MOORE V SWEET: FOUR LESSONS IN UNJUST ENRICHMENT FROM THE SUPREME COURT OF CANADA

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The recent decision in Moore v Sweet provided the Supreme Court of Canada with an opportunity to provide valuable guidance concerning the capacity of the unjust enrichment analysis to ground recovery in novel cases. The opportunity was not lost. First, the Court confirmed that resort should be made to the underlying unjust enrichment principle only in circumstances in which there is no existing and applicable restitutionary doctrine or rule. Second, the Court explained how the concept of "corresponding deprivation" may apply in three-party cases where the benefit comes from a source other than the plaintiff. Third, the application of the "no juristic reason" for the transfer element to transfers required by statute was clarified. Fourth, the Court provided guidance concerning the availability of the constructive trust remedy.

Le récent arrêt rendu par la Cour suprême du Canada dans l'affaire Moore c Sweet a été l'occasion pour elle de donner certaines directives précieuses sur la possibilité de recourir à la doctrine de l'enrichissement sans cause pour fonder une demande de réparation dans des affaires futures. La Cour a sauté sur l'occasion, confirmant d'abord qu'on ne devrait avoir recours au principe sous-jacent de l'enrichissement sans cause qu'en l'absence de toute doctrine ou règle applicable en matière de restitution. La Cour explique ensuite la manière dont le concept de « l'appauvrissement correspondant » peut trouver application dans les affaires impliquant trois parties et où l'avantage provient d'une source autre que le plaignant. Elle a, en troisième lieu, clarifié l'application du concept de « l'absence de motif juridique » relatif à l'élément transfert des transferts exigés par la loi, puis, a finalement donné des directives quant à la possibilité de fonder une réparation sur la fiducie par interprétation.

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Introduction

The recent decision of the Supreme Court of Canada in *Moore v Sweet*[1] provided authoritative treatment of a type of claim that has arisen with some frequency in recent Canadian restitutionary jurisprudence. The facts were not complicated. Lawrence and Michelle Moore were married for twenty years or so. They had three children. As a result of Lawrence's financial irresponsibility and related personal difficulties, the couple was concerned about providing some financial security for Michelle and their children in the event of Lawrence's passing. Accordingly, Lawrence took out a term life insurance policy, naming Michelle as the beneficiary. The premiums for the policy were paid out of their joint bank account. When the couple eventually separated, they entered into an oral agreement pursuant to which Lawrence agreed to maintain Michelle as the beneficiary of the policy and Michelle agreed to continue making the premium payments. A subsequent formal separation agreement was silent on this issue. In due course, Lawrence named his new partner, Risa Sweet, as the "irrevocable beneficiary" of the policy. This was a clear breach of his oral undertaking to Michelle. Unaware of this change of beneficiary, Michelle continued to pay the premiums. Upon Lawrence's passing, Michelle became aware of Lawrence's breach and commenced an action against Ms. Sweet for the proceeds of the policy, pleading unjust enrichment and seeking the remedy of constructive trust. Lawrence's estate had no significant assets.

1 *Moore v Sweet,* 2018 SCC 52 [*Moore v Sweet* SCC].

It will seem obvious to many that Ms. Moore should recover in these circumstances and, indeed, the judge at first instance awarded recovery.[2] The decision was overturned by the Court of Appeal for Ontario, however, and Ms. Moore undertook an appeal to the Supreme Court of Canada. For reasons to be further explored below, the Supreme Court reversed the Court of Appeal and awarded Ms. Moore relief in the form of a constructive trust on the proceeds of the policy.

A number of similar claims have arisen in recent Canadian experience.[3] In the typical case, upon the separation of a co-habiting couple, the parties may agree that life insurance, pension, or other forms of benefits will either be preserved in favour of the initial spouse or transferred to a subsequent spouse. For some reason, then, either because of a breach of undertaking, as in *Moore v Sweet*, or because of a mistaken attempt to effectuate the arrangements in question, the benefits end up in the wrong party's hands. In *Roberts v Martindale*,[4] the leading case prior to *Moore v Sweet*, the deceased had intended to transfer life insurance benefits from the initial beneficiary, her husband, to her sister who—after separation of the spouses—had been her principal caregiver during an illness that resulted in her death. Unfortunately, the deceased had failed to execute appropriate documentation to accomplish this objective and the former husband remained entitled to the proceeds. Upon separation, the parties had agreed, *inter alia*, that the parties relinquished any interest in the property of the other party. The British Columbia Court of Appeal granted restitutionary relief to the sister against the former husband in the form of a constructive trust on the proceeds of the policy.

In recent years at least, Canadian cases of this kind have been analyzed on the basis of the Canadian version of the principle against unjust enrichment articulated by Justice Dickson in *Pettkus v Becker*[5] as requiring an enrichment of the defendant, a corresponding deprivation of the plaintiff and no juristic reason for the transfer.[6] Readers familiar with recent Canadian unjust enrichment jurisprudence will know that

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2 *Ibid* at paras 19–21.

3 Peter D Maddaugh & John D McCamus, *The Law of Restitution* (Toronto: Thomson Reuters, 2019) under Heading 35:400 "Failed Arrangements to Allocate Assets Following Family Dissolution". These claims may be seen as a subset of a broader category of three-party claims further discussed in Part 6, below (see also *ibid*, ch 35 & 36).

4 *Roberts v Martindale* (1998), 162 DLR (4th) 475, (*sub nom. Martindale Estate v Martindale*), 55 BCLR (3d) 63 (CA) [*Roberts v Martindale*].

5 *Pettkus v Becker,* [1980] 2 SCR 834, 117 DLR (3d) 257 [*Pettkus v Becker* cited to SCR].

6 *Ibid* at 848. See also *Rathwell v Rathwell*, [1978] 2 SCR 436 at 455, 83 DLR (3d) 289.

in *Garland v Consumers' Gas Co*[7], the Supreme Court provided a refined version of the third "no juristic reason" element of this tripartite principle. In the recent Canadian cases dealing with failed arrangements to allocate assets following family dissolution, courts have struggled to some extent with the question as to whether the tripartite principle actually fits fact situations of this kind and enables restitutionary relief. Indeed, in *Moore v Sweet*[8] itself, the Court of Appeal for Ontario denied relief on the basis that the designation of Ms. Sweet as the "irrevocable beneficiary" on the policy provided a juristic reason for the transfer and, accordingly, a basis for denying recovery.[9] The question of whether and how to apply the tripartite principle to a fact situation of this kind, then, was squarely before the Supreme Court in *Moore v Sweet*. In the result, the Supreme Court concluded that neither the juristic reason element nor other elements of the tripartite principle precluded relief in these circumstances.

Moore v Sweet thus provided an opportunity for the Supreme Court to consider a number of important issues concerning the operation of the unjust enrichment principle in Canadian law. First, the Court reaffirmed a position taken on previous occasions—but nonetheless still a contentious one as will be further explained below—with respect to the proper role of the Canadian tripartite unjust enrichment analysis. As we shall see, the Court affirmed that resort should be made to the tripartite principle only when there do not exist well established lines of authority—or, one might say, existing "rules"—dealing with the situation at hand. The content of the law of restitution includes a number of well-established lines of authority providing for restitutionary relief of benefits conferred by mistake, under duress, pursuant to ineffective transactions, or in necessitous circumstances and, as well, of benefits acquired through wrongful conduct such as breach of fiduciary obligation, breach of confidence, waiver of tort and breach of contract. The Supreme Court confirmed in *Moore v Sweet* that where such existing lines of authority are applicable, they should be applied.[10] Resort may be made to the tripartite unjust enrichment analysis, however, in circumstances where the plaintiff cannot establish liability on the basis of a pre-existing rule or where the plaintiff wishes to argue for a modification of existing doctrine. Although, as indicated, the Supreme Court has confirmed this position on previous occasions,[11] the affirmation of the Court's view on this point is an important first lesson to be drawn from the reasoning in *Moore v Sweet*.

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7 *Garland v Consumers' Gas Co*., 2004 SCC 25 [*Garland*].

8 *Moore v Sweet*, 2017 ONCA 182 [*Moore v Sweet* ONCA].

9 *Ibid* at para 2.

10 *Moore v Sweet* SCC, *supra* note 1 at para 37 (discussed further within).

11 See e.g. *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 98 DLR (4th) 140 [*Peel* cited to SCR]; *Kerr v Baranow*, 2011 SCC 10 [*Kerr*].

Turning to the question of how to apply the tripartite principle to the very fact situation in *Moore v Sweet*, further lessons can be drawn from the majority opinion of the Supreme Court. First, it may be observed that it is not perfectly obvious how the element of the plaintiff's "corresponding deprivation" should apply in the context of a case like *Moore v Sweet*. In the view of the majority of the Court, this element, when properly understood, captures the fact situation in this case. Further, as intimated above, application of the concept of "no juristic reason for the transfer" appears problematic on the *Moore* facts. Not only did the insurance policy in question designate Ms. Sweet as the "irrevocable beneficiary" of the policy, thus providing a possible contractual "juristic reason" for the transfer, but, as well, the applicable insurance legislation provided that insurers should pay proceeds of a life insurance policy to someone identified as an "irrevocable beneficiary". In the view of the majority of the Court, however, the juristic reason test, when properly understood, did not preclude recovery on the present facts. Finally, the Court provided guidance with respect to the appropriateness of constructive trust relief in cases of this kind.

After providing a brief account of the decision in *Moore v Sweet* itself, we turn to an examination of each of these four lessons to be drawn from the majority opinion in the *Moore* case. Finally, we will turn to a consideration of the possible implications of *Moore v Sweet* for three-party cases in a more general sense. As we shall see, three-party cases may be considered to constitute a particular category of restitution claim.[12] Indeed, most restitutionary claims are two-party claims in the sense that they involve the recovery of benefits transferred by the plaintiff to the defendant. Thus, monies paid by mistake by the plaintiff to the defendant are recoverable in a restitution claim. A more complicated model emerges in the context of cases like *Moore v Sweet*. In *Moore* and similar cases, it is a third party that has transferred the benefit to the defendant rather than the plaintiff. Nonetheless, the circumstances are such that the plaintiff might be said to have, as a matter of justice at least, a stronger claim than the defendant to the benefit in question. As we shall see, there are a number of different types of three-party cases that are similar in this respect, some of which are subject to well-established lines of authority. The final question to be considered, then, is whether *Moore v Sweet* carries more general implications for the analysis of three-party cases either in this specific context of failed arrangements on dissolution of co-habitation or in threeparty cases more generally.

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12 See Maddaugh & McCamus, *supra* note 3, ch 35 & 36.

1. The Decision in *Moore v Sweet*

The factual circumstances have been briefly described above. Once aware of the dispute, the insurer paid the proceeds of the policy into Court. Michelle Moore brought an application for a declaration that the monies were held on a constructive trust in her favour. The application judge, Justice Wilton-Siegel, determined that an unjust enrichment of Risa Sweet had occurred.[13] Applying the tripartite principle, the application judge held that a benefit had been received by Ms. Sweet and that Ms. Moore had suffered a corresponding deprivation, both by the payment of premiums and by the loss of the proceeds themselves. Critical to his determination that there was a "corresponding deprivation" and that there was no juristic reason for the transfer, however, was a finding that the oral agreement between Lawrence and Michelle constituted an equitable assignment either of the proceeds or of the entire policy to Michelle.[14] This latter finding was reversed by the Court of Appeal for Ontario on the basis that the concept of equitable assignment had not been specifically pleaded and argued by the applicant.[15] Further, a majority of the Court of Appeal held

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13 *Moore v Sweet,* 2015 ONSC 3914 [*Moore v Sweet* Sup Ct].

14 *Ibid* at paras 15, 16, 27.

15 *Moore v Sweet* ONCA, *supra* note 8 at paras 27–69. It is also an interesting question whether basic trust principles could have solved the problem in this case. Again, the point was not argued. One might suggest, however, that, on the very facts of this case, the agreement between Mr. and Ms. Moore arguably created a trust which was violated by Mr. Moore, as trustee, by designating Ms. Sweet as the irrevocable beneficiary. As the proceeds had been paid into court, they could arguably have been made subject to a tracing order to the benefit of Ms. Moore. Admittedly, this analysis seems a bit artificial, given the apparent absence of a trust intention on the part of Mr. Moore. See *Re Schebsman*, [1944] Ch 83, [1943] 2 All ER 768 (CA). More generally, however, one might object to reliance on trust analysis in this context on the basis that if relief in these types of cases is restricted to trust concepts, there could be many situations where, although they would fall outside the trust analysis, the claims would nonetheless appear to be meritorious. Thus, if tracing were not possible in the *Moore* situation, the only possible claim by Ms. Moore against Ms. Sweet would appear to be one of "knowing receipt". Such a claim could succeed only if Ms. Sweet knew or ought to have known of Mr. Moore's breach of trust. See Maddaugh & McCamus, *supra* note 3 under Heading 36:300 "Equity: Knowing Receipt". There appeared to be no evidence to this effect in this case and, accordingly, such a claim would have failed. Nonetheless, even if Ms. Sweet was innocently unaware of Mr. Moore's infamy, the claim would appear meritorious. Further, if the trust analysis failed in *Moore* itself because of a lack of intention to create a trust, the claim would still appear to be compelling. More generally, it may be objected that restricting this type of claim to a trust analysis would preclude other types of meritorious disappointed beneficiary claims (such as transfers by mistake, for example, where there might be no initial agreement in the same sense) and, further, would offer no solution to other types of three-party claims in which recovery has also been allowed on unjust enrichment grounds in the past. Arguably, then, unjust enrichment offers a broader and more satisfactory solution both to disappointed

that the designation of Risa as an "irrevocable beneficiary" constituted a juristic reason for the transfer under the applicable insurance legislation, and accordingly, that Michelle's claim should be denied.[16] Justice Lauwers dissented on the basis that Michelle's "corresponding deprivation" was constituted by her failure to acquire the full life insurance proceeds,[17] and further, that on a correct interpretation, the *Insurance Act*[18] provisions did not constitute a juristic reason for the transfer.[19]

At the Supreme Court of Canada, a strong majority, authored by Justice Côté, agreed with the dissenting opinion from the Court of Appeal decision that the corresponding deprivation of Michelle Moore was constituted by her failure to receive the full proceeds of the policy as a result of Lawrence's breach of undertaking.[20] Further, the majority was of the view that the *Insurance Act* provisions and the designation of Risa Sweet as the irrevocable beneficiary did not constitute a juristic reason for the transfer that would preclude recovery in unjust enrichment.[21]

In dissent, Justices Gascon and Rowe adopted a narrow or strict interpretation of the "corresponding deprivation" element of the tripartite principle to the effect that there must be a precisely corresponding loss, or expense, suffered by the plaintiff which matches the benefit enjoyed by the defendant. In their view, the correspondence between the benefit enjoyed by the defendant and the loss suffered by the plaintiff must be such that they are "essentially two sides of the same coin."[22] Further, prior to Lawrence's passing, the beneficiary had no rights to the proceeds of a life insurance policy. Accordingly, at the time of Lawrence's death, the only rights possessed by Michelle were contractual rights that she could assert against Lawrence's estate. With respect to the element of juristic reason, the view of the dissenting judges was that the provisions of the insurance legislation were designed to protect the right of an irrevocable beneficiary to the proceeds of the policy and provide no basis whatsoever for granting relief to an individual, like Michelle, who had been the source of the premium payments.[23] Accordingly, the dissenting judges would have denied Michelle's claim.

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beneficiary claims and to three–party claims more generally. See Maddaugh & McCamus, *supra* note 3, ch 35 & 36 and Part 6 below.

16 *Moore v Sweet* ONCA, *supra* note 8 at paras 77–83.

17 *Ibid* at para 207.

18 *Insurance Act*, RSO 1990, c I.8.

19 *Moore v Sweet* ONCA, *supra* note 8 at paras 215–29.

20 *Moore v Sweet* SCC, *supra* note 1 at para 46.

21 *Ibid* at para 70.

22 *Ibid* at para 108.

23 *Ibid* at para 121.

2. Lesson One: The Role of the Unjust Enrichment Principle

In considering the appropriate role for the principle against unjust enrichment, it is useful to begin by drawing a distinction between underlying principles and rules. At the risk of over-simplification, an underlying principle may be defined as an underlying rationale, policy or theoretical explanation for the imposition of liability whereas a rule may be defined as a description of the factual circumstances that give rise to the imposition of liability in a particular context. In the recent decision of the Supreme Court of Canada in *Bhasin v Hrynew*,[24] Justice Cromwell articulated the distinction in the following terms:

> As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations.[25]

In *Bhasin* itself, the distinction was applied in order to distinguish between an underlying principle requiring the good faith performance of contractual obligations and particular rules such as the obligation to exercise contractual discretions for a proper purpose which the Court suggested could be explained on the basis of a general underlying principle requiring good faith performance.

In the restitution context, of course, the modern view is that the principle underlying the various rules generated over recent centuries that imposed restitutionary liability can best be explained on the basis of a general principle against unjust enrichment. That general principle was articulated by the American Law Institute as section 1 of its pioneering *Restatement of Restitution*[26] in 1937. That section reads as follows: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[27] In articulating this general principle, it is abundantly clear that the authors had in mind the distinction between underlying principles and particular rules for which they provide support. Indeed, the point is made quite explicitly in the following passage from the commentary preceding section 1 in the following terms:

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24 *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin v Hrynew*].

25 *Ibid* at para 64.

26 American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul: American Law Institute Publishers, 1937) [*First Restatement*].

27 *Ibid* at 12.

> The rules stated in the Restatement of this Subject depend for their validity upon certain basic assumptions in regard to what is required by justice in the various situations. In this Topic, these are stated in the form of principles. They cannot be stated as rules since either they are too indefinite to be of value in a specific case or, for historical or other reasons, they are not universally applied. They are distinguished from rules in that they are intended only as general guides for the conduct of the courts and are not intended to express that universality of application to particular cases which is characteristic of the statement*s* made in subsequent chapters.[28]

A few other statements of general principle are offered in this introductory topic of the *Restatement*, and the detailed rules concerning benefits transferred under mistake, compulsion, ineffective transactions and so on are set out in detail in subsequent chapters. Readers who are familiar with restitutionary law well understand that the point of stating the underlying principle in this form was to put to rest the traditional explanations for imposing restitutionary liability. The traditional view was that at common law, liability rested on "implied" or "*quasi*" contracts whereas in equitable restitutionary doctrine, liability rested on the implication of trust relationships. The confusion and unsatisfactory results generated by these false theories or general principles were to be swept away by the more modern conception that these forms of liability rested on an underlying principle against unjust enrichment.[29]

What was left unsaid in the *First Restatement* is that, as in other fields of law, the general underlying principle may not only explain existing rules but may provide a basis for adjusting the law by revising existing rules in light of the principle and/or extending relief in new factual situations by the development of new rules. Certainly, this creative function of the general principle is explicitly acknowledged in the recently published third edition of the *Restatement of Restitution and Unjust Enrichment*.[30]

This duality of roles was plainly acknowledged by the Supreme Court of Canada in the *Bhasin* decision. Thus, Justice Cromwell, for the Court, indicated that the underlying principle of good faith performance not only provided an explanation for a number of existing rules of contract law, it

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28 *Ibid* at 11.

29 For a concise account, see generally John D McCamus, *An Introduction to the Canadian Law of Restitution and Unjust Enrichment* (Toronto: Thomson Reuters, 2020), ch 1 & 2.

30 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (St. Paul: American Law Institute Publishers, 2011) [*Third Restatement*]. For commentary, see John D McCamus, "The Restatement (Third) of Restitution and Unjust Enrichment" (2012) 90:2 Can Bar Rev 439.

also provided a basis for recognizing new rules. Justice Cromwell observed as follows:

> This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.[31]

Indeed, in the *Bhasin* decision itself, the Court recognized the existence of a new rule that requires parties to contractual relationships to behave honestly in the course of performing their contractual obligations. In short, contract parties must not lie to each other.

In a leading opinion, Justice McLachlin (as she then was) had similarly articulated a dual role for the unjust enrichment principle. In *Peel (Regional Municipality) v Canada*.[32] McLachlin began by identifying two different possible approaches to the imposition of restitutionary liability. She explained:

> There are two distinct doctrinal approaches to restitution at common law. The first is the traditional "category" approach. It involves looking to see if the case fits into any of the categories of cases in which previous recovery has been allowed, and then applying the criteria applicable to a given category to see whether the claim is established. The second approach, which might be called the "principled" approach, developed only in recent years. It relies on criteria which are said to be present in all cases of unjust enrichment: (1) benefit to the defendant; (2) corresponding detriment to the plaintiff; and (3) the absence of any juridical reason for the defendant's retention of the benefit.[33]

As Justice McLachlin noted, these two different approaches were exemplified in the submissions made by counsel for each party. The plaintiff, finding difficulty in applying the existing categories of liability to the fact situation, placed reliance on the general principle as if it were itself a rule or cause of action. The defendant, on the other hand, urged that the claim should fail if the claim could not be brought within one of

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31 *Bhasin v Hrynew*, *supra* note 24 at para 66.

32 *Peel*, *supra* note 11.

33 *Ibid* at 784, citing *Pettkus v Becker*, *supra* note 5.

the existing "categories". Justice McLachlin then indicated that the best approach was to "choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery; one which charts a predictable course without falling into the trap of excessive formalism; one which recognizes the importance of the right to choose where to spend one's money while taking account of legitimate expectations and what, in the light of those expectations, is fair."[34] Justice McLachlin further explained as follows:

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.
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> It follows from this that the traditional categories of recovery, while instructive, are not the final determinants of whether a claim lies. In most cases, the traditional categories of recovery can be reconciled with the general principles enunciated in *Pettkus v. Becker*, *supra*. But new situations can arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule.[35]

It is abundantly clear that Justice McLachlin envisaged a creative role for the general principle against unjust enrichment. At the same time, it is clear that McLachlin was of the view that an initial step for a plaintiff to take in a restitution claim was to attempt to fit its claim within one of the existing and established categories of relief, that is to say, to successfully plead its claim on the basis of one of the existing rules. Indeed, she further observed that there were a number of existing categories of claims that might apply to the plaintiff's claim and that the plaintiff's difficulty was not in successfully doing so[36] but, rather, in establishing that an actual benefit had been conferred. The claim was therefore dismissed on the latter basis.

In *Bhasin*, Justice Cromwell, after articulating the dual role to be applied by the underlying principle of good faith contract performance, indicated that the approach he was taking was consistent with that taken in the case of the unjust enrichment principle by Justice McLachlin in the *Peel* decision relying on passages from that decision quoted above. Similarly, in *Kerr v Baranow*,[37] the recent decision clarifying the nature of the claim to

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34 *Ibid* at 786.

35 *Ibid* at 788–89.

36 *Ibid*.

37 *Kerr, supra* note 11.

share jointly created wealth upon the separation of a co-habiting couple—the doctrine first articulated in *Pettkus v Becker*[38]—Justice Cromwell, again placing reliance on the *Peel* decision, explicitly referred to the dual role of the unjust enrichment principle in the following passage:

> At the heart of doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: … For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of the benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request.
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> …
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> Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of a benefit the defendant, a corresponding deprivation of the plaintiff, and the absence of juristic reason for the enrichment: … By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice."[39]

Notwithstanding these rather clear pronouncements from the Supreme Court on the question of the dual role of the unjust enrichment principle, some confusion persists on this question.

The principal source of this confusion is the insistence by a few Canadian scholars that the Supreme Court of Canada has, in fact, simply replaced the existing doctrines of restitutionary law with the tripartite version of the unjust enrichment principle formulated by Justice Dickson in *Pettkus v Becker*.[40] As is well known, Justice Dickson formulated the principle in his own fashion as a fact situation that "must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as contract or disposition of law—for the enrichment."[41] Some Canadian observers have taken the view that in articulating this version of the general principle, the Supreme Court intended to overrule, supplant or replace all of the existing Canadian restitutionary doctrine with a simple rule articulated in the form of Justice Dickson's version of the unjust enrichment principle.[42] Such observers are typically admirers of

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38 *Pettkus v Becker*, *supra* note 5.

39 *Kerr*, *supra* note 11 at paras 31–32.

40 See *Pettkus v Becker*, *supra* note 5 at 849.

41 *Ibid* at 844.

42 See e.g. Mitchell McInnes, "A Return to First Principles in Unjust Enrichment: *Kerr v Baranow*" (2011) 51:2 Can Bus LJ 275. For discussion, see John D McCamus,

the later views of the English legal scholar Peter Birks, who—many years later—made a somewhat similar proposal with respect to the reform of English restitutionary doctrine. In a 2005 work titled *Unjust Enrichment*,[43] Professor Birks suggested that the existing English doctrine, which he referred to as the "unjust factors" approach, should be abandoned and replaced by a German civilian doctrine which holds that restitutionary recovery ought to be granted in any case in which there is an "absence of basis" for the transfer of value from the plaintiff to the defendant.[44] Indeed, Birks claimed that the House of Lords had itself adopted such an approach in a particular case[45] and that this radical transformation of English restitution doctrine had therefore occurred.[46] It must be said that no one, including the English judiciary, appears to believe that such a transformation has, in fact, taken place. Canadian followers of Birks, however, take the position, against what appears to be overwhelming evidence to the contrary, that the Supreme Court of Canada has adopted a Birksian approach in simply replacing the existing law of restitution with Justice Dickson's tripartite version of the unjust enrichment principle.

One could argue for such a radical transformation of Canadian law on the basis of general principle, though I confess that I find it difficult to imagine sound arguments for doing so. The one advantage would be to make the law of restitution easily memorized in the form of a single sentence drawn from Justice Dickson's opinion in *Pettkus v Becker*. This advantage will continue to have some appeal to lawyers who are simply unfamiliar with the existing law. As others have pointed out, however, the simplicity is quite misleading.[47] Once one begins to attempt to apply this single sentence to difficult fact situations, a number of complexities arise that are most easily resolved by turning to the existing doctrine on the subject. It is quite another matter, however, to argue, as some do, that the House of Lords or the Supreme Court of Canada has given its blessing to such a proposal. Certainly, the passages quoted above offer rather compelling evidence that the Supreme Court of Canada has not adopted a view of this kind.

Nonetheless, confusion on this point persists, Canadian admirers of Birks draw particular support from the decision of the Supreme Court

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"Unjust Enrichment, 'Existing Categories' and *Kerr v. Baranow*: a reply to Professor McInnes" (2012) 52:3 Can Bus LJ 390.

43 Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) (1st ed published in 2003) [Birks, *Unjust Enrichment*].

44 *Ibid*, ch 5.

45 *Kleinwort Benson Ltd. v Lincoln CC*, [1999] 2 AC 349, [1998] 4 All ER 513 (HL).

46 Birks, *Unjust Enrichment*, *supra* note 43 at 127: "There is now no turning back".

47 See e.g. Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2011) at 101–14.

of Canada in *Garland v Consumers' Gas Co*.[48] In that decision, it will be recalled, Justice Iacobucci developed a novel two-step version of the "absence of a juristic reason for the transfer" element of the tripartite formula. Birksians claim that, in so doing, Justice Iacobucci intended to replace all existing doctrine or rules with his new version of the tripartite principle. Support for this interpretation of *Garland* is drawn from the fact that Justice Iacobucci appeared to simply ignore existing doctrines relating to mistaken payments and illegal transactions that were plainly applicable to the *Garland* facts. At the same time, however, it is not at all clear that Justice Iacobucci had such a radical transformation of Canadian law in mind. Justice Iacobucci placed great reliance on the passage from Justice McLachlin's opinion in *Peel* (quoted above) and indicated that he was merely elaborating upon it. It seems most unlikely that he intended to overrule all of the "existing categories" of liability that were obviously preserved in *Peel*. Certainly, any suggestion that Justice Iacobucci intended to overrule, in one fell swoop, all prior law would be quite inconsistent with the Court's later opinions in *Bhasin* and *Kerr v Baranow*.

More importantly, for present purposes, the Supreme Court returned to this question of the relationship between the underlying principle and the prior existing rules or categories of relief in *Moore v Sweet*.[49] Justice Côté referred to the "'categories of recovery' — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request"[50] all of which, though discrete categories which "exist independently of one another … [are each] premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense."[51] Application of the existing categories of relief was contrasted by Justice Côté with the principled framework developed in *Pettkus*, *Garland* and *Kerr*. She further noted that "while the principled unjust enrichment framework and the categories coexist … the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis."[52]

In short, Justice Coté, for the majority, reaffirmed the generally accepted view that where the existing law —the existing categories of relief —are applicable , they should be applied, but that the general principle can be relied upon to "develop [the law] in a flexible way as required to

48 *Garland v Consumers' Gas Co.*, 2004 SCC 25.

49 *Moore v Sweet* SCC, *supra* note 1.

50 *Ibid* at para 36.

51 *Ibid*.

52 *Ibid* at para 37.

meet changing perceptions of justice."[53] Justice Côté does not explain why the plaintiff might have argued the claim on this basis. The explanation may be, however, that previous cases of this kind—which seem to have no precise English antecedents—had been argued on the basis of the tri-partite principle in earlier Canadian jurisprudence. Be that as it may, the Court's reaffirmation of the dual role of the principle against unjust enrichment—as, first, the principle underlying the existing categories of relief and, second, as a basis for extending the law in new directions—is of central importance for the future of Canadian restitutionary doctrine.

3. Lesson Two: The "Corresponding Deprivation" Element of the Principle

In the *First Restatement* version of the unjust enrichment principle, this element was rendered as "at the expense of". As the *First Restatement* stated in section 1, "a person who has been unjustly enriched *at the expense of another* is required to make restitution to the other."[54] The "at the expense of" element has always been problematic, as the authors of the *First Restatement* well recognized. The *First Restatement*, again, brought together large bodies of common law and equity and restated the existing black-letter rules under a new organizational rubric titled, "Restitution" for which "unjust enrichment" was said to be the underlying principle. As the authors recognized, however, the underlying principle, and, more particularly, the "at the expense of" element did not fit neatly underneath all of the black-letter rules brought together in the *First Restatement*. A number of those black-letter rules dealt with what is now commonly referred to as "restitution for wrongs". In this context, liability of benefits gained by the plaintiff did not necessarily require a corresponding loss or expense suffered by the plaintiff. Thus, breach of fiduciary duty and waiver of tort claims were all brought within the new organizational framework.[55] Nonetheless, in each of these categories, restitutionary liability is not dependent on showing that the benefit acquired by the defendant was derived from the plaintiff. It is sufficient to demonstrate that the benefit was acquired by the defendant (perhaps from a third party) as a result of a wrong committed against the plaintiff.[56]

Thus, for example, it is well understood that a fiduciary will be liable for ill-gotten gains whether or not the gains have come directly from the plaintiff. They may have been acquired by the defendant wrongfully in

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53 *Ibid* at para 38, quoting from the passage in McLachlin J's judgment in *Peel*, *supra* note 11.

54 *First Restatement*, *supra* note 26 at 12 [emphasis added].

55 *Ibid*, ch 7 & 12.

56 See generally Maddaugh & McCamus, *supra* note 3, ch 23–30 for a survey of the broader field of "restitution for wrongs".

dealings with third parties.[57] The profits secured in dealings with third parties might or might not have represented opportunities for profiting that properly belonged to the plaintiff. Where the profits taken by the fiduciary might otherwise have been gained by the plaintiff, one could comfortably say that in a sense the benefits were acquired "at the expense of" the plaintiff. It is also well understood, however, that under existing law the defendant fiduciary may be liable to account for benefits obtained in dealings with third parties that the plaintiff either could not or would not have acquired but for the wrongful conduct. Similar propositions are well established with respect to benefits acquired through breach of confidence or in the context of so-called "wavier of tort" claims. Nonetheless, all of these claims were considered by the authors of the *First Restatement* to be appropriately considered to be part of this new category of "restitution", notwithstanding the awkwardness of applying the "at the expense of" element to some of these claims. The concept of "restitution", they conceded, appeared to apply most comfortably to cases involving the return of assets transferred to the defendant by the plaintiff. Acknowledging this difficulty, the authors suggested that when one moves beyond clear cases of benefits which have been acquired in this strict sense "at the expense of" the plaintiff, the emphasis should be placed on the concept of "unjust enrichment" which they considered to be broad enough to capture claims of this kind.[58] In other words, the concept of "at the expense of" was interpreted in a rather loose manner so as to facilitate inclusion of all of the law of fiduciary obligation, for example, within the framework of this new branch of the law.

For purposes of further discussion, it will be useful to distinguish between the three different types of benefits' scenarios identified above. Let us refer to cases where the benefit has been transferred directly from the plaintiff to the defendant as "subtraction" cases, cases where the benefit has been acquired by the defendant which would otherwise, but for the defendant's intervention, have accrued to the plaintiff as "interception" cases and cases where the benefits or profits enjoyed by the defendant through dealings with third parties that would not otherwise have accrued to the plaintiff as "indirect" benefits.

Professor Birks purported to resolve this difficulty with the "expense" element in his earlier 1985 study,[59] by suggesting that the phrase "at the expense of" could be interpreted in two different senses. First, it could

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57 See generally *ibid*, ch 27.

58 WA Seavey & AW Scott, "Restitution" (1938) 54 Law Q Rev 29 at 37.

59 Peter Birks, *An Introduction to the Law of Restitution*, (Oxford: Oxford University Press, 1985); Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford, Oxford University Press, 1989).

be interpreted as meaning that the benefit acquired by the defendant was "at the expense of" the plaintiff in the sense that the plaintiff had transferred the value in question to the defendant. Second, the phrase could be interpreted as meaning that the benefit had acquired, albeit from a third party, "at the expense of" the plaintiff in the sense that it had been acquired by the defendant through wrongful conduct, which constituted a breach of a duty owed to the plaintiff. The wrongful conduct that produced the gain was at the expense of the plaintiff, in such a case, in the sense that the plaintiff was the victim of the wrongful conduct. In other words, Birks shored up the conceptual framework adopted by the original *First Restatement* by suggesting that the phrase "at the expense of" could be interpreted as having two different senses, one of which referred to benefits acquired in the subtraction sense, and a second that would cover cases of both interceptive benefits and indirect benefits.

In his later work,[60] however, Birks resiled from these views and concluded, in essence, that the term "unjust enrichment" was best defined or used as a referring only to subtraction cases and that cases of interceptive or indirect benefits could be considered to be cases of "restitution" but were more properly considered to constitute a fourth branch of the law in addition to contract, tort and unjust enrichment.[61]

We may note in passing that these terminological innovations by Birks had the effect of turning the American usage on its head. Whereas the authors of the *First Restatement* considered that unjust enrichment was the broader term that could capture cases of interceptive and indirect benefits where the narrower expression of "at the expense of" did not fit easily, Birks interpreted the unjust enrichment principle much more narrowly, and purported to confine this new branch of the law to subtraction cases. For Birks, unlike the *First Restatement's* authors, "restitution" could be construed broadly to refer to all forms of benefit-based liability including interceptive and indirect benefits. These terminological innovations have, I regret to say, caused much confusion, especially amongst lawyers who are not intimately familiar with these scholarly terminological machinations.

Against this background, we must try to give some content to the notion of "corresponding deprivation" invented by Justice Dickson in the *Pettkus v Becker* decision. At first blush, the phrase "corresponding deprivation" seems even more obviously restricted to "subtraction" cases than the American "at the expense of". Thus, it is perfectly understandable that some subsequent Canadian judges have interpreted the concept of "corresponding deprivation" in this restrictive way. The result, however,

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60 Birks, *Unjust Enrichment*, *supra* note 43.

61 *Ibid*, ch 1 & 2.

is that some Canadian judges, when applying the "unjust enrichment" analysis are unaware that restitution or unjust enrichment cases historically have extended to impose liability, at least in cases of wrongful conduct, in cases of interceptive and indirect profiting.[62] As a matter of precedent, we can be quite confident that Justice Dickson did not have any of these difficulties in mind when he articulated his version of the unjust enrichment principle in the *Pettkus* case. There is absolutely no possibility that Justice Dickson had in mind simply overruling existing lines of authority dealing with interceptive and indirect profits by pronouncing the unjust enrichment principle in *Pettkus* as the basis for extending liability in what we might call matrimonial property cases.

Nonetheless, the seemingly narrow interpretation of the concept of unjust enrichment articulated in *Pettkus* has caused considerable confusion in later cases in which the benefits acquired by the defendant are either interceptive or indirect in nature. Thus, this has been the case, for example, in the very context addressed by *Moore v Sweet*, that is, benefits misdirected in the context of arrangements made by cohabiting couples upon the occasion of their separation. Thus, in *Chanowski v Bauer*[63] relief was denied to a second spouse who claimed that the failure of her late husband to designate her as the beneficiary of a life insurance policy was accidental and, on this basis, had brought a claim against the named beneficiary, the deceased's first spouse. Although the claim was denied on a variety of grounds, including a lack of clear evidence with respect to the deceased's intentions, the Manitoba Court of Appeal also considered that there had been no "corresponding deprivation" on these facts in the sense that there was no direct causal link between the plaintiff's deprivation and the defendant's receipt of the proceeds. Similarly, in *Moore v Sweet* itself, the "corresponding deprivation" element was the subject of dispute. In the Court of Appeal below, arguments for and against the proposition that a "corresponding deprivation" could be established on the basis that Ms. Moore had made the premium payments were rehearsed by the Court. The Court of Appeal concluded, however, that it was not necessary to resolve this issue on the basis that the claim could be rejected, as we have already noted, on the basis that the naming of Ms. Sweet as the "irrevocable beneficiary" constituted a valid "juristic reason" for the claim and the same basis for its denial.[64]

In the Supreme Court of Canada decision, however, the majority addressed this question directly and held that the "corresponding

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62 See e.g. *Apotex Inc. v Eli Lilly and Co.,* 2015 ONCA 305, for discussion of which, see Maddaugh & McCamus, *supra* note 3 at 3–26.

63 *Chanowski v Bauer*, 2010 MBCA 96.

64 *Moore v Sweet* ONCA, *supra* note 8 at paras 72–75.

deprivation" element was plainly met on the *Moore v Sweet* facts. Relying on existing authorities, Justice Côté observed as follows:

> The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the Court finds would have accrued for his or her benefit had it not been received by the defendant instead.[65]

In other words, as Justice Côté noted, "the corresponding deprivation element does not require that the disputed benefit be conferred *directly* by the plaintiff on the defendant."[66] Justice Côté drew further support for this proposition from Quebec civilian doctrine which holds that "[t]he theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party."[67]

Moore v Sweet thus stands as a clear authority for the proposition that liability in this context can be imposed with respect to what has been referred to above as "interceptive" benefits, that is benefits that, but for the third party's wrongful conduct, would otherwise have flowed to the plaintiff rather than the defendant. What is less clear, however, is whether this concept applies only to the very fact situation at issue in *Moore v Sweet*. Thus, in justifying this approach, Justice Côté also referred to the fact that Ms. Moore had in fact paid the premiums for the policy and, further, to the fact that Mr. Moore was in breach of a contractual obligation to Ms. Moore when he changed the beneficiary designation of the policy to Ms. Sweet.[68] It seems unlikely that either of these elements will be considered to be necessary to the finding in *Moore* and *Sweet* in future jurisprudence. With respect to the fact that Ms. Moore made the premium payments, it seems likely that her claim would be considered to be meritorious even if that element had not been present. Indeed, such an element is surely rather

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65 *Moore v Sweet* SCC, *supra* note 1 at para 44, citing as authority on point, *Citadel General Insurance Co. v Lloyds Bank of Canada*, [1997] 3 SCR 805, 152 DLR (4th) 411 at para 30.

66 *Ibid* at para 45. In other words, for those who consider that "corresponding deprivation" means that there must be a plus-minus equivalent (at least in cases where no wrongdoing on the part of the defendant is involved), the minus suffered by the plaintiff is the benefit that would have accrued to the plaintiff if it had not been received by the defendant.

67 *Ibid*.

68 *Ibid* at para 46.

unusual and not present in earlier cases in which relief was permitted,[69] one of which was referred to Justice Côté's opinion without any suggestion that it was incorrectly decided.[70] Further, as far as the contractual breach element is concerned, a number of previous cases, indeed the leading case of *Roberts v Martindale*[71] deals with a situation in which there was an accidental failure to change the name of the beneficiary. Restitution was allowed in favour of the intended beneficiary even though no breach of contract was involved.[72] In my view, cases of accidental transfer, or, indeed, non-transfer, are quite analogous to cases of mistaken payments and constitute circumstances in which relief is surely appropriate.

In sum, then, the Supreme Court of Canada in *Moore v Sweet*, clearly embraced the idea that the "corresponding deprivation" element of the unjust enrichment principle can apply to cases of interceptive benefits where the benefit acquired by the defendant is one that, but for the wrongful conduct of the third party, would have accrued to the benefit of the plaintiff. What may be considered to remain unclear, however, is whether the Supreme Court's view is that the unjust enrichment principle can also explain or ground recovery in cases of indirect benefits where the defendant has acquired benefits, for example, through breach of fiduciary duty, that would not otherwise have accrued to the plaintiff. To be clear, such liability is well-established in the case law and there is no suggestion in *Moore v Sweet* that such cases are wrongly decided. The question is to whether or not to include such cases as cases of "unjust enrichment" relates essentially to the question of how to design a branch of the law to be named "unjust enrichment" or "restitution", a matter to which we will return below.

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69 See e.g. *Shannon v Shannon* (1985), 50 OR (2d) 456, 19 ETR 1 (SC H Ct J) [*Shannon*]; *Gregory v Gregory* (1994), 113 DLR (4th) 255, 92 BCLR (2d) 133 (SC); *Steeves v Steeves* (1995), 168 NBR (2d) 226, 430 APR 226 (QB); *Fraser v Fraser* (1995), 32 CCLI (2d) 202, 9 ETR (2d) 136 (SC); *Bielny v Dzwiokowski*, [2002] ILR 1-4018, 2001 CarswellOnt 1029 (WL Can) (Sup Ct J); *Mitchell v Clarica Life Insurance Co*. (2005), 23 ETR (3d) 297, 2005 CarswellOnt 8381 (WL Can) (Sup Ct J); *Schorlemer Estate v Schorlemer* (2006), 29 ETR (3d) 181, 2006 CarswellOnt 8155 (WL Can) (Sup Ct J).

70 *Moore v Sweet* SCC, *supra* note 1 at para 71, referring to *Shannon*, *supra* note 69.

71 *Roberts v Martindale*, *supra* note 4. See also *Holowa Estate v Stell-Holowa*, 2011 ABQB 23 [*Holowa Estate*].

72 *Roberts v Martindale*, *supra* note 4 and *Holowa Estate*, *supra* note 71 were referred to by Gascon and Rowe JJ in dissent, again without any suggestion that they were incorrectly decided. See *Moore v Sweet* SCC, *supra* note 1 at para 105.

4. Lesson Three: The "No Juristic Reason for the Transfer" Element of the Principle

This third element of Justice Dickson's version of the unjust enrichment principle is unsatisfactory for a number of reasons and has caused much confusion in the decided cases. These difficulties were heightened by the decision of the Supreme Court in the *Garland*[73] case, which purported to provide a more certain and easily applied version of the test. The *Garland* version of the no juristic reason test was said by Justice Côté in *Moore* to "shed light on exactly what must be shown under the juristic reason of the unjust enrichment analysis."[74] Famously, in *Garland*, Justice Iacobucci formulated a new "two-step" version of the test. Justice Côté formulated the first step in *Moore* as follows:

> The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the established categories of juristic reason: a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations .... If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action.[75]

As Justice Côté explained, the view expressed in *Garland* was that if one establishes all of these elements of the first step of the test, a *prima facie* case for recovery is established and the analysis proceeds to the second stage. In the second step, the burden is cast upon the defendant to demonstrate that there is "some residual reason"[76] to deny recovery as a matter of either the reasonable expectations of the party or "moral and policy-based arguments."[77]

Among the many problems created by the *Garland* version of the no juristic test is its absolute lack of its advertised clarity. The first half of

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73 *Garland*, *supra* note 7.

74 *Moore v Sweet* SCC, *supra* note 1 at para 56.

75 *Ibid* at para 57.

76 *Ibid* at para 58.

77 *Ibid* at para 83.

the first step, however, is quite clear and well-established on the basis of existing authority. That is to say, it has been quite well understood for a very long time that a restitution claim will be denied where benefits have been transferred as a gift or in performance of a binding contractual obligation or as a result of a statutory obligation to do so. To envelop such well known truths with the phrase, "absence of a juristic reason [for the transfer]",[78] is, it must be admitted, a rather obscure way of referring to these propositions. Uncertainty begins, however, when one turns to the second half of the first branch of the test. That is, it is not at all clear what is meant by the reference to "other valid common law, equitable or statutory obligations."[79] Keeping in mind that the *Garland* first step imposes an obligation on the plaintiff to disprove the existence of all juristic reasons, the burden imposed on the plaintiff is an impressively difficult one. I doubt that few, if any, Canadian lawyers could enumerate the required list of legal, equitable or statutory obligations that might provide an explanation for a transfer that would preclude restitutionary relief. Moreover, any such list would likely include items such as change of position or bona fide purchase, traditionally understood to be defences to restitution claims. The burden of establishing defences should, of course, be placed on the defendant and it is therefore rather perverse to impose on the plaintiff a burden to disprove the existence of all such possible defences.

Unsurprisingly, the practice has developed in Canadian jurisprudence of simply ignoring the second half of the first step of the *Garland* juristic reason analysis. Neither plaintiffs in their argument nor courts in their reasons purport to make a list of such reasons and demonstrate how the plaintiff has successfully disproved their existence. Rather, the common practice is to simply identify what seems to be an obvious possible juristic reason and focus attention on that issue, be it the possibility of a gift intention, a binding contract, or a statutory obligation. Although the majority opinion in *Moore* purports to apply the *Garland* two-step analysis, it is no exception in this regard. Thus, Justice Côté simply observes that the plaintiff "submits that none of these categories applies in the circumstances of this case" whereas the defendant takes the position that the insurance legislation "required the proceeds of the policy to be paid exclusively to her as the validly designated beneficiary."[80]

Focusing, then, on the question of whether a particular statutory provision pursuant to which a transfer is made constitutes a "juristic reason" for the transfer, it is on this point that the majority opinion in *Moore* makes a very valuable contribution. The reference to "statutory

78 *Ibid* at para 54.
79 *Ibid* at para 57.
80 *Ibid* at para 60.

obligation" in the juristic reason formula has caused some confusion in later cases. Thus, there are decisions, including some in the present context,[81] in which the fact that a particular transfer, such as a payment, is made pursuant to a statutory provision is considered to amount, *per se*, to a basis for denying a restitution claim. Thus, in a trial decision[82] involving a claim for mistaken improvements to land made by a tenant who mistakenly believed he had exercised an option to purchase, whereas in fact the land had been purchased by the defendant, the court held that the provincial land registry legislation constituted a valid juristic reason for the transfer. In truth, however, the fact that the land had been transferred to the defendant, and recorded pursuant to the provisions of the legislation merely created the unjust enrichment rather than providing an explanation for a denial of recovery.

In the present context,[83] some courts have found that insurance legislation pursuant to which payments or proceeds are made to designated beneficiaries constitutes a juristic reason for the transfer and a basis for denying recovery. Indeed, this was the approach taken by the Court of Appeal for Ontario in *Moore* itself. As noted above, Justice Blair, for a majority of the Court of Appeal, held that the designation of Ms. Sweet as the "irrevocable" beneficiary of the policy constituted a juristic reason for the transfer and for the denial of relief.[84] Justice Blair was particularly concerned that the statutory consequences of the designation of Ms. Sweet as the "irrevocable" beneficiary, carrying with it a statutory requirement that the identity of the beneficiary could be changed only with the irrevocable beneficiary's consent together with a provision that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by creditors provided a compelling basis for this conclusion.[85] For the majority of the Supreme Court in *Moore*, Justice Côté simply disagreed with this analysis and, in so doing, provided an analytical model for addressing questions of this kind. For Justice Côté, the appropriate question to consider is whether the statutory provision has as its purpose, presumably amongst other possible purposes, the denial of the type of restitution claim at issue. More particularly, it should be considered whether the legislation in question specifically precludes the existence of rights outside the provisions of the statutory scheme. In Justice Côté's view, the designation of Ms. Sweet as an irrevocable beneficiary did not preclude the assertion of Ms. Moore's claim to the proceeds. As she explained:

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81 See e.g. *Richardson (Estate) v Mew*, 2009 ONCA 403.

82 *Olchowy v McKay*, [1996] 1 WWR 36, 136 Sask R 241 (QB).

83 *Supra* note 81.

84 *Moore v Sweet* ONCA, *supra* note 8 at para 75.

85 *Ibid* at paras 77–83.

This is because the applicable statutory provisions do not require, either expressly or implicitly, that a beneficiary keep the proceeds as against a plaintiff in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death. By not ousting prior contractual or equitable rights that third parties may have in such proceeds, the Insurance Act allows an irrevocable beneficiary to take insurance money that may be subject to prior rights and therefore does not give such a beneficiary an absolute entitlement to that money. … Put simply, the statute required that the Insurance Company pay Risa, but it did not give Risa a right to keep the proceeds as against Michelle, whose contract with Lawrence specifically provided that she would pay all of the premiums exclusively for her own benefit. Neither by direct reference nor by necessary implication does the statute either (a) foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary—whether revocable or irrevocable—or (b) preclude the imposition of a constructive trust in circumstances such as these.[86]

Moreover, in Justice Côté's view, one should not reach a conclusion to the contrary unless the legislation in question indicates "with irresistible clearness"[87] that an unjust enrichment claim is precluded.

As far as the specific features of the *Insurance Act* provisions that troubled Justice Blair were concerned, Justice Côté was of the view that the distinction between revocable and irrevocable beneficiaries was not of assistance. The mere fact that Ms. Sweet had been designated as an "irrevocable" beneficiary did not, in her view, strengthen the argument for denying relief on the basis of the juristic reason analysis.[88] Further, with respect to the immunization of the proceeds from claims by creditors of the insured, Justice Côté noted that Ms. Moore did indeed have a claim against Mr. Moore's estate and was in that sense a creditor of the insured. Nonetheless, at the same time, Ms. Moore also had a claim against Ms. Sweet which was not covered by the statutory immunization.[89]

In summary, then, the majority opinion in *Moore v Sweet* indicates that one should carefully consider whether a statutory provision that appears to condone, facilitate or require a particular transfer is also intended to

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86 *Moore v Sweet* SCC, *supra* note 1 at para 73 [emphasis in original; citations omitted]. In other words, once the proceeds are paid to Ms. Sweet, the statute says nothing to immunize them from claims by Ms. Sweet's creditors, including a claimant such as Ms. Moore who has a valid unjust enrichment claim against Mr. Sweet.

87 *Ibid* at paras 70, 80.

88 *Ibid* at para 78.

89 *Ibid* at para 80.

preclude all restitutionary claims against the transferee by other parties. Further, one ought to resist such a conclusion unless the statute indicates "with irresistible clearness" that such a result is intended by the statute.

As the Supreme Court majority thus concluded that the defendant's "juristic reason" argument failed at step one, it was not strictly necessary for the Court to go on to give further consideration to step two of the *Garland* analysis. Nonetheless, the majority did so. Thus, Justice Côté considered whether the defendant could establish either reasonable expectations or moral and policy-based arguments that would preclude relief. Here, again, we encounter the inherent vagueness of the *Garland* two-step test. It is not at all clear from *Garland* itself or from prior or subsequent case law what would count as a successful defence on this basis.

The notion of "reasonable expectations", appears to be drawn out of the co-habitational claim context.[90] It will be recalled that the Supreme Court held in *Pettkus v Becker*[91] that in order to enjoy success in a claim for jointly created wealth during co-habitation, the plaintiff spouse would have to establish a "reasonable expectation" of acquiring title to the target asset in the event of termination of their relationship. The unrealistic nature of this requirement—that is, many co-habiting partners, especially the partner without title, would not have formed expectations with respect to the proprietary or other consequences of an unanticipated termination of their relationship—has resulted in its disappearance from the cause of action in the co-habitation context. It is not at all obvious how reasonable expectations would play a role in restitutionary claims in a more general way. The other branch of step two—the invocation of public policy or morality concerns that would justify retention of the benefit transferred—is also plagued by obscurity. Nonetheless, Justice Côté attempted to give some content to these notions. With respect to reasonable expectations, Justice Côté noted that Ms. Sweet had an expectation to receive the insurance money by virtue of the fact that she had been validly designated as an irrevocable beneficiary. Nonetheless, in Justice Côté's view, that expectation should not be allowed to take precedence over Ms. Moore's contractual right to remain the named beneficiary.[92] As far as public policy justifications for retaining the benefit are concerned, it was apparently suggested that the oral nature of the agreement reached by the Moores created a policy reason for allowing Ms. Sweet to retain the proceeds. Justice Côté dismissed this defence on the basis that unwritten agreements have long been recognized as having some legal force and

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90 See generally Maddaugh & McCamus, *supra* note 3, ch 34.

91 *Pettkus v Becker, supra* note 5.

92 *Moore v Sweet* SCC, *supra* note 1 at para 85.

effect.[93] Certainly, there appears to be no reason to disagree with Justice Côté's conclusion that under step two of the *Garland* analysis there are no reasons of "reasonable expectations " or "public policy" that would constitute a convincing defence to Ms. Moore's claim.

5. Lesson Four: The Availability of Constructive Trust in Three-Party Cases

Another valuable contribution of the Court's opinion in *Moore v Sweet* is to provide some guidance with respect to the availability of the remedial constructive trust in three-party cases. In previous cases of this kind, although there has been a judicial tendency to make constructive trust relief available, there has also been an absence of clear reasoning as to why this form of relief should be available in this context. At the same time, however, the majority opinion in *Moore v Sweet* manifests a tendency, present in previous authorities on point, to overgeneralize about the subject of constructive trust relief. This aspect of the reasoning is less helpful.

With respect to the application of the remedial constructive trust on the facts of *Moore v Sweet*, the majority began with the observation that the target asset, the proceeds of the insurance policy, "has been paid into court and is readily available to be impressed with a constructive trust."[94] Identification of a target asset is the usual first step in making constructive trusts relief available and the analysis of the Court on this point is unexceptional.

Of greater interest is, of course, the answer to the question as to why the remedial constructive trust should be made available on these facts. The majority opinion made a number of points on this issue. First, the Court observed that payment of the monies to Ms. Sweet with the prospect that Ms. Moore could then attempt to enforce her restitutionary remedy against Ms. Sweet would create a difficult situation for Ms. Moore. This, in itself, offered a reason for imposing constructive trust relief. As Justice Côté observed: "Furthermore, ordering that the money be paid out of court to Risa, and then requiring Michelle to enforce the judgment against Risa personally, would unnecessarily complicate the process through which Michelle can obtain the relief to which she is entitled. It would also create a risk that the money might be spent or accessed by other creditors in the interim."[95] Presumably, the underlying idea may be that the common law remedy is inadequate in these circumstances.

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93 *Ibid* at para 86.

94 *Ibid* at para 93.

95 *Ibid.*

With respect to the problem of overgeneralization, the majority opinion of the Court suggested that constructive trust should generally be available only if the plaintiff can establish two elements, which were described as follows: "first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed."[96] Applying the second element of this test, Justice Côté observed that "the application judge found that Michelle's payment of the premiums was causally connected to the maintenance of the policy under which Risa was enriched."[97] Further, Justice Côté observed that "because each of Michelle's payments kept the policy alive, and given that Risa's right as designated beneficiary necessarily deprived Michelle of her contractual entitlement to receive the entirety of the insurance proceeds, I would impose a constructive trust to the full extent of those proceeds in Michelle's favour."[98]

Although the two-part test proposed by Justice Côté for the imposition of a remedial constructive trust can find some support in earlier Supreme Court authority,[99] it is not beyond criticism. The first step— inadequacy of a monetary remedy—is unobjectionable in the sense that it merely suggests that there must be a good reason to award the proprietary relief of the constructive trust remedy with the advantages that it accords to the plaintiff. Although it is difficult to find support for such a proportion in historical equity jurisprudence,[100] the idea that the plaintiff must justify this form of relief has become an accepted and acceptable proposition in this context. Of greater interest, then, is the reason offered by Justice Coté as to why constructive trust relief is appropriate on the present facts. On this point, Justice Coté suggested that Ms. Moore's claim should not be defeated (or, presumably, reduced in quantum) in a competition with Ms. Sweet's other creditors.[101] The proprietary constructive trust would obviously give Ms. Moore a priority in any such contest. Certainly, a substantial argument can be made that Ms. Moore is an "involuntary" creditor of Ms. Sweet, and therefore is deserving of a preference in the

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96 *Ibid* at para 91.

97 *Ibid* at para 94.

98 *Ibid.*

99 See e.g. *Kerr*, *supra* note 11.

100 Indeed, traditional equity jurisprudence offers little guidance with respect to the question of whether constructive trust ought to be made available rather than its equitable monetary equivalent, an equitable accounting of profits. See Timothy G Youdan, "The Fiduciary Principle: The Applicability of Proprietary Remedies" in Timothy G Youdan ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989), ch 3. See also Maddaugh & McCamus, *supra* note 3 at Heading 5:200.60.10 "Inadequacy of the Remedy of Common Law".

101 *Moore v Sweet* SCC, *supra* note 1 at para 93.

event of Ms. Sweet's insolvency.[102] As noted above, Justice Coté appears to make a separate point that the enforcement of Ms. Moore's remedy against Ms. Sweet would "unnecessarily complicate" the process of obtaining relief. The awarding of the constructive trust would, presumably, have the advantage of avoiding the burden of further litigation and any difficulties that might be encountered in enforcing a monetary order against Ms. Sweet. The relevance of the fact that Ms. Moore would have difficulty in enforcing her rights were she not awarded a remedial constructive trust not only has some support in earlier Supreme Court authority[103] but might be considered to accord with common sense. One might suggest that these two points are interrelated and that the question of the priority to be given to Ms. Moore's claim is probably best seen as an application of an involuntary creditor rationale.

A more helpful discussion of the possible guidelines for granting constructive trust relief was set forth in the opinion of Justice La Forest in the *Lac Minerals* case.[104] It is not necessary for present purposes to provide an extensive review of Justice La Forest's reasoning in that case. Briefly, Justice La Forest began by clearing away two misconceptions about remedial trust relief. First, he noted that it is not necessary to find that there exists a "special relationship", such as a fiduciary relationship, between the parties in order to ground constructive trust relief.[105] Second, he noted that there need not be a pre-existing proprietary interest of the plaintiff in the target asset.[106] He then turned to consider positive guidelines for affording this form of relief and suggested, essentially, that one should focus on the particular attributes of constructive trust relief and attempt to determine whether or not they are appropriate in the circumstances of the case at hand. Thus, first, it would be appropriate to determine whether the plaintiff should receive the priority accorded to the holder of a proprietary interest in a bankruptcy. Further, it should be determined whether it is appropriate for the plaintiff to acquire changes in value that had been enjoined by the asset. Third, it would be a relevant consideration if the defendant had intercepted assets that the plaintiff was attempting to obtain. Fourth, the moral quality of the defendant's act might be relevant. Fifth, it would be relevant if determination of the value of the target asset was virtually impossible. Sixth, the uniqueness of the property could weigh in favour of constructive trust relief.[107] In my view,

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102 See Maddaugh & McCamus, *supra* note 3 at Heading 5:200.60.20 "Creditor in Invitum".

103 See e.g. *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621.

104 *International Corona Resources Ltd. v Lac Minerals Ltd.*, [1989] 2 SCR 574, 61 DLR (4th) 14 [*International Corona* cited to SCR].

105 *Ibid* at 675.

106 *Ibid* at 676.

107 *Ibid* at 678–79.

Justice La Forest's discussion of this question is quite valuable and could benefit the jurisprudence in this area if it was given more prominence.

On the particular facts of the *Moore* dispute, it may be relevant to adjust the third guideline identified by Justice La Forest and suggest that constructive trust relief might be appropriate in a case, like *Moore*, where, but for the wrongful conduct of the third party, the target asset would have been delivered to Ms. Moore. That is to say, as a result of Mr. Moore's wrongful conduct, the target asset—the proceeds of the life insurance policy—were directed to Ms. Sweet rather than to Ms. Moore. Indeed, we might consider this to be an appropriate application of Justice La Forest's third guideline to a three-party situation. In *Lac Minerals*, the target asset was appropriated by the defendant itself, through its wrongful conduct. In *Moore*, the target asset was diverted by the wrongful conduct of the third party, Mr. Moore, and delivered to the defendant.

The second step in the test pronounced by Justice Côté in *Moore*—the need for a causal connection or link between the plaintiff's contribution and the target asset—appears to rest on the analysis offered by the Supreme Court in the leading decision in the cohabitational property context, *Kerr v Baranow*.[108] In that context, a causal connection test appears to make perfectly good sense. In that line of authority, the question arises as to whether a spouse who has contributed to the accumulation of wealth owned by the other spouse should be entitled to obtain constructive trust relief against a portion of the jointly created wealth. As the Court held in *Kerr*, it appears quite appropriate to grant constructive trust relief only in cases where the contribution of the spouse without title, whether it be in the form of services or saved expenses of the other spouse, is causally connected or in some other sense linked to the particular asset over which relief is sought. To suggest, however, that a causal connection of this kind must be found in every case where remedial constructive trust is to be made available does not make sense in the context of other situations in which constructive trust relief might appropriately be made available. Indeed, historically, the availability of constructive trust relief in the context of breach of fiduciary obligation simply cannot be explained on this basis. In the leading case of *Keech v Sandford*,[109] for example, where the trustee of an infant renewed a lease held by the infant for his own benefit, a constructive trust was imposed as a prophylactic measure to ensure that individuals with such responsibilities not be tempted to take advantage of a situation in this way. On such facts, there is simply no basis on which one could suggest that the infant's conduct had a causal connection to the benefit enjoyed by the trustee. More generally, in fiduciary duty cases

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108 *Kerr*, *supra* note 11.

109 *Keech v Sanford*, [1726] EWHC Ch J76.

which are, after all, the original and natural home of constructive trust relief, it would normally be the case that the "cause" of the profit secured by the fiduciary is the wrongful conduct of the fiduciary rather than some conduct or "contribution" by the person to whom the duty is owed. In short, a causal connection test does not begin to explain the great variety of situations in which constructive trust relief has been made available historically and, no doubt, will continue to be made available in the future. It would be unfortunate if the test articulated by the majority in *Moore v Sweet* were considered, in the future, to be the invariable touchstone for granting constructive trust relief.

In the three-party context, the causal connection test would frequently not be met as the cause of the transfer of the asset to the defendant will typically be the conduct of the third party. In *Moore*, of course, that would be the conduct of Lawrence Moore. On the rather unusual facts of *Moore*, however, the premiums had been paid by Michelle Moore and this could be argued to be the necessary link or causal connection with the proceeds received by Ms. Sweet. Such facts will typically not be present in disappointed beneficiary cases and, more generally, in the great variety of three-party cases in which relief has been allowed. A better solution to the problem of determining when constructive trust relief is available in three-party cases would be to focus on the other reasons identified by Justice Coté in *Moore* and by Justice La Forest in *Lac*, for granting such relief.

Finally, on the general question of the availability of remedial constructive trust, it should be recalled that in *Soulos v Korkontzilas*,[110] the case of the real estate agent who acquired for himself a property that he had undertaken to acquire for his principal, the plaintiff, the Supreme Court denied what it considered to be unjust enrichment relief on the basis of a very narrow interpretation of the unjust enrichment principle, but awarded relief on the basis that the constructive trust could be made available in any case where it was "against conscience" that the defendant retained the asset in question. Peter Maddaugh and I have argued elsewhere[111] that this decision is both unsound and unhelpful. Although the result is correct, the decision is unsound in the sense that constructive trust relief in such circumstances is a well-established feature of prior law and it was, accordingly, quite unnecessary to provide an innovative explanation for this form of relief. Indeed, *Soulos* could have been seen as a simple and straightforward application of the doctrine of *Keech v Sandford*, referred to above. Under the modern view of restitutionary doctrine, such cases

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110 *Soulos v Korkontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214.

111 Maddaugh & McCamus, *supra* note 3 at Heading 5:200.50 "The Constructive Trust and 'Good Conscience'".

would be considered to come within the category of unjust enrichment. The decision is unhelpful as it has created the impression that in addition to the traditional doctrines gathered together under the rubric of unjust enrichment, there exists an indeterminate body of law which makes constructive trust relief in any case where it is "against conscience" that it not be made available. Accordingly, it has become a common practice in Canadian restitutionary cases for plaintiffs to argue for a constructive trust on the basis of unjust enrichment (narrowly construed) and add, as a "Hail Mary" pass, as it were, a plea that it is "against conscience" for the defendant to retain the target asset in question. The better course, surely, would be to interpret the concept of unjust enrichment more broadly, as capturing or explaining the traditional case law—including *Keech v Sandford*—rather than developing a new and apparently vague and unstructured form of liability in cases where failure to grant relief would be "against conscience". Although it would appear that the appellant made such an argument in *Moore* itself, the Court wisely concluded that it was unnecessary to determine whether and/or the extent to which the Supreme Court's decision in *Soulos* had extended the notion of remedial constructive trust beyond cases involving unjust enrichment or wrongful acts such as breach of fiduciary duty.[112]

6. Implications of *Moore v Sweet* for Three-Party Cases More Generally

Although this may not be widely known within the profession, the disappointed beneficiary cases, such as *Moore v Sweet*, can be considered to be a sub-set of a much larger category of three-party restitution cases.[113] Some of the other types of cases involve wrongful conduct by a third party. Thus, it is well established historically that where a third party who, in breach of contract, or by committing a tort, appropriates benefits that would otherwise flow to the plaintiff and then transfers those benefits to a defendant, the defendant is exposed to a direct restitutionary claim by the plaintiff.[114] Thus in a leading 18th century authority, *Clarke v Shee & Johnson*,[115] the plaintiff brewer had an employee who diverted sums from customers that should have been paid to the plaintiff and purchased lottery tickets from the defendant. The plaintiff was allowed a direct restitution claim against the defendant for the misappropriated funds. More recently, the House of Lords allowed a claim on similar facts in the leading case of *Lipkin Gorman v Carpnale Ltd.*[116] Similar claims have been allowed in

112 *Moore v Sweet* SCC, *supra* note 1 at para 95.

113 For a survey of which, see Maddaugh & McCamus, *supra* note 3, ch 35 & 36.

114 *Ibid* under Heading 36:200 "Common Law: Theft, Tort, Breach of Contract".

115 *Clarke v Shee & Johnson*, (1774) 1 Comp 197, 98 ER 1041 (KB).

116 *Lipkin Gorman v Carpnale Ltd.*, [1991] 2 AC 548, [1992] 4 All ER 512 (HL).

the context of equitable wrongdoing by third parties as where a fiduciary, in breach of a fiduciary obligation owed to the plaintiff, misappropriates assets and transfers them to the ultimate defendant. In such circumstances, a claim in so-called "knowing receipt" will lie.[117] The Supreme Court of Canada has held that claims in knowing receipt are best characterized as claims in "unjust enrichment".[118] Indeed, *Moore v Sweet* itself could have been decided on the basis of these lines of authority.[119] As we have seen, however, the case was argued simply on the basis of the tripartite unjust enrichment principle.

Other three-party cases do not involve wrongful conduct by the third party. One sub-category of such cases deals with situations where a defendant is reimbursed, perhaps by a state authority, with respect to expenses initially borne by the plaintiff.[120] The decision in *James Moore & Sons Ltd v University of Ottawa*[121] provides a simple illustration. The plaintiff, a building contractor, was hired by the university under an agreement that required the contractor to pay taxes on building materials. Amending legislation concerning those taxes required the taxing authority to reimburse the university with respect to taxes of this kind relating to the construction of university buildings. The defendant university insisted on retaining the rebate. The plaintiff brought a successful claim in unjust enrichment for the rebate. Similarly, it is well established that one who is the recipient of benefits pertaining to a proprietary entitlement of another party may be the subject of such a claim.[122] A simple illustration would be where a tenant, mistakenly thinking that "A" owns the property in question, whereas the property is actually owned by "B", mistakenly pay the rent to "A". "B" will have a direct claim against "A" for the mistakenly directed rental payment.[123] It may be asked, then, whether the decision in *Moore v Sweet* has any implication for these types of three-party cases. The short answer to this question is that *Moore v Sweet* plainly accepts that it is appropriate to categorize such cases as involving unjust enrichment in the sense that they would appear to be accommodated by the tripartite

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117 Maddaugh & McCamus, *supra* note 3 under Heading 36:300 "Equity: Knowing Receipt".

118 *Citadel General Assurance Co. v Lloyds Bank of Canada*, [1997] 3 SCR 805 at para 30, 152 DLR (4th) 411.

119 More particularly, the breach of contract cases might have provided a persuasive analogy.

120 Maddaugh & McCamus, *supra* note 3 under Heading 35:200 "Claimant has Borne on Expense for which the Defendant has been Reimbursed".

121 *James Moore & Sons Ltd. v University of Ottawa* (1974), 5 OR (2d) 162, 49 DLR (3d) 666 (H Ct J).

122 Maddaugh & McCamus, *supra* note 3 under Heading 35:500 "Defendant Intercepts Benefits Pertaining to Proprietary or Other Entitlements of the Claimants".

123 *Arris v Stukely* (1677), 2 Mod 260 (Eng KB).

version of the principle adopted in the *Pettkus* line of authority. The fact that some of these cases do not involve the direct transfer of wealth from the plaintiff to the defendant does not, as a result of *Moore v Sweet*, prevent their categorization in this fashion.

Turning more particularly to disappointed beneficiaries cases such as *Moore v Sweet* itself, it may be asked whether the holding in *Moore v Sweet* should be considered applicable beyond the narrow fact situation it represents, that is a breach of contract by the third party. Lawrence Moore had promised to maintain Michelle as the beneficiary of the policy and then, in breach of that undertaking, named Risa Sweet as the irrevocable beneficiary. Other disappointed beneficiary cases have dealt with situations where there is no breach of contract by the third party but, rather, the third party mistakenly fails to implement arrangements or understandings concerning either the retention of a former spouse as a beneficiary or the substitution of a new spouse as a beneficiary of the particular benefit in question.[124] It has been suggested above that the relief afforded in such cases has received the blessing of the Supreme Court of Canada, at least inferentially, in the *Moore v Sweet* decision.

In the previously mentioned decision of *Roberts v Martindale*,[125] the married couple separated after a lengthy marriage after the wife became ill and entered into a separation agreement in which the husband relinquished all interest in the estate of his wife and any entitlement to other interest in property registered in her name. The former wife was cared for by her sister during her illness and it was accepted by the Court that she had formulated an intention to transfer the life insurance benefits to her sister but had accidently failed to complete the necessary documentation. In such circumstances, it could obviously not be considered to be a breach of contractual obligation owed to the former husband to make such a change and the circumstances are best viewed as an accidental failure to carry out the deceased's intentions. The British Columbia Court of Appeal allowed the plaintiff's sister to obtain a constructive trust relief against the proceeds which were payable to the former husband. Obviously, the facts of *Roberts v Martindale* could be distinguished on this basis from those of *Moore v Sweet*. It is submitted, however, that *Moore v Sweet* should be considered to affirm the holding in *Roberts v Martindale*.

In the first place, as noted above, the decision is referred to by the Supreme Court in *Moore* and no suggestion is made that the case was incorrectly decided. Further, the facts of cases like *Roberts* are sufficiently analogous to those of *Moore* that it would surely be considered anomalous

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124 See e.g. *Roberts v Martindale*, *supra* note 4; *Holowa Estate*, *supra* note 71.

125 *Roberts v Martindale*, *supra* note 4.

to allow relief in *Moore* and deny relief in cases such as *Roberts*. Although it may be argued that the breach of undertaking in *Moore* is more wrongful than the accidental conduct of the deceased in *Roberts*. Nonetheless, the law of restitution generally allows for the recovery of mistakenly transferred benefits and the granting of recovery in cases like *Roberts* could simply be seen as an application of that well-established principle. Finally, with respect to the "juristic reason" analysis, *Moore* should be considered to stand for the proposition that in a case like *Roberts*, the fact that the insurance policy designates the former husband as the beneficiary does not constitute a juristic reason precluding recovery by the sister of the deceased. Assuming this view to be correct, it appears that *Moore v Sweet* may be taken to provide authority more generally for providing relief in the disappointed beneficiary cases.

Another possible implication of *Moore v Sweet* relates to the traditional line of authority permitting the recovery of mistakenly transferred benefits by a plaintiff to a defendant. It is well-established, of course, that where "A" mistakenly pays money to "B", "A" has a good restitution claim against "B" for recovery of the mistaken payment. What is much less clear, however, is whether in a three-party situation, that is where "A" intended to pay "B", but mistakenly pays "C", "B" may have a direct claim against "C" for the mistaken transfer. A direct claim of this kind appears to be allowed in English and Canadian law only in the context of estates administration. In the well-known case of *Re Diplock*,[126] where the executors of a will paid out monies to various charities on the basis of a mistaken interpretation of the will's provisions, the lawful beneficiaries of the estate were allowed to bring a direct claim against the mistakenly paid parties. In short, a direct claim was allowed to be bought by the intended beneficiaries in circumstances where the monies were mistakenly paid to the defendant charities. What is less clear, then, is whether the principle in *Re Diplock* can apply to three-party mistaken transfer cases outside of the estates context. As a matter of principle, it appears that such claims should enjoy success. Such relief is allowed in American law.[127] The foregoing analysis suggests that similar relief has been made available in the context of the *Roberts v Martindale* line of authority and that this line of authority now has the support of the Supreme Court of Canada by virtue of *Moore v Sweet*. It will be of considerable interest, then, to see whether Canadian courts will allow direct relief of this kind in three-party mistaken payment cases as a more general matter.

126 *Re Diplock*, [1951] AC 251, [1950] 2 All ER 1137 (UK HL).

127 *Third Restatement, supra* note 30, ss 11(3)(c), 48.

Conclusion

Moore v Sweet makes a valuable contribution to the continuing evolution and modernization of the Canadian law of restitution. It usefully reaffirms the Supreme Court's understanding of the role of the unjust principle, that is, that it is a principle underlying the existing lines of authority—the "existing categories" or rules established over many centuries—and as a basis for modifying those existing rules and for recognizing new situations in which liability should be imposed in order to enable the law "to develop in a flexible way as required to meet changing perceptions of justice."[128] The decision achieved a just result by reversing an unfortunate decision below. It offered useful guidance with respect to the application of the tripartite version of the principle articulated in *Pettkus* by demonstrating how to apply the "corresponding deprivation" element in three-party cases, by confirming that the "no juristic reason for the transfer" test only precludes recovery where the statutory reason for the transfer indicates "with irresistible clearness" that among its objectives is to preclude an unjust enrichment claim in the circumstances, and by offering guidance with respect to the availability of the constructive trust on three-party cases.[129] Further, the decision offers some indication of the judicial treatment to be afforded three-party cases more generally in the future.

Moore v Sweet may be added to the now very long list of decisions of the Supreme Court of Canada that have reshaped the modern Canadian law of restitution. Admittedly, some of these decisions manifest an understandable inclination of the Supreme Court to engage in over-generalization, that is the pronouncement of general principles of excessive width that cannot explain all of the complex rules and situations that make up this vast body of law. This inclination was not entirely avoided by *Moore v Sweet* itself in the discussion of constructive trust. Nonetheless, the overall effect of this line of authority, including *Moore v Sweet*, has been to very considerably improve the quality of Canadian restitutionary jurisprudence.

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128 *Moore v Sweet* SCC, *supra* note 1 at para 38.

129 *Ibid* at para 70.