Burden on the Bank” and “Misnomer,”<sup>109</sup> the ideal position may lie in the acceptance of concurrent actions. At law, the plaintiff is entitled to plead both conversion and unjust enrichment if a rogue steals her car and gives it to the defendant. In equity, she similarly should be permitted to sue in both “knowing receipt” and unjust enrichment if a trustee improperly transfers trust assets to the defendant in circumstances in which the recipient has knowledge of the trustee’s breach. If adopted, that proposal would allow courts to sensitively and clearly address the distinct consequences of a stranger’s involvement in a breach of trust. Unfortunately, however, given the tenor of the Supreme Court of Canada’s recent decisions in the area, it seems highly unlikely that that approach will be accepted in this country any time soon. In Canada, the discussion is considerably less sophisticated and until the logic of the principle

<sup>106</sup> Elsewhere, Smith further notes that liability in “knowing receipt” extends beyond restitution of enrichment to compensation for consequential losses: “W(h)ither Knowing Receipt” (1998) 114 L.Q.R. 394. Logically, a cause of action in unjust enrichment supports restitutionary remedies only: Birks “Misnomer” in *Restitution: Past, Present & Future*, *supra* note 1 at 12. In his proposal, Lord Nicholls recognizes that fact and confines the strict liability claim in unjust enrichment to restitutionary relief; compensatory damages are placed under a different, fault-based action: “Knowing Receipt: The Need for a New Landmark” in *Restitution: Past, Present & Future*, *supra* note 1 at 236-39, 243-44.

<sup>107</sup> Cf. G. Jones, *Goff & Jones: The Law of Restitution* (4<sup>th</sup> ed.) (London: Sweet & Maxwell, 1993) at 78.

<sup>108</sup> Interestingly, however, the common law action in conversion is strict. Smith nevertheless rationalizes fault-based liability under the equitable analogue on the ground that equitable proprietary rights typically receive less protection than legal proprietary rights: “Tracing and Electronic Funds Transfers” in *Restitution and Banking Law*, *supra* note 12 at 125. He might also note that the legal action in conversion initially was fault-based, but, over time, became strict as a means of better protecting the integrity of proprietary interests at law: P. Birks “Property and Unjust Enrichment: Some Categorical Truths”, [1997] New Zealand L. Rev. 623 at 646. Such a development was necessary because, whereas equity has always contained a *vindicatio* claim that allowed for the direct vindication of proprietary interests by means of the declaration of a trust and an order for specific relief, no similar claim exists at law.

<sup>109</sup> “The Burden on the Bank” in *Restitution and Banking Law*, *supra* note 12 at 205-206; “Misnomer” in *Restitution: Past, Present & Future*, *supra* note 1 at 25.

of unjust enrichment is rigorously applied, as it is in the English literature, conceptual errors and oversights will persist.

#### IV. Constructive Trusts

The difficulties that Canadian courts experience at the intersection of restitutionary and equitable concepts are not confined to cases of “knowing receipt.” That is hardly surprising. Equity, like unjust enrichment, does not receive the scholarly attention that it deserves in Canada. There are no modern texts on the subject<sup>110</sup> and the leading work on equity’s most significant contribution, trusts, is now fifteen years old.<sup>111</sup> Despite (or perhaps because of) that fact, the Supreme Court of Canada has in recent years taken a relatively free hand in developing the constructive trust as a response to the event of unjust enrichment.<sup>112</sup> As might be expected in the circumstances, problems have arisen.

Outside of North America, there is great reluctance to recognize a judicial discretion to take property from one party and give it to another for remedial purposes.<sup>113</sup> The primary reason, succinctly stated, stems from the belief that there is a fundamental distinction “between property and obligation, between what I own and what I am owed.”<sup>114</sup> It generally has been feared that imposition of proprietary relief would intolerably disrupt statutory regimes governing the distribution of assets in the event of insolvency.<sup>115</sup> If a plaintiff is permitted a

<sup>110</sup>In contrast, equity remains very much a primary subject of study elsewhere in the Commonwealth: see e.g. J.E. Martin, *Hanbury & Martin, Modern Equity* (15<sup>th</sup> ed.) (London: Sweet & Maxwell, 1997); R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane *Equity: Doctrine and Remedies* (3<sup>rd</sup> ed.) (Sydney: Butterworths, 1992).

<sup>111</sup>D.W.M. Waters, *Law of Trusts in Canada* (2<sup>nd</sup> ed.) (Toronto: Carswell, 1984). Fortunately, that void is filled, at least partially, by an excellent casebook: A.H. Oosterhoff & E.E. Gilless, *Text, Commentary and Cases on Trusts* (5<sup>th</sup> ed.) (Scarborough: Carswell, 1998).

<sup>112</sup>The discussion that follows will not investigate the purported distinction between “institutional” and “remedial” constructive trusts. In principle, there certainly is a difference between a trust that arises automatically upon the occurrence of certain events and a trust that is imposed as a discretionary remedy. In practice, however, the two categories often are difficult to distinguish. For example, although the constructive trust imposed in *Soulos v. Korkontzilas* (discussed below at text accompanying note 118), was described by McLachlin J. as “institutional,” it also was discretionary.

<sup>113</sup>In *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, Lord Browne-Wilkinson contemplated in *obiter* the development of the remedial constructive trust: [1996] A.C. 669 at 716 (H.L.). Subsequently, however, the Court of Appeal strongly reiterated the English Courts’ traditional rejection of such a proposal: *Re Polly Peck (No. 2)*, [1998] 3 All E.R. 812. See also *Fortex Group Ltd. v. McIntosh*, [1998] 3 N.Z.L.R. 171 (N.Z.C.A.). In contrast, American courts have long taken a broad and flexible approach to constructive trusts.

<sup>114</sup>R. Goode, “Proprietary Restitutionary Claims” in *Restitution: Past, Present & Future*, *supra* note 1 at 65.

<sup>115</sup>As Goode notes (*ibid*), it is unfortunate that insolvency was not established in any of the leading cases. In formulating rules regarding proprietary relief, the courts have not been compelled to squarely address the concerns of unsecured creditors.

beneficial interest in an asset held by the defendant, then the pool of resources available to the defendant's general creditors in the event of bankruptcy is diminished accordingly; the creditors cannot satisfy the defendant's debt by taking the plaintiff's property. Such an effect is too important to be taken lightly. If a restitutionary claimant is to be allowed to reduce the size of a debtor's estate, it must be on the basis of a convincing and clearly articulated explanation. Unfortunately, no such rationale emerges from the Canadian case law.<sup>116</sup>

*Soulos v. Korkontzilas*<sup>117</sup> represents the Supreme Court of Canada's most recent contribution to the issue. Reduced to essentials, the facts tell a simple story. The defendant, who acted as the plaintiff's real estate agent, breached his fiduciary obligations by purchasing a property for himself, rather than informing his client of the vendor's offer to sell. Although the land subsequently declined in value, the plaintiff sought ownership of the property by way of constructive trust. In exchange, he offered indemnification for the defendant's original purchase price and consequential losses. The claimant's motivation obviously was personal, rather than economic; he wished to acquire the property in order to become his banker's landlord and thereby gain prestige within Toronto's Greek community.

In upholding the lower court's decision in the plaintiff's favour, Justice McLachlin explained the availability of constructive trusts in terms of a two-part principle of 'good conscience.'

The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. ... The second concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself.<sup>118</sup>

Of course, as previously explained,<sup>119</sup> the orthodox theory of unjust enrichment actually encompasses both of those categories.<sup>120</sup> The first type of case

<sup>116</sup>The issue does not, however, warrant attention. That is true both here and abroad; the remedial constructive trust represents one area of unjust enrichment upon which Canadian scholars have written extensively. Most recently, a special issue of the *Alberta Law Review* devoted to the law of restitution contains two articles on the role of proprietary relief: R. Chambers, "Constructive Trusts in Canada," L.I. Rotman, "Deconstructing the Constructive Trusts" (1999) 37 *Alberta L. Rev.* (forthcoming). See also M. McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1998) 25 *Manitoba L.J.* 513.

<sup>117</sup>(1997), 146 D.L.R. (4th) 214 (S.C.C.).

<sup>118</sup>*Supra* note 117 at 227.

<sup>119</sup>Above at Section II(B).

<sup>120</sup>The Court's refusal to recognize an unjust enrichment in *Soulos v. Korkontzilas* stemmed from the fact that the defendant purchased at market value and subsequently saw the land depreciate. In the circumstances, however, the estate agent's failure to realize a positive profit from his wrongdoing should not have been determinative. The plaintiff sought proprietary relief in exchange for indemnification of the defendant's costs and losses. Accordingly, since the claim was to the property itself, and not to the value of the property, the Court should have recognized that the defendant's possession of the land constituted an enrichment: McInnes, "Restitution, Unjust Enrichment and the Perfect Quadrant Thesis," *supra* note 50.

represents the concept of restitution for wrongs; the second type of case represents the autonomous action in unjust enrichment.

Further discussing the first category of case, McLachlin J. adopted an article written by Professor Goode<sup>121</sup> and held that a constructive trust should be available as a response to a wrongful acquisition of property only upon satisfaction of four conditions.

- (1) The defendant must have been under an equitable obligation, that is an obligation of the type that the courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.<sup>122</sup>

In "Proprietary Restitutionary Claims,"<sup>123</sup> however, Goode revisits the issue of constructive trusts, restates his earlier views and reveals the incongruity of McLachlin J.'s dependence upon his work.<sup>124</sup>

Goode's thesis separately addresses several types of situation. The first, as illustrated by *Soulos v. Korkontzilas*, involves a special class of wrongful acquisitions called "deemed agency gains." In that type of case, the defendant breaches an equitable obligation and thereby acquires from a third party an asset that he should have acquired, if at all, for the plaintiff's benefit. Given the nature of the defendant's underlying obligation, Goode countenances the possibility of a constructive trust on the ground that, as between the parties alone, the plaintiff has the greater claim to beneficial ownership. At the same time, however, he is adamant that proprietary relief should not work to the prejudice of third parties. Because the defendant's wrongful gain was acquired from a third party, and therefore did not diminish the plaintiff's pre-existing holdings, the constructive

<sup>121</sup> "Property and Unjust Enrichment" in *Essays on the Law of Restitution*, *supra* note 64 at c. 9.

<sup>122</sup> *Supra* note 117 at 230. See also Goode "Property and Unjust Enrichment," *ibid.* at 237-44.

<sup>123</sup> *Restitution: Past, Present & Future*, *supra* note 1 at c. 5.

<sup>124</sup> So, too, her reliance upon Professor Birks: *Soulos v. Korkontzilas*, *supra* note 117 at 228. As previously noted in these pages (L.D. Smith (1997) 76 Can. Bar Rev. 539 at 544), contrary to McLachlin J.'s suggestion, Birks is opposed to the creation of property rights by way of constructive trusts: *An Introduction to the Law of Restitution*, *supra* note 22 at 67-70, 387-90; P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 U. of Western Australia L. Rev. 54-63.

trust bestows upon the claimant proprietary rights that she did not previously enjoy. By the same token, such relief diminishes the assets available to the defendant's general creditors and potentially removes from his estate an asset over which he had granted security. Accordingly, Goode insists that the remedial constructive trust be available only on terms. An order might be granted *pro nunc*, rather than *pro tunc*, or, as in *Soulos v. Korkontzilas*, the plaintiff might be required to indemnify the defendant for the loss of the asset.

With respect to a case like *Soulos v. Korkontzilas*, then, Justice McLachlin and Professor Goode appear to be in agreement regarding the availability of a constructive trust. Beyond that case, however, her reliance upon his work is troubling. Goode's general approach is restrictive. While willing to support proprietary relief as a response to "deemed agency gains" in limited circumstances, he argues that other forms of wrongful acquisitions should be sanctioned by personal relief only. In contrast, the Supreme Court of Canada's general approach is expansive. While the Court occasionally speaks of the need to carefully confine the availability of proprietary relief,<sup>125</sup> it consistently has taken an expansive view of constructive trusts. Consequently, for example, it would be rather surprising if the Court did not eventually follow the Privy Council<sup>126</sup> in overruling *Lister v. Stubbs*<sup>127</sup> and imposing a constructive trust upon a defendant who received a bribe in breach of a fiduciary obligation. The arguments tendered in support of such a conclusion seem to be precisely the type that Canadian courts currently find persuasive.<sup>128</sup> However, as Goode reiterates in "Proprietary Restitutionary Claims," his analysis does not admit of such a possibility. In such circumstances, he maintains that there simply is no principled reason for awarding anything more than personal relief. The improper gain represents neither something which the defendant should have pursued on the claimant's behalf nor something in which the plaintiff enjoyed pre-existing property rights. Accordingly, as the plaintiff has no proprietary connection to the bribe, there is no basis for awarding preferential status in the event of the wrongdoer's insolvency.

Finally, while McLachlin J.'s comments in *Soulos v. Korkontzilas* were directed only to the availability of constructive trusts in the context of restitution for wrongs, it is interesting to note that Goode's thesis is incompatible with the Supreme Court of Canada's approach to proprietary relief in cases of autonomous

<sup>125</sup> *Soulos v. Korkontzilas*, *supra* note 117 at 227, *per* McLachlin J.; *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4<sup>th</sup>) 14 at 51 *per* La Forest J.

<sup>126</sup> *A.G. for Hong Kong v. Reid*, [1994] 1 A.C. 324 (P.C.).

<sup>127</sup> (1890), 45 Ch.D. 1 (C.A.).

<sup>128</sup> In *Soulos v. Korkontzilas*, McLachlin J. defended the imposition of a constructive trust largely on the ground that proprietary relief was necessary to protect the societal interest in the institution of fiduciary relationships. In *A.G. for Hong Kong v. Reid*, Lord Templeman was guided by similar notions of deterrence: *supra* note 126 at 330-31. ("Bribery is an evil practice which threatens the foundations of any civilised society. In particular bribery of policemen and prosecutors brings the administration of justice into disrepute").

unjust enrichment, as well. Since *Pettkus v. Becker*,<sup>129</sup> Canadian courts habitually have used the remedial constructive trust as a malleable instrument<sup>130</sup> for achieving “equitable” distributions of assets upon the dissolution of cohabitational relationships. Moreover, they typically do so on the basis of the claimant’s provision of services. Thus, if, as in *Peter v. Beblow*, a woman cares for a man’s house and children, she eventually may be entitled to take title to the cohabitational home even if she contributes no tangible property to the relationship.<sup>131</sup> Goode, however, argues that the cause of action in unjust enrichment should support a constructive trust only when the plaintiff is able to establish a “proprietary base” by proving that the defendant (traceably) holds a *hard* asset that was subtracted from her.<sup>132</sup> On that approach, the provision of *soft* assets, such as domestic services, can not provide the foundation for a proprietary base for the simple reason that services are not a form of property and are not something in which the plaintiff can sustain an interest.<sup>133</sup> Goode’s thesis, therefore, can not accommodate the *Pettkus v. Becker* constructive trust.

Of course, the point of the preceding discussion is not that Canadian courts must entirely embrace Goode’s position regarding the role of constructive trusts in unjust enrichment.<sup>134</sup> Rather, it is that the Supreme Court of Canada should carefully re-consider its view of proprietary relief. Its open-ended remedial approach to autonomous actions in unjust enrichment is “a counsel of despair

<sup>129</sup> *Supra* note 4.

<sup>130</sup> As Justice Cory once stated, the flexibility of the remedial constructive trust affords the courts “that treasured and essential measure of individualized justice and fairness”: *Rawluk v. Rawluk* (1990), 65 D.L.R. (4<sup>th</sup>) 161 at 181 (S.C.C.).

<sup>131</sup> (1993), 101 D.L.R. (4<sup>th</sup>) 621 (S.C.C.).

<sup>132</sup> Where a proprietary base is established in a claim for autonomous unjust enrichment, Goode argues that concerns regarding prejudice to the defendant’s general creditors can be set aside. Because he believes that the constructive trust arises automatically upon the occurrence of the unjust enrichment in such circumstances, he further holds that the defendant never acquires beneficial title to the property. And if that is true, then the disputed asset should not be available to the defendant’s general creditors; they should not be permitted to satisfy his debt on the basis of the plaintiff’s property.

<sup>133</sup> “Property and Unjust Enrichment” in *Restitution: Past, Present & Future*, *supra* note 1 at 227-29.

<sup>134</sup> Indeed, even within English academic circles, Goode’s thesis is controversial. Lord Millett, for example, takes a much more restrictive view: “Restitution and Constructive Trusts” in *Restitution: Past, Present & Future*, *supra* note 1 at c. 13. While agreeing with McLachlin J. that a principle of good conscience underlies restitutionary constructive trusts, he insists that such trusts properly arise only in the context of restitution for wrongs. In the context of autonomous actions in unjust enrichment, he argues (at 215) that proprietary relief should be provided instead by way of the resulting trust “if (but only if) the legal title is transferred without any intention to benefit the recipient.” That proposition was rejected in *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* (*supra* note 113) and has yet to be authoritatively considered by the Supreme Court of Canada. However, as a number of contributors to *Restitution: Past, Present & Future* note, the arguments in favour of the resulting trust thesis, as principally formulated by Dr. Chambers (*Resulting Trusts*, *supra* note 6), are highly persuasive.

which too readily concedes the impossibility of propounding a general rationale for the availability of proprietary remedies.”<sup>135</sup> And its adoption of Professor Goode’s thesis in the context of restitution for wrongs appears to commit it to conclusions that it may not wish to accept. The law must be placed on a more principled and coherent footing.

### *Conclusion*

In many respects, the Canadian law of restitution is unsatisfactory. It would, however, be unfair to place all of the blame on the courts. As a complex and rapidly evolving principle, unjust enrichment requires careful scrutiny by both judges and jurists. Unfortunately, Canadian academics have taken too little interest in the subject and there simply is not enough serious scholarship on point. Until that situation changes, Canadian courts may find it desirable to consult the large and sophisticated body of literature that recently has developed in England. And in that regard, *Understanding the Law of Obligations, Restitution and Banking Law* and *Restitution: Past, Present & Future* have a great deal to offer. As this essay has suggested, many of the papers contained in those volumes provide valuable insights into the Canadian law of unjust enrichment.

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<sup>135</sup> A.J. Oakley, “Restitution and Constructive Trusts: Commentary” in *Restitution: Past, Present & Future*, *supra* note 1 at 220, quoting Sir Peter Millett, “Equity - The Road Ahead” (1995) 6 King’s L.J. 1 at 19.