THE RECOVERY OF MISTAKEN PAYMENTS: REVISITING THE DOCTRINE OF RELATIVE FAULT

Maziar Peihani[1]

When a payment is mistakenly made, ought the relative blameworthiness of the two parties, the payer and the payee, in relation to the mistake affect whether the payment can be recovered by the payer? In Canada, the leading case on payments by mistake of fact is BMP Global v Bank of Nova Scotia, where the Supreme Court of Canada held that the basic rule on recovering mistaken payments was properly articulated by Goff J. in Barclays Bank v WJ Simms Son, as the Simms test. This article examines the salient issues surrounding the Simms test, namely, how it has been applied by the courts in Canada and in other common law jurisdictions. Some judges and scholars have argued that the introduction of fault into the mistaken payments regime is supported by the long-standing proposition that among two innocent parties, justice requires the party who was in a position to detect the fraud or prevent the loss to bear its burden. The article takes up this argument, revisiting authorities that have laid down the maxim of the "two innocent parties" and examining the extent to which this maxim has influenced the decisions made by Canadian courts. I argue that carelessness, in the sense of neglect or lack of reasonable care, has no application to the Simms test, and that the "two innocent parties" proposition was developed in relation to negotiable instruments and non est factum to address concerns that differ from those raised by mistaken payments. I further submit that introducing fault into the analytical framework for mistaken payments brings unwarranted complexity as it invites the court to determine what would be ex aequo et bono without any precise guide.

Dans le cas d'un paiement effectué par erreur, la faute de l'une et l'autre partie, le payeur et le preneur, relative à cette erreur constitue-t-elle un facteur quant à savoir si le paiement est recouvrable ou non par le payeur? Au Canada, la décision de principe sur les paiements par erreur de fait est l'arrêt B.M.P. Global Distribution Inc. c. Banque de Nouvelle-Écosse, dans lequel la Cour suprême a établi que la règle fondamentale en matière de recouvrement des paiements effectués par erreur avait été correctement formulée par le juge Goff dans l'affaire Barclays Bank Ltd. c. W. J. Simms Son, dans ce qui est devenu le critère de l'arrêt Simms. L'auteur analyse les principales questions entourant le critère, notamment celle de sa mise en

[1] Assistant Professor and Lawson Lundell UBC Professor in Business Law. I extend my sincere gratitude to the anonymous reviewers for their invaluable feedback and to the editorial team at Canadian Bar Review for their assistance throughout the publication process. I would also like to express my appreciation to Jakub Czypinski and Gabriel Rincon for their exceptional research assistance.

application par les tribunaux du Canada et des autres pays de common law. Certains juges et chercheurs ont fait valoir que l'introduction d'une notion de faute dans le régime des paiements par erreur est étayée par le principe, établi de longue date, voulant que lorsque deux parties sont innocentes, la justice fasse porter le fardeau à celle qui est à même de constater la fraude ou de prévenir la perte. Dans cet article, l'auteur reprend cet argument, jette un regard neuf sur les sources ayant établi la règle des « deux parties innocentes », et examine dans quelle mesure cette règle influence les décisions des tribunaux canadiens. Il soutient que le manque de diligence, dans le sens d'une négligence ou d'un défaut de diligence raisonnable, ne correspond pas à une application du critère de l'arrêt Simms et que la règle des « deux parties innocentes » a été établie en lien avec les instruments négociables et les dénégations d'écriture pour traiter des questions autres que celles soulevées par les paiements effectués par erreur. Il soutient, en outre, que l'introduction de la notion de faute dans le cadre d'analyse des paiements par erreur constitue une complexification inutile, car cela amène le tribunal à déterminer ce qui serait équitable et bon sans disposer de repères précis.

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1. Introduction

When a payment is mistakenly made, ought the relative blameworthiness of the two parties, the payer and the payee, in relation to the mistake affect whether the payment can be recovered by the payer? While it may seem instinctively "right" that carelessness or fault be relevant, I argue that the law is better served if carelessness or fault is not a direct factor. In Canada, the leading case on payments by mistake of fact is *BMP Global v Bank of Nova Scotia*.[2] I will discuss this case in greater detail below, but to summarize it briefly, a company named BMP received a cheque drawn from an account at RBC. BMP deposited the cheque into its own account at Scotiabank, who released the funds. However, Scotiabank later learned that the cheque was in fact a counterfeit and froze the remaining balance in the company's account. These funds were returned to RBC. Finding Scotiabank to be in breach of the service banking agreement made with its customer, the trial judge awarded BMP pecuniary damages.[3] The British Columbia Court of Appeal overturned the decision, finding that a forged cheque failed to provide BMP with a ground in equity to retain the funds.[4] Writing for the Supreme Court of Canada, Deschamps J. held that the case could be "resolved by applying the common law rules on mistake of fact" as restated by Goff J. (as he then was) in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* (*Simms*).[5]

This article examines the salient issues surrounding the *Simms* test, namely, how it has been applied by the courts in Canada and in other common law jurisdictions. In particular, the article considers the relevance of carelessness to the *Simms* test: Does the payer's carelessness bar restitution, or phrased more broadly, is restitutionary liability proportionate to carelessness? Some judges and scholars have argued that the comparative fault analysis is supported by the long-standing proposition that among two innocent parties, as is often the case in payment frauds, justice requires the party who was in a position to detect the fraud or prevent the loss to bear its burden. The article takes up this argument, revisiting authorities that have laid down the maxim of the "two innocent parties" and examining the extent to which this maxim has influenced the decisions made by Canadian courts.

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2 *BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15 [*BMP*]; John D McCamus, "Mistake, Forged Cheques and Unjust Enrichment: Three Cheers for B.M.P. Global." (2009) 48:1 Can Bus LJ 76 at 80–81 [McCamus, *Mistake, Forged Cheques and Unjust Enrichment*]; Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) at 3 [Birks, *Unjust Enrichment*].

3 *BMP*, *supra* note 1 at para 284.

4 *Ibid* at paras 30, 35.

5 *Ibid* at paras 19, 21; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*, [1979] 3 All ER 522 (QB), at 541.

I argue that carelessness, in the sense of neglect or lack of reasonable care, has no application to the *Simms* test, and that the "two innocent parties" proposition was developed in relation to negotiable instruments and *non est factum* to address concerns that differ from those raised by mistaken payments. A payment by mistake of fact can be recovered because the supposition on which the payment was made is false and contrary to the initial belief the payee is not entitled to the money. Even if the payer is careless, which typically involves a mistake of fact, it is still unconscionable for the payee to keep the money. I further submit that introducing fault into the analytical framework for mistaken payments brings unwarranted complexity as it invites the court to determine what would be e*x aequo et bono* without any precise guide. This would effectively be a license for intuitive justice and runs contrary to the well-established principle that a payment by a mistake of fact is recoverable as a matter of right in common law. This is not to say that the dictates of justice and fairness are irrelevant to mistaken payments, but rather, that these considerations are already embedded in the right of recovery and defences, such as payment for good consideration and change of position that could bar restitution. Similarly, this article does not contend that further inquiries into the positions of the parties are never appropriate, but instead, that such inquiries can be conducted in a principled fashion under other causes of action such as negligence and estoppel. The article explores the reasonable banker's duty of care as a helpful benchmark for guiding such inquiries in bank payments. Finally, a survey of recent decisions on mistaken payments reveals that the "two innocent parties" maxim has received limited recognition. Most authorities have refused to follow the proposition, and in other cases where courts have engaged in comparing the parties' blameworthiness, the maxim has been relied upon as an alternative rationale or the outcome could be better explained through the *Simms* framework.

This article proceeds as follows. First, it discusses how *Barclays Bank v WJ Simms* built upon the previous authorities to arrive at a refined framework for recovery of mistaken payments. It explains the two steps involved in the *Simms* analysis and how they were applied in *BMP*. The article reflects on the controversy that *BMP* has triggered as to the current state of the law of unjust enrichment in Canada, but maintains that such controversy does not affect the desirability of the *Simms* framework, especially given the rigor and simplicity that it brings to the analysis of mistaken payments. The article then turns to the defence of change of position, the most important qualification to a claimant's right of recovery.

It discusses the formulation of the defence in *Lipkin Gorman v Karpnale Ltd.*[6] and how subsequent cases have come to understand the requirements that must be met in order for the defence to be successful. The article also discusses the basis on which the defence operates through a presentation of the disenrichment and equitable models which have dominated scholarly discourse to date. I draw upon the Privy Council's decision to identify a third alternative: a "practical justice" perspective that seeks to strike the "middle course between the extremes of inflexible rules and case by case "palm tree" justice.[7] I explain how this approach worked in *Dextra Bank & Trust Company Ltd v Bank of Jamaica*, where the Privy Council refrained from an overly technical analysis of the defence while at the same time not going so far as to make the defence a function of judicial discretion.[8] Importantly, once it was established that the defendant had changed its position in good faith and in reliance of the payment, the defence was held to be available regardless of carelessness.

After discussing the overarching framework for mistaken payments, the article turns to the doctrine of relative fault. It starts off by looking at the authorities which have laid down the maxim of "two innocent parties" as well as those decisions which have applied a comparative fault approach. The article proceeds to discuss the conceptual and practical challenges the introduction of fault into the framework presents and why the maxim of the two innocent parties as set out in *Lickbarraw v Mason*[9] and *Marvco Colour Research Ltd v Harris*[10] cannot be extended to payments by mistake of fact. It also revisits judicial decisions engaging in relative fault analysis to suggest that the outcome of these cases could be better explained on other grounds, such as discharge of bona fide debt or breach of duty of care in banking relations. The article concludes by looking at the broader picture of this issue. It does so by considering how the recent authorities have approached cases involving mistaken payment and the extent to which they been receptive to the relative fault of the parties.

2. Recovery of Mistaken Payments: The Simms Framework

As alluded to above, the leading case on recovery of mistaken payments in Canada is *BMP Global v Bank of Nova Scotia*.[11] In this case, BMP, a bakeware distributor, was approached by a con artist who offered to buy a license to distribute bakeware in the United States. BMP subsequently

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6 [1991] 2 AC 548, [1992] 4 All ER 512 (HL) [*Lipkin Gorman*].

7 *Dextra Bank & Trust Company Ltd v Bank of Jamaica* [2001] UKPC 50 [*Dextra*]; *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, [1992] SCJ No 101 at 844 [*Peel*].

8 *Dextra*, *supra* note 6.

9 (1787), 100 ER 35, 2 TR 63 (Eng KB) [*Lickbarraw v Mason*].

10 [1982] 2 SCR 774, 141 DLR (3d) 577 [*Marvco*].

11 *BMP*, *supra* note 1.

received an unendorsed cheque for over $900,000. The cheque was drawn on an account held by First National Financial Corp. (First National) at the Royal Bank of Canada (RBC). BMP and First National had no prior business dealings. On receipt of the cheque, BMP sought to deposit it at Scotiabank. Following receipt of the funds from RBC, Scotiabank released the funds to BMP, who dispersed the funds through numerous transactions. These disbursements included a $20,000 payment to the account of an unknown person in New York. It soon became clear that the unknown account belonged to the con artist who had orchestrated the fraud. A week later, RBC notified Scotiabank that First National's signature had been forged. Despite BMP's insistence that it was entitled to retain the amounts advanced, Scotiabank froze BMP's account and transferred the remaining funds to RBC. The critical question was whether RBC had a right to recover the money that it had paid out on the forged cheque. Both the British Columbia Court of Appeal and the Supreme Court of Canada answered in the affirmative, though one court arrived at this answer from an equity perspective while the other derived it from the common law. Specifically, the Supreme Court held that the basic rule on recovering mistaken payments at common law was articulated by Goff J. (as he then was) in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*.[12]

Simms was a pivotal decision, with Goff J. extracting the principles for recovery of mistaken payments from a disparate line of cases. A notable example of earlier authorities was *Kelly v Solari*, a case where an insurance company had paid money to the executor of the insured believing that it was liable under a life insurance policy.[13] In fact, there was no liability to pay the money as the insurance policy had lapsed as a result of the insured's failure to pay premiums. It was held that the claimant could recover the money given the mistake as to the existence of the liability. Parke B J. explained the rationale for the recovery as follows: "where money is paid to another under the influence of a mistake, that is, on the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it."[14] After a careful survey of earlier cases, Goff J. provided a modern reformulation of the basic rule for recovery of mistaken payments:

> From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover

12 [1979] 3 All ER 522 (Eng QB), [1980] QB 677 [*Simms*].

13 *Kelly v Solari* (1841), 152 ER 24 at 320 ["*Kelly*"].

14 *Ibid* at 322.

> it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payer or by a third party to whom he is authorized to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.[15]

Prior to Goff J.'s elegant summary, Canadian common law recognized the recoverability of mistaken payments, but the courts had applied a far more restrictive and less principled framework. An earlier leading authority was *Royal Bank v The King*.[16] Here, Dysart J. held that it was "well settled law" that payments made by mistake of fact could be recovered subject to four conditions: (1) the mistake is honest; (2) the mistake needs to be between the payer and recipient of the money; (3) the facts, as they are believed to be, must impose an obligation to make the payment; and (4) the recipient has no legal, equitable, moral right to retain the money as against the payer.[17] Yet, it was not clear what a mistake "between the parties" meant. The fourth condition also precluded recovery for mistaken gifts even if the payer had intended the recipient keep the gift.[18] Goff J. obviated this confusion, reformulating the analytical framework on a principled and coherent basis, which in turn led to its wide adoption by Canadian courts.[19]

3. A Two Step Process

In *BMP*, the Supreme Court affirmed and applied the *Simms* test, ultimately finding that RBC could recover the payments made to BMP.

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15 *Simms*, *supra* note 11 at 535.

16 [1931] 1 WWR 709, [1931], 2 DLR 685 [*Royal Bank v The King*].

17 *Ibid* at paras 8–15.

18 For problems associated with the traditional rule set out in *Royal Bank v The King*, see Peter D Maddaugh & John D McCamus, *The Law of Restitution*, looseleaf ed (Aurora, ON, Canada Law Book Inc), § 10:300; McCamus, *Mistake, Forged Cheques and Unjust Enrichment*, *supra* note 1 at 80–81.

19 See e.g. *Royal Bank of Canada v LVG Auctions Ltd* (1983), 43 OR (2d) 582, 12 DLR (4th) 768 (ON CA); *Toronto-Dominion Bank v Pella/Hunt Corp* (1992), 7 BLR (2d) 99, 10 OR (3d) 634 (Gen Div); *Central Guaranty Trust Co v Dixdale Mortgage Investment Corp* (1994), 24 OR (3d) 506 (CA); *Central Guaranty Trust Co v Dixdale Mortgage Investment Corp* (1994), 121 DLR (4th) 53, 24 OR (3d) 506 (CA) at 512; *AE LePage Real Estate Services Ltd v Rattray Publications*, [1994] OJ No 2950, 120 DLR (4th) 499 (ON CA) at 507. In the last case, Finlayson J.A. observed that: "*Barclays Bank v Simms* is the accepted authority explaining the obligations of a bank to its customer and its redress against the payee of a cheque who appears to be taking advantage of an innocent mistake on the part of a bank employee."

On the first step, *Simms* creates a *prima facie* right to recovery for an operative mistake of fact, namely, a mistake that caused the payment. The test is indifferent as to what the mistake of fact is; the only requirement is that the mistake causes the payment. Although Goff J. did not articulate any test for causation, the decision can be explained on a "but for" basis where, but for the mistake, the payer would have not made the payment.[20] Applying the first branch of the test to the facts in *BMP* meant that RBC had a *prima facie* right to recover on the grounds that the payment was made on the basis of a forged instrument.[21] The second step of the test sets out three qualifications to the *prima facie* right of recovery. The first qualification, based on Parke B J.'s dictum in *Kelly*, is that recovery will be denied where the payer intended the payee to "have the money at all events."[22] This was not the case in *BMP*, since RBC did not intend for BMP to have the funds regardless of the forgery. However, another issue which was considered in *BMP* under this rubric was whether there were any policy grounds suggesting that RBC had assumed the risk of a mistake when making the payment. Specifically, the Supreme Court held that while "finality of payment" was a laudable principle, it could not raise an "indiscriminate bar to the recovery of a mistaken payment" and thereby enable BMP to retain the funds which it received because of a fraudulent scheme.[23] The second qualification that Goff J. carved out was a payment for good consideration. This would include, for example, payments for the discharge of debt. However, since no value had been given by BMP for the cheque, there was never any good consideration for it. This also meant that BMP was not entitled to the protections afforded to a holder in due course by the *Bills of Exchange Act*.[24] Lastly, in determining whether restitution should be granted, courts should also consider changes in the

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[20] Lord Goff & Gareth Jones, *The Law of Unjust Enrichment,* 9th ed (London: Sweet & Maxwell, 2016) at 317 [Goff & Jones 2016, *Unjust Enrichment*]; Graham Virgo, *The Principles of the Law of Restitution*, 2d ed (Oxford: Oxford University Press, 2006); Andrew Burrows, *The Law of Restitution* 3d ed (Oxford: Oxford University Press, 2011) at 209.

[21] *BMP*, *supra* note 1 at para 24.

[22] *Kelly*, *supra* note 12 at 322.

[23] *BMP*, *supra* note 1 at para 35. Payment finality relies heavily on *Price v Neal* (1762), 3 Burr 1354, 97 ER 871, where the drawee had accepted and eventually paid a forged bill of exchange which was discounted by the bearer. Considerable time passed before the drawee discovered the forgery. Lord Mansfield held that the drawee was not entitled to recovery. The Supreme Court refuted an interpretation of *Price v Neal* that lays down an "unqualified rule that a drawee will never have any recourse" against the collecting bank or the payee for a payment made on a forged cheque. For further discussion of the reasoning, relevant authorities and commentaries, see *BMP*, *supra* note 1 at paras 29–35.

[24] *BMP*, *supra* note 1 at para 61. *Bills of Exchange Act*, RSC 1985, c B-4, s 128(a) reads as follows:

> The acceptor of a bill by accepting it is precluded from denying to a holder in due course

circumstances of the defendant following the receipt of payment. This third qualification will now be discussed in greater detail.

Prior to *Simms*, there was no general recognition of the defence of change of position. In fact, case law remained formally against accepting such a defence. In the leading case of *Baylis v Bishop of London*, the English Court of Appeal held that the claimant could recover the money paid under a mistake of fact and it was no defence that the recipient had applied some of the funds to provide for the needs of the parish and paid the surplus to a trustee in bankruptcy.[25] Where the defendant argued a change of position, courts normally framed the issue as one of estoppel. This approach was problematic for two reasons. First, estoppel normally operates on the basis of a representation.[26] A representor is estopped from going back on his representation if the representee changes their position in detrimental reliance on that representation. Although a representation can be made by conduct, a mere payment will itself not rise to the level of a representation entitling a recipient to that payment.[27] So, for example, in *Royal Bank v The King* the plea for estoppel failed despite the defendant's detrimental reliance on the payment, since there was never any representation made in the first place.[28] Second, estoppel does not operate *pro tanto*, and therefore, it shields the defendant against the whole claim even though she has only partially dispersed the funds.[29] These difficulties provided an impetus for recognizing change of position as an independent defence. Goff J. therefore referred to change of position as one of the qualifications to the payer's *prima facie* right to recovery. Engaging in a change of position analysis in *BMP*, the Supreme Court held that the defence was not available to the collecting bank nor the

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a) the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.

The situation, however, differed for the Scotiabank. As the collecting bank, Scotiabank had acquired the status of holder in due course by accepting the cheque and crediting the payee's account. Yet, the court found that the bank had chosen not to rely on this protection and was thus not obliged to do so. See *BMP*, *supra* note 1 paras 39–41.

[25] *Baylis v Bishop of London,* [1913] 1 Ch 127, [1911–13] All ER Rep 273 (CA) at 277.

[26] As Professor MacDougall notes, whatever the estoppel and whatever other "prerequisites" there might be for that type of estoppel, there will always be a statement of some sort that the recipient wants to have the maker held to." He goes on to explain that, while a representation can be made implicitly by conduct, "a payment in error is not a representation that the payee is entitled to keep the payment that can form the basis of an estoppel unless the payor owned some duty to make correct payment." Bruce MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis, 2012) at 24, 250; *Moss v London and North Western Railway Co* (1873), 22 WR 532 (Exch).

[27] *Lipkin Gorman*, *supra* note 5 at 579.

[28] *Royal Bank v The King*, *supra* note 15 at para 25.

[29] *Lipkin Gorman*, *supra* note 5 at 579.

payee given that, at the time the account was frozen, the funds were still credited to BMP's account.[30] Thus, all of the conditions from *Simms* for recovery of funds paid by mistake had been met. The Supreme Court did acknowledge, however, that it was rare in a mistaken payment case for an innocent victim of fraud to have neither given consideration nor changed his position.[31]

4. The Controversy Surrounding BMP

BMP has generated a heated debate. This is unsurprising given its disconnect from the Supreme Court of Canada's prior jurisprudence on unjust enrichment. Specifically, in *Pettkus v Becker*, Dickson J. (as he then was) made famous the statement that "… there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment."[32] While both English and Canadian courts had required an enrichment and corresponding deprivation for unjust enrichment, the third aspect of the test differed from the English courts' emphasis "that the enrichment be unjust".[33] In other words, *Pettkus* altered the inquiry in unjust enrichment from whether the enrichment was unjust to whether there were any reasons for retaining the enrichment.[34] In the course of delivering a unanimous judgement in *Garland v Consumers Gas Co*, Iacobucci J. further explained that the juristic reasons analysis has two parts. First, the plaintiff must show that there is no juristic reason from the established categories (such as contract, gift or trust) to deny recovery. If successful, the plaintiff will have a *prima facie* right to recovery and the burden will then shift to the defendant to prove another reason why the enrichment must be retained.[35] The second stage of the analysis pertains to residual defences, allowing the court to look to all other relevant circumstances, particularly the reasonable expectations of the parties and public policy, that may rebut the *prima facie* case made by the plaintiff.[36] Surprisingly, however, *BMP* did not mention *Garland* or juristic reasons at all. As a result, the decision has been characterized by scholars as "anomalous" given its disregard for the reformulated conception for unjust

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30 *BMP*, *supra* note 1 at paras 61–64.

31 *Ibid* at para 65.

32 *Pettkus v Becker*, [1980] 2 SCR 834, [1980] SCJ No 103 (QL) [*Pettkus*]; *Peel*, *supra* note 6 at 844. Dickson J. originally formulated this test in his minority reasons in *Rathwell v Rathwell*, [1978] 2 SCR 436, [1978] 2 RCS 436 at 455.

33 *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 40 [*Garland*]; Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12 SCLR (2d) 211 at 212–213.

34 Lionel Smith, "The State of the Law of Unjust Enrichment in Common Law Canada" (2015) 57 Can Bus LJ 39 at 40.

35 *Garland*, *supra* note 32 at paras 44–45.

36 *Ibid* at para 46.

enrichment which "invariably turns on the absence of juristic reasons".[37] The decision has also been viewed as a step backward, with Deschamps J. having framed the issue in terms of the traditional "doctrine of mistake of fact", a forerunner to the modern law of unjust enrichment in England.[38]

And yet, it can be questioned whether the conceptual reformulations in *Pettkus* and *Garland* were meant to overrule all prior restitutionary doctrines, such as mistake, to the effect that the law of unjust enrichment could be solely understood through an absence of juristic reasons.[39] For example, in *Bhasin v Hrynew*, Cromwell J. emphasized the flexibility inherent in the Canadian approach and went on to say that the organizing principle in the law of unjust enrichment is what McLachlin J. (as she then was) outlined in *Peel v Canada*,[40] namely that "restoration of a benefit which justice does not permit one to retain".[41] As the discerning reader would note, McLachlin J.'s formulation emphasizes the unjust factor in enrichment rather than an absence of juristic reason for recovery. Further insights to this effect can be also drawn from the Court's more recent jurisprudence, such as *Moore v Sweet*, where the majority held that the unjust enrichment model outlined in *Pettkus* and *Garland* coexists with the established categories of recovery including mistake, compulsion and failed or ineffective transactions.[42]

To summarize, the nature of unjust enrichment, whether it is a cause of action or organizing principle, and the role of past doctrines, both continue to be matter of controversy.[43] Yet, as will be discussed further below, when it comes to mistaken payments, Canadian decisions have taken the approach from *BMP* seriously and have applied the *Simms* framework to resolve restitutionary claims for money paid by mistake of fact. This trend may reflect the courts' familiarity with the longstanding doctrine of mistake, as well as the elegance of the *Simms* analytical framework. In fact, the *Simms* test appears simpler than the two stage analysis in *Garland*, as it grants a *prima facie* right to recovery merely based on mistake without

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37 Mitchell McInnes, "BMP Global Distributions v Bank of Nova Scotia: Unitary Action in Unjust Enrichment" (2009) 48 Can Bus LJ 102 at 118, 120 [*McInnes 2009*].

38 Zoe Sinel, "Causes of Action and Self-Help Remedies" (2009) 17 RLR 122 at 129.

39 This may indeed reflect the fact that "juristic reasons" is a civilian doctrine which only recently made its way to the Canadian common law; McCamus *Mistake, Forged Cheques and Unjust Enrichment supra* note 1 at 91, 93–94.

40 *Peel*, *supra* note 6 at 786, 788.

41 *Ibid* at 788.

42 *Moore v Sweet*, 2018 SCC 52 at paras 36–38.

43 Notably, the recent Supreme Court's decision in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 (CanLII) at paras 12, 23–25 seems to take the position that unjust enrichment is a cause of action.

requiring the plaintiff to prove a negative factor (such as, for example, the absence of juristic reason).[44] While the *Simms* test and the tri-partite unjust enrichment model do not completely overlap, especially in how they allocate the burden of proof, they would have both generated a similar outcome in *BMP*.[45] The payment was based on a forged instrument so there was no juristic reason, such as contract or donative intent, for BMP to retain the funds.[46] Nor did public policy reasons, such as the finality of payments, refute RBC's right to recovery.

5. The Change of Position Defence

As mentioned above, recovery of a mistaken payment will be barred if the payee has changed his position in good faith. Change of position was listed as the third qualification to the claimant's *prima facie* claim in *Simms*, and the defence was subsequently recognized in *Lipkin Gorman*, where the House of Lords also formally accepted unjust enrichment.[47] In this case, a thief who had stolen money from the claimant used the funds to gamble at the defendants' casino. The House of Lords barred recovery of the stolen money, reasoning that the defendant had changed their position by paying the winnings to the thief. Conscious of not inhibiting "the development of the defence on a case by case basis", Lord Goff broadly formulated the defence as being "available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."[48] Lord Goff stressed that the mere expenditure of the money by the defendant, whether complete or partial, does not amount to change of

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[44] Cognizant of this problem, Professor Smith has recommended that an absence of juristic reasons in Canadian common law must be understood to indicate a positive reason for reversing the enrichment. Although Iacobucci J. acknowledged Professor Smith's critique in *Garland*, there is no mention of mistake within the *Garland* framework. Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12 SCLR 211 at 244 (reprinted in Lionel Smith, *Ruled by Law: Essays in Memory of Mr. Justice Sopinka* (Toronto, LexisNexis Butterworths, 2003)); Lionel Smith, "Demystifying Juristic Reasons" (2007) 45 Can Bus LJ 281 at 285.

[45] The *Simms* test places the burden of proving the exceptions to recovery on the defendant, while *Garland* requires the plaintiff to prove the absence of juristic reason. See Lionel Smith & Samuel Beswick, "Unjust Enrichment: Principle or Cause of Action?" at 1.1.1-1.1.15 (Paper delivered at the Continuing Legal Education Society of British Columbia Restitution 2021 Webinar, September 29, 2021) [unpublished] online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942665> [perma.cc/JAZ8-TPTK] [Smith & Beswick, *Unjust Enrichment*].

[46] *McInnes 2009*, *supra* note 36 at 119.

[47] *Lipkin Gorman supra* note 5; Lionel Smith, "Defences and the Disunity of Unjust Enrichment", in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, eds, *Defences in Unjust Enrichment* (Oxford: Bloomsbury, 2016) at 27.

[48] *Lipkin Gorman*, *supra* note 5 at 580.

position.[49] He also narrowed the scope of the defence by stating that it will not be open to a "wrong doer", or "one who has changed his position in bad faith", such as where the defendant has paid away the money with knowledge of plaintiff's claim to restitution.[50]

Subsequent cases have somewhat elucidated the meaning of these principles. In *Niru Battery Manufacturing Co v Milestone Trading Ltd*, Moore-Bick J. held that bad faith is not confined to mere "dishonesty" but also embraces the "failure to act in a commercially acceptable way".[51] Moore-Bick J. found that the defendants failed to meet the good faith requirement when they paid away the money after realizing that it had been paid by mistake and without making the appropriate enquiries.[52] The defendants in that case were thus not permitted to avail themselves of the defence.[53] There is also some support from Canadian authorities for the proposition that a defendant would not be acting in good faith if they failed to make reasonable enquiries. In *Ferrum Inc v Three Dees Management Ltd*, Lane J. held that good faith required "at least a phone call" where the payee knew that the cheque was for more than what the plaintiff intended to pay, rather than just cashing the cheque and saying nothing.[54]

The "wrongdoer" bar was applied in *Barros Mattos Jnr v MacDaniels*, where Laddie J. held that the defendant could not rely on the defence as the change of position in question violated applicable foreign exchange legislation and was therefore illegal.[55] Although the result has been criticized as "astonishingly harsh",[56] the decision can be defended on grounds of public policy: a court cannot allow the recipient to hold on to the plaintiff's money if the recipient has been guilty of illegal conduct.[57]

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49 *Ibid*.

50 *Ibid*.

51 *Niru Battery Manufacturing Co v Milestone Trading Ltd*, [2002] EWHC 1425 (Comm) at para 135.

52 *Ibid* at para 136.

53 The Court of Appeal affirmed this conclusion, holding that it would be "inequitable or unconscionable" to deny the plaintiff a right to restitution. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd,* [2003] EWCA Civ 1446 at para 170.

54 *Ferrum Inc v Three Dees Management Ltd*, [1992] OJ No 208 (QL), 5 BLR (2d) 103 at para 14.

55 *Barros Mattos Junior and others v General Securities & Finance Ltd and another* [2004] EWHC 1188 (Ch) at para 28.

56 Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Markham: LexisNexis, 2014) at 1521 [McInnes, *Unjust Enrichment*].

57 *Tinsley v Milligan*, [1994] 1 AC 340, [1993] All ER 65 (HL) at 355. Lord Goff, in the minority, held that "if A puts property in the name of B intending to conceal A's interest for a fraudulent or illegal purpose, neither law nor equity will allow A to recover the property, and equity will not assist him in asserting an equitable interest in it." *Tinsley*

The Supreme Court adopted a similar "public policy" approach in *Garland*, denying the change of position defence as the funds had been collected in contravention of the *Criminal Code*.[58] It was held that that the payee could not be permitted to keep the proceeds of their crime.[59]

6. The Contested Basis: Disenrichment v Equity

Although these authorities may help explain what disqualifies the payee from invoking the change of position defence, the basis on which such a defence operates remains unsettled. A widely accepted view holds that the rationale for the change of position defence "lies in the logic of subjective devaluation"[60] or negating the defendant's enrichment: "if by reason of an event which would not have happened but for the enrichment the defendant's wealth is reduced, his liability to that extent is extinguished."[61] So, if the recipient of a mistaken payment uses the money to buy things which would have not been bought but for the payment, restitution will run contrary to the payee's freedom of choice as it would, in effect, force the recipient to pay for the benefits that she did not want in the first place.[62] Those supporting this view argue that the disenrichment model provides

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v Milligan at p. 356. Despite acknowledging the potential difficulties arising from this conclusion, Lord Goff believed that introducing discretion into the legal system was not a suitable approach. *Tinsley v Milligan* at 363.

Tinsley v Milligan became the subject of much criticism and its reasoning was questioned in both UK and other jurisdictions. Two decades later, in *Patel v Mirza* [2016] UKSC 42, UK's Supreme Court that *Tinsley v Milligan* was no longer representative of the law. Lord Toulson made the following observation on the state of law concerning illegality:

> Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand. *Patel v Mirza* at para 99.

He also emphasized that deciding whether a claim tainted by illegality is against public policy requires:

> a) Taking into account the fundamental purpose of the violated prohibition,
>
> b) Evaluating any other applicable public policies that could be undermined or weakened by rejecting the claim, and
>
> c) Bearing in mind the potential for excessive measures, unless the law is employed with a proper sense of proportionality. *Patel v Mirza* at para 101.

[58] *Garland*, *supra* note 32 at paras 65–66.

[59] *Ibid* at para 57.

[60] Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Oxford University Press, 1985) at 413.

[61] Birks, *Unjust Enrichment*, *supra* note 1.

[62] Andrew Burrows, "Change of Position: The View from England" (2003) 36:2 Loy LA L Rev 803 at 804.

a principled basis for various features of the defence, such as the exclusion of voluntary expenses that the defendant has incurred with knowledge of the payer's unjust enrichment claim. Disenrichment also helps explain why the defence is only available for exceptional expenditures, that is, expenses that would not have occurred but for the initial enrichment.[63] Proponents have also found support for the disenrichment model in *Peel*, where McLachlin J. said that "where the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice."[64] It is important, however, to note that change of position can only arise after a *prima facie* entitlement to recovery has been established.[65] This was not the case in *Peel* as the plaintiff fell short of establishing that the defendant had gained a demonstrable financial benefit" or "was spared an inevitable expense."[66] Since there was no restitutionary liability to begin with, it is difficult to maintain that *Peel* stands for a disenrichment-based model.

A further challenge to the disenrichment model arises from how Lord Goff identified the defence: he simply said that the payee should be relieved from liability if the change of circumstances has made restitution "inequitable". Lord Goff stated the defence in the broadest sense, refraining from connecting the defence to any particular element of the restitutionary claim, which a change of circumstances could be said to have negated. Lord Goff's use of the term "inequitable" may therefore be interpreted to support an alternative explanation of the defence, namely, that the defence's foundation lies in equity. In the Canadian context, *Garland* seems to support this view: "The rationale for the change of position defence appears to flow from considerations of equity."[67] This also appears to be how earlier authorities understood restitutionary claims. Both *Bank of Montreal v The King* and *Dominion Bank v Union Bank of Canada* emphasized that the *prima facie* right of recovery and as well as the applicable defences rest on "equity and good conscience".[68] In taking this position, Canadian judges were particularly influenced by *Moses v Macferlan,* which provided the first general theory of common counts of *indebitatus assumpsit* that underlie the modern law of unjust enrichment.[69] Addressing the nature of money had and received, an important species

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63 Birks, *Unjust Enrichment*, *supra* note 1 at 211; McInnes, *Unjust Enrichment*, *supra* note 55.

64 *Peel*, *supra* note 6 at 795.

65 Graham Virgo, *The Principles of the Law of Restitution,* 3rd ed (Oxford: Oxford University Press, 2015) at 680–681.

66 *Peel*, *supra* note 6 at 798.

67 *Garland*, *supra* note 32 at para 64.

68 *Bank of Montreal v The King*, 1907 CanLII 29 (SCC), 38 SCR 258 at 280; *Dominion Bank v Union Bank of Canada*, 1908 CanLII 50 (SCC), 40 SCR 366 at 381.

69 *Moses v Macferlan,* 2 Burr 1005, 97 ER 676 at 1012 [*Moses*].

of the *assumpsit* which also included money paid under mistake, Lord Mansfield identified the "gist of this kind of action" as the defendant being "obliged by the ties of natural justice and equity to refund the money."[70] As Professor McInnes notes, however, Lord Mansfield's statement can be best seen as perplexing, given that the bulk of restitutionary actions grew out of common law writs. Indeed, *Moses* was itself decided in the Court of King's Bench rather than the court of equity.[71] McLachlin J. in *Peel* also recognized that modern unjust enrichment is rooted in the common law writs and equity has merely contributed to the development of law in the area, most notably in the remedies available.[72] Furthermore, the view that the money had and received is "founded in the equity of the plaintiff's case" was later vehemently rejected by English courts as a "well-meaning sloppiness of thought" that obscures the nature of the action for money had and received.[73]

7. An Alternative: Dextra's Practical Justice

How should the term "inequitable" be understood then? It may be more persuasive to answer this question by saying that the defence operates on the same basis as the right to restitution. This is similar to the right to recovery of a mistaken payment, which seeks to remedy an "unjust" benefit; the defence is designed to protect the defendant from a claim to restitution which due to the change of circumstances has become "unjust".[74] Read this way, the defence operates on a broad concept of "practical justice" that strikes the "middle course between the extremes of inflexible rules and case by case 'palm tree' justice."[75] *Dextra Bank & Trust Company Ltd v Bank of Jamaica*, a case arising out of a commercial fraud involving two banks, provides a helpful illustration of how this

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[70] *Ibid* at 583. Money had and received was one of the four common counts of the 16th century *indebitatus assumpsit* which underlies the modern of law unjust enrichment. Lord Goff and Jones urge abandoning the "old language of money had and received" in pleadings, given that the old forms of actions have long been abolished and such language reveals little about the true nature of claims in unjust enrichment. However, money had and received has not been subsumed in the law of unjust enrichment and continues to be a distinct cause of action in Canada. Lord Goff & Gareth Jones, *The Law of Unjust Enrichment,* 8th ed (London, UK: Sweet & Maxwell, 2011) at 15; *Peel*, *supra* note 6; Smith & Beswick, *Unjust Enrichment*, *supra* note 44 at 1.1.7.

[71] McInnes, *Unjust Enrichment*, *supra* note 55 at 41.

[72] *Peel*, *supra* note 6 at 787.

[73] See e.g. *Baylis v Bishop of London*, [1913] 1 Ch 127, 82 L.J Ch 61 at 140; *Sinclair v Brougham*, [1914] AC 398, 83 LJ Ch 465 at 452; *Holt v Markham*, [1923] 1 KB 504, 74 LJKB 318, at 513; *Morgan v Ashcroft*, [1938] 1 KB 49 at 62.

[74] *Dextra*, *supra* note 6 at para 38.

[75] *Ibid* at paras 36-38; *Peel*, *supra* note 6 at 802; *Barafield Realty Ltd v Just Energy (BC) Limited Partnership*, 2017 BCCA 307 at para 48.

approach works in practice. The claimant, Dextra, drew a cheque on its bankers in favour of the defendant, the Bank of Jamaica (BOJ). Dextra drew the cheque on the assumption that it would constitute a loan to the BOJ. This assumption, however, proved mistaken as the loan agreement was never concluded. In fact, the BOJ had never requested such a loan and it was led to believe that it received the cheque as part of a currency exchange transaction, under which it was to transfer the equivalent sums in Jamaican dollars to nominated third parties. After the BOJ paid out the sums to the fraudsters, the fraud came to light. Dextra, left out of pocket, sought to recover the funds from BOJ based on a mistake of fact. Adopting a broad practical justice interpretation of the change of position defence, the Privy Council held it was unjust to require the BOJ to make restitution as the BOJ had relied in good faith on the payment to reimburse the accounts of nominees.[76] Interestingly, it is difficult to explain the outcome in Dextra through a disenrichment framework as the payment of the Jamaican dollars had been made before the BOJ received Dextra's cheque. As such, there was only an anticipatory change of position, meaning that no causal relationship could be established between the receipt and the disenrichment. Put differently, the "reliance on the anticipation of a receipt is not the same as reliance on the receipt itself."[77]

Admittedly, *Dextra* does not settle the controversy as to the nature of change of position, and one can argue that the Privy Council deliberately sidestepped the thorny question of what basis the defence operates. Yet, the decision still offers two important insights. First, a "practical justice" reading of the defence avoids black letter law or overly technical analysis. The defence simply prevents recovery where there is an "injustice" in requiring restitution. Second, a determination of whether the relevant circumstances make restitution unjust takes place through a principled "judicial evaluation". [78] Thus, once it was established that the BOJ had changed its position in good faith and in reliance, albeit anticipatory, of the payment, the defence was held to be available. There was no further exercise of judicial discretion to determine how the losses should be apportioned between parties, who were both innocent of the fraud. The latter point is quite important. As I will argue in the next section, the change of position does not provide the court with "carte blanche" to deny recovery simply because "it thinks it unfair or unjust in the circumstances to grant recovery."[79] Doing so will infuse the defence with uncertainty,

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[76] *Dextra*, *supra* note 6 at paras 36–38.

[77] Tim Akkouh & Charlie Webb, "Mistake, Misprediction and Change of Position" (2002) 10 RLR 107 at 111.

[78] *Commerzbank Ag v Price-Jones*, [2003] EWCA Civ 1663 at para 53 (CA); *Lipkin Gorman supra* note 5 at 578; Andrew Burrows, *The Law of Restitution,* 2nd ed (Oxford: Oxford University Press, 2002) at 514.

[79] *Lipkin Gorman*, *supra* note 5 at 578.

disintegrating it to an arbitrary apparatus far removed from the principled analysis that *Simms* sought to create in the first place.

8. The Maxim of Two Innocent Parties: *Marvco Colour Research v Harris*

Having discussed the primary contours of the mistaken payment regime, we can now turn to the key question, namely, whether carelessness bars restitution. Put more broadly, should parties bear losses that are proportionate to their respective fault or carelessness? This question becomes especially important where both the payer and the payee are victims of a fraudulent scheme, but where one party's careless conduct is responsible for the initial mistake. The *American Restatement* adopts such a balancing test in its articulation of the change of position defence.[80] Section 142(2) permits the recipient to raise the defence only if "the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant." Indeed, if the change of position defence is founded in equity, such balancing of the parties' equities is appropriate and compatible with the equitable discretion upon which the defence operates. This view has also influenced Canadian jurisprudence.

Some scholars argue that the reasoning of Canadian authorities indicates that the courts have adopted and developed a norm of "two innocent parties" involving an analysis of the relative fault or carelessness of the payer and the payee.[81] In his seminal treatise, *The Law of Banking and Payment in Canada*, Bradley Crawford, Q.C., credits the original formulation of the maxim to Lord Ashurst's statement in *Lickbarraw v Mason* that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."[82] A similar statement to this effect appears in the Supreme Court's decision in *Marvco Colour Research Ltd v Harris*: "as between two innocent parties there remains a distinction significant in the law, namely that the respondents, by their carelessness, have exposed the innocent appellant to risk of loss."[83] It is important to note that the

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[80] The American Law Institute, *Restatement of The Law of Restitution*, (St Paul, MN: American Law Institute Publishers, 1973) at § 142(1) [*American Restatement*].

[81] Bradley Crawford, *The Law of Banking and Payment in Canada* (Aurora, ON: Carswell, 2008) at paras 3-170–3-174 [Crawford, *Law of Banking*]; Peter D Maddaugh & John D McCamus, *The Law of Restitution,* (Aurora, ON: Carswell, 2004) (loose-leaf updated 2004) at paras 10–60; John D. McCamus, "Rethinking Section 142 of the Restatement of Restitution: Fault, Bad Faith, and Change of Position" (2008) 65 Wash & Lee L Rev 889 at 908.

[82] *Lickbarraw v Mason*, *supra* note 8 at 70.

[83] *Marvco*, *supra* note 9.

term "carelessness" in these passages does not mean negligence in tort, which requires a breach of a duty of care, but simply neglect or lack of reasonable care.[84] Hence, the two parties are innocent in the sense that they are not guilty of any wrongdoing, but one is to suffer for the fraud of a third because of his relatively greater fault.[85]

9. Judicial Support for Relative Fault

A number of recent cases also seem to have engaged in a comparative fault analysis. In *Rogers v Priyance Hospitality Inc*, Mesbur J. dismissed the plaintiff's motion for recovery of a mistaken payment by relying on, among other things, a "long-standing principle" that as a general proposition, between two totally innocent parties, justice requires that the party who is in a position to prevent the loss, in this case the law firm, should bear it.[86] In *Bank of Montreal v Asia Pacific International Inc*,[87] Nishikawa J. dealt with a claim by BMO seeking the return of $428,000 as money paid under a mistake of fact. A fraudster had impersonated a client and authorized a wire transfer to Asia Pacific. In consideration for this wire transfer Asia Pacific sold gold to a third party, an accomplice to the fraud, before knowing the initial wire transfer was fraudulent. Nishikawa J. distinguished the case from *BMP*, holding that the plaintiff bank could not recover the money under a mistake of fact as it was capable of discovering the fraud.[88] Notably, these decisions do not treat relative fault strictly as part of the change of position defence. Rather, the judges held that the payers could not argue they had made a mistake of fact in transferring the funds because they had been careless in failing to detect the fraud. As such, the payers' claims for restitution of the mistaken payment were denied as they did not meet the first step of the *Simms* test.[89]

Scholars favouring this balancing test also find support in a number of early authorities that, while not directly endorsing the doctrine, have considered whether a party's careless conduct commenced the chain of events leading to the loss. Crawford, Q.C., for instance, cites *Bank of Nova Scotia v Toronto-Dominion Bank*,[90] where Laskin J.A. (as he then was) opined that "BNS was better positioned to detect the fraud than TD

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84 *Ibid* at 783. See also Cartwright J.'s dissent in *Prudential Trust Co Ltd et al v Cugnet*, [1956] SCR 914, 5 DLR (2d) 1, overturned, at 929 [*Cugnet*].

85 *Marvco, supra* note 9 at 785.

86 *Rogers v Priyance Hospitality Inc*, 2016 ONSC 7851 at paras 21, 26–30 [*Rogers*].

87 2018 ONSC 4215 [*Asia Pacific*].

88 *Ibid* at paras 50–53.

89 *Ibid* at paras 41, 51; *Rogers, supra* note 85 at paras 24–30.

90 [2001] OJ No 1717, 200 DLR (4th) 549.

because of its relationship with the drawer."[91] Professor McCamus refers to *Clark v Eckroyd,* noting that the Court of Appeal for Ontario reasoned that, although both parties were mistaken, the "origin and real cause of the loss was the defendant's own neglect."[92]

National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd[93] provides another practical illustration of how courts can apply a comparative fault analysis when addressing the change of position defence. In that case, which arose out of foreign exchange dealings, the claimant bank mistakenly paid US$500,000 to the defendant. Although the defendant informed the bank of the mistake, the bank was insistent that the money was the defendant's property. The defendant then lost the money by investing it, without security, in a company that became insolvent. When the bank discovered the accounting error that had led to the mistake, it brought proceedings against the defendant for unjust enrichment. The Court of Appeal affirmed the trial judge's decision to assess the parties' relative fault as a basis for reducing the extent to which the defendant could raise the change of defence position. While the bank was the party principally at fault for not observing procedure and failing to address the error promptly, the defendant was also held to bear some responsibility for the loss.[94] Looking at the matter "overall and in the round", the trial judge concluded that "justice would be done" by holding Waitaki liable for 10 percent of the amount at issue.[95]

10. Is Fault Relevant to Mistaken Payments? A Reappraisal of the Case Law

Although importing the relative fault maxim the change of position defence may seem to offer greater flexibility to "secure justice in the individual case", doing so presents important conceptual and practical challenges.[96] Restitutionary remedies in cases of mistaken payments address a basic problem, namely, that the recipient does not have any legal claim to the money paid and was not intended to receive the funds. The payment is made on the supposition that "a specific fact is true, which would entitle the other to the money."[97] Since this perception is false and the recipient is

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91 Scotiabank was better positioned to detect the fraud than TD because of its relationship with the drawer. See *ibid* at para 22.

92 *Clark v Eckroyd,* [1886] OJ No 11, 12 OAR 425 at 430 [*Clark*].

93 [1997] 1 NZLR 724 [*Waitaki 1997*].

94 *Waitaki 1997*, *supra* note 92 at 734.

95 *Ibid.*

96 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, [1999] 2 NZLR 211 at 230 [*Waitaki 1999*].

97 *Kelly*, *supra* note 12 at 159.

not entitled to the payment, the payer has the right to recover the money.[98] Of course, restitution is barred if there is a justifying ground for keeping the money, such as where the payee faces a prejudice in having to return the funds due to change of position.[99] Otherwise, it is unfair to permit the recipient to keep an unjust enrichment simply because the payer could have been more diligent. This principle helps explain why *Marvco,* which is cited to support the relative fault maxim, cannot be extended to mistaken payments.

The central issue in *Marvco* is not a mistaken payment, but rather *non est factum*, which operates as a defence to the signature doctrine in contracts.[100] At common law, if a party signs a document, she is taken to have notice of its content. As such, a party is bound by a contract she has signed.[101] However, if a document is signed due to a fundamental misapprehension as to its nature, not merely its contents, the defendant can raise the defence of *non est factum* "on the basis that his mind at the time of the execution of the document did not follow his hand."[102] In this context, it makes sense to posit that someone who has not even taken the time to read the document cannot then disavow her signature by arguing the document she signed is fundamentally different from the one she had in mind. Matters are different in a payment by mistake of fact, where it is the payee's (the defendant's) conduct which is under scrutiny; it is unconscientious to let the payee keep the money when she has no entitlement to the money.[103] Since the money is paid under a mistake of fact, the payer (the plaintiff) in most cases bears some degree of fault; had she been diligent, she would not have been mistaken or miscalculated. Yet, the law is indifferent as to the payer's carelessness: by merely mistakenly transferring funds she has not exposed an innocent party to the risk of loss. In contrast, a party who carelessly signed a contract without actually understanding it and then claims *non est factum* compromises business certainty, and consequently, the other party's reliance interest. This distinction is why Parke B J. expressly stated in *Kelly* that money paid under a mistake of fact "may, generally speaking, be recovered back,

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98 *Ibid*; Goff & Jones, *Unjust Enrichment*, *supra* note 19 at 309–310.

99 *Simms*, *supra* note 11 at 535*; National Trust Co v Newmaster,* [2003] OJ No 3830, 67 OR (3d) 310 at para 24.

100 *Marvco*, *supra* note 9 at 778.

101 *L'Estrange v Graucob Ltd,* [1934] 2 KB 394 at 403 (CA) at 406–407; *Karroll v Silver Star Mountain Resorts Ltd,* 1988 CanLII 3294 (BC SC) at para 13; Bruce MacDougall, *Mistake in Contracting*, (Markham: LexisNexis, 2018) at 193–194.

102 *Marvco*, *supra* note 9 at 778. See also *Cugnet*, *supra* note 83 at 921; *Carlisle and Cumberland Banking Company v Bragg*, [1911] 1 KB 489, 80 LJKB 472 at 495.

103 *ILWU Canada, Local 502 v Ford*, 2016 BCCA 226 at para 30 ["*Ford*"]; *CIBC v Bloomforex Corp*, 2020 ONSC 69 at para 42 [*Bloomforex*].

however careless the party paying may have been, in omitting to use due diligence to inquire into the fact."[104]

As explained above, the liability for mistaken payments does not turn on judicial discretion. Nor is the change of defence position meant as judicial license for intuitive justice.[105] Thus, introducing fault into this branch of law results in unwarranted complexity by inviting courts to conduct a loose examination of what might be fair between the parties. Lord Goff in *Lipkin Gorman* was at pains to point out that "recovery of money in restitution is not, as a general rule, a matter of discretion for the court", but rather, the claim is made in "common law" and "as a matter of right".[106] And yet, these principles were disregarded in *Waitaki*, with the result that New Zealand courts struggled to reconcile fault with change of position and descended into a discretionary weighing of the parties respective blameworthiness.[107] It is therefore not surprising that in *Dextra,* the Privy Council rejected making change of position a fault based inquiry. The Privy Council refused to engage in balancing the equities of the parties or assessing the relative fault of the two banks, finding that such a "hopeless" exercise would make the defence "unstable".[108] The reasoning was clear: "it has been well settled for over 150 years that the plaintiff may recover however careless [he] may have been, in omitting to use due diligence."[109] Their Lordships also refused to consider the payee's fault, considering it unnecessary to extend the inquiry into the payee's conduct beyond good faith.

This article's rejection of the relative fault thesis should not be taken to mean that further inquiries into the payer's or payee's respective conduct are never appropriate, but rather, that such inquiries are independent of unjust enrichment and can be conducted in a principled manner under other causes of action. These include negligence where a breach of a duty of care is established or estoppel where the necessary prerequisites such as representation and detrimental reliance are met. For example, it can be argued that the defendant's submission in *Waitaki*, that it was the bank's insistence that the payment was due which led to the loss, does not depend on the payer being more at fault than the payee.[110] Rather, the defendant's submission offered an independent reason for the defence of estoppel: the

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104 *Kelly*, *supra* note 12 at 322.

105 *Credit Suisse (Monaco) SA v Attar,* [2004] EWHC 374 at paras 70, 93 ["*Credit Suisse*"]; *Ford*, *supra* note 102 at paras 30, 49; *Lipkin Gorman*, *supra* note 5 at 579.

106 *Lipkin Gorman*, *supra* note 5 at 578.

107 *Dextra*, *supra* note 6 at para 45; *Waitaki 1997*, *supra* note 92; *Waitaki 1999*, *supra* note 95.

108 *Ibid* at paras 44–45; Birks, *Unjust Enrichment*, *supra* note 1 at 216.

109 *Dextra*, *supra* note 6 at para 45.

110 *Waitaki 1997*, *supra* note 92 at 733.

bank could not go back on its representation after Waitaki relied to its detriment on the bank's repeated assurances that the money was properly payable.[111]

Similarly, duty of care provides a more suitable framework for looking at the conduct of parties rather than the vague maxim of "two innocent parties". Indeed, in bank-customer relations, banks have long been under a duty to exercise reasonable care and diligence in performing all banking operations.[112] This duty is not only implied into the bank-customer contract, but courts have also found and applied it in tort. [113] Determining whether the standard of care has been breached requires a factual inquiry into the bank's conduct, the account and verification agreement between the parties, and practices in the banking industry.[114] An important aspect of this duty is the requirement to use a commercially reasonable system of security for electronic funds transfer, a requirement which has been codified in Article 4A of the *Uniform Commercial Code* (UCC).[115]

At first blush, it may be tempting to view the ruling in *Asia Pacific* as consistent with the reasonable banker standard. In this case, the imposter purported to be an account holder at BMO, from whom she ordered a wire transfer of nearly the entire available balance to Asia Pacific International's (API) account. As a result of this transfer, API released gold bars to Filali, the fraudster who the police could never identify. BMO's staff complied with the imposter's transfer request despite many unusual circumstances, including the imposter going to a BMO branch different from the customer's usual branch, the imposter ordering a wire transfer in excess of the account's available balance and doubling the amount of the transfer during the transaction, and the imposter's signature differing from the customer's signature on file; none of the imposter's answers were responsive to the questions asked by staff, and yet, they accepted them and made no further inquiries.[116] The conduct of BMO's staff was not even consistent with the bank's own policy on "Wire Payments Procedures and Processes", which stated that it is "the employee's responsibility to ensure

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[111] Ross Grantham & Charles Rickett, "Change of Position and Balancing the Equities" (1999) 7 RLR 158 at 163.

[112] *Hilton v Westminster Bank, Ltd* (1926), 135 LT 358 (CA) at 362, 358*; Selangor United Rubber Estates, Ltd v Cradock et al (No. 3),* [1968] 2 All ER 1073, [l968] l WLR 1555 at 117–118.

[113] *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, [1993] SCJ No 52.

[114] *Dupont Heating & Air Conditioning Limited v Bank of Montreal*, [2009] O.J. No. 386 at para 31. See also Crawford, *Law of Banking*, *supra* note 80 at paras § 9:38–9:39, 9:92–9:95.

[115] UCC § 4A-202(c) (1995).

[116] *Asia Pacific*, *supra* note 86 at para 41.

that the individual requesting the wire transfer is authorized to perform the transaction and authenticate that the request form is from the BMO customer and not an impersonator."[117]

Considering these red flags, it seems rather uncontroversial to find BMO liable for negligence *vis-à-vis* its customer. Such a finding is also consistent with the well settled rule in common law that any loss from a transaction unauthorized by the customer falls on the bank.[118] These factors, in turn, help explain why BMO restored the full amount of the wire transfer to the customer's account.[119] It is, however, an entirely different matter to find BMO liable to API for failing to detect the fraud; there is simply no general duty of care that requires the bank to protect a third-party payee from fraud committed by a rogue.[120] Therefore, it is not surprising that the trial judge did not find BMO liable in negligence, but instead, chose to base her decision on the maxim of two innocent parties. Yet, it was not necessary to resort to relative fault to hold BMO liable. As acknowledged by the court itself, the defence of change of position would have been available to the payee had the case been decided under a mistake

117 *Ibid* at para 42.

118 See e.g. *Hall v Fuller* (1826) 5 B & C 750 at 757; 108 ER 279 at 282 where Bayley J. stated: "The banker, as the depository of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer, and to justify the payment, he must shew that the order is genuine, not in signature only, but in every respect." See also *Clansmen Resources Ltd v Toronto-Dominion Bank*, [1990] 4 WWR 73, 43 BCLR (2d) 273 at para 45. In the words of Southin J., "a banker who pays out money contrary to his customer's instructions cannot debit that money to his customer. The customer is entitled to have the debit entry reversed."

119 *Asia Pacific*, *supra* note 86 at para 33.

120 See e.g. *Groves-Raffin Construction Ltd v Canadian Imperial Bank of Commerce*, 1975 CanLII 912 (BC CA) and *McDonald and Dickson v TD Bank*, 2021 ONSC 3872 at paras 151–155. In these cases, fraudsters deposited investor funds in an account at the defendant banks. The victims sued the banks in negligence, alleging that they had constructive knowledge of the fraud and thus owed them a duty to prevent the fraudulent use of the accounts. Most recently, *1169822 Ontario Limited v The Toronto-Dominion Bank,* 2018 ONSC 1631 at paras 214–217, relying on *Dynasty Furniture Manufacturing Ltd v Toronto Dominion Bank*, 2010 CarswellOnt 1241, aff'd in 2010 ONCA 514, and *Pardhan v Bank of Montreal*, 2012 ONSC 2229, held that banks do not have a duty of care to prevent harm to a third-party by a dishonest bank customer when the bank merely has constructive knowledge of the fraud. These cases can be distinguished from *Asia Pacific* on the basis that the fraudster in *Asia Pacific* was not a BMO customer. However, it can be still inferred from these authorities that if a bank does not owe a duty of care to protect third parties from fraud by a bank's customer, it is unclear why the bank would have an analogous duty to prevent a fraud perpetrated by a rogue where the bank merely had constructive knowledge.

of fact.[121] This approach would have led to a similar outcome, albeit on a more principled basis.

A close examination of two other authorities often cited to support the relative fault thesis also reveals that the outcome of these cases could be explained more coherently based on other reasons. In *Clark*, the defendant Eckroyd shipped goods by rail to the plaintiff H. E. C. & Co., its customer. In one instance, the defendant invoiced the plaintiff for a shipment which was misdirected to "J. H. C. & Co." instead of "H. E. C. & Co.". The carriers kept the shipment for eighteen months but ultimately sold the goods for storage charges. The plaintiff, assuming the shipment had been received, paid the invoice only to discover that the goods had never been delivered.[122] The Ontario Court of Appeal held that the plaintiff was entitled to recover the money under a mistake of fact.[123] The Court applied the general rule set out in *Kelly* that money paid under mistake of fact can be recovered regardless of the payer's carelessness, but also held that this rule is subject to the further qualification that a payee "must not through the neglect or misconduct of the person who paid it be placed in a worse position than if he had not paid it."[124] Rather than supporting the relative fault thesis, this statement seems more aligned with the defence of change of position which was subsequently expanded in *Mobil Oil Canada, Ltd v Storthoaks*[125] and *Lipkin Gorman*. In fact, the decision went on to conclude that the payer's neglect in not discovering the mistake earlier was irrelevant, as the plaintiff was careless toward its own business.[126] The plaintiff owed no duty of care to the defendant that could form the basis of a finding of negligence.[127]

Carelessness seems to play a more prominent role in the Ontario Superior Court of Justice's decision in *Rogers*.[128] In this case a law firm, having received a deposit from its client, issued a certified cheque to a third party secured creditor to which the client owed money.[129] The law firm later discovered the deposit received from its client was invalid and sought the return of the money from the payee.[130] The Court, however, denied recovery, reasoning that the law firm could have easily avoided the

121 *Asia Pacific*, *supra* note 86 at paras 53–54, 64.

122 *Clark*, *supra* note 91 at 425.

123 *Ibid* at 428.

124 *Ibid* at 429.

125 *Mobil Oil Canada, Ltd v Storthoaks (Rural Municipality)*, [1976] 2 SCR 147, [1975] SCJ No 70 at 164; *Lipkin Gorman*, *supra* note 5.

126 *Clark*, *supra* note 91 at 431.

127 *Ibid.*

128 *Rogers*, *supra* note 85.

129 *Ibid.*

130 *Ibid* at para 15.

loss had it "exercised even a modicum of care and attention.".[131] Mesbur J. explained that that he "… fail[ed] to see how the firm's carelessness can equate to a mistake of fact at law" and that the law firm should bear the loss."[132] Yet, there was no reason for the Court to assess the law firm's blameworthiness: recovery could have simply been barred based on the fact that the payee had received the money for valuable consideration, the discharge of a debt, which is an clear exception to the to the *prima facie* right of recovery. Indeed, Mesbur J. also decided the case on these grounds.[133] The Court's analysis is also problematic because it relies on the "general proposition that as between two totally innocent parties, justice requires that the party who was in a position to prevent the loss should bear it."[134] The decision purports to extract this "long-standing" principle from *Armatage Motors Ltd v Royal Trust Corp of Canada*.[135] This, however, seems to be a misattribution, as *Armatage Motors* involves the doctrine of subrogation for two competing mortgage registrations and contains no mention of the two innocent parties maxim.[136] The proposition seems to have been derived from *Marvco*, which deals with *non est factum*. This is a doctrine which, as I explained earlier, relies on a set of rationales that differ from those of payment by mistake of fact.[137]

11. How Receptive Are Canadian Courts to Relative Fault?

A survey of the relevant authorities indicates that Canadian courts by and large have shied away from comparative fault analysis in deciding restitutionary cases. In *RBC Dominion Securities v Dawson*, the Court of Appeal of Newfoundland and Labrador denied the defence of change of position to a payee that had used a portion of the money to pay her credit card debt and to pay back money she had borrowed from her family.[138] The Court found the trial judge to have erred by denying restitution due to the "presence of carelessness on the part of the payor."[139] Citing *Kelly*, the Court held that "the carelessness of RBC should not have prejudiced its right to the return of the money."[140] In *ILWU Canada, Local 502 v Ford*, a case involving recovery of funds that the defendant treasurer had stolen from his union, the Court of Appeal for British Columbia stated

131 *Ibid* at para 30.

132 *Ibid* at para 29.

133 *Ibid* at paras 16, 22; *Simms*, *supra* note 11 at 535.

134 *Rogers*, *supra* note 85 at para 21.

135 *Armatage Motors Ltd v Royal Trust Corp of Canada,* [1995] OJ No 1778, 45 RPR (2d) 204, affirmed by [1997] OJ No 3259 (ON CA) [*Armatage Motors*].

136 *Ibid* at paras 21–25.

137 *Marvco*, *supra* note 9 at 785.

138 *RBC Dominion Securities v Dawson*, 111 DLR (4th) 230, [1994] NJ No 22 (CA).

139 *Ibid* at para 47.

140 *Ibid.*

that "there is no authority for the proposition that carelessness precludes a payor from reclaiming mistakenly paid money."[141] On the contrary, the authorities indicate that such carelessness is not a factor."[142] Writing for the Court, Garson J.A. approvingly cited the English decision *Credit Suisse (Monaco) SA v Attar*, where the careless conduct of the plaintiff bank led to the mistaken payment. The English Court of Queen's Bench noted that "manifest fault" on the part of Credit Suisse would not afford the payee a defence to a restitutionary claim.[143] Garson J.A. also rejected the proposition that courts are free to "undertake a loose examination of what might be fair," reiterating Lord Goff's observation in *Lipkin Gorman* that the change of position defence "does not give a court 'carte blanche' to reject a claim simply because it thinks it is unfair or unjust in the circumstances to grant recovery."[144]

These passages were accepted by the Alberta Court of Queen's Bench in *Chevron Canada Resources v Canada*, where Hall J. found that "as a matter of law, the gross negligence of Chevron in making its miscalculations does not afford a defence to its claim." [145] Regardless of how careless or incompetent Chevron was in making the miscalculations that led to the mistaken payment, it was still entitled to recover the money paid under a mistake.[146] Two other recent decisions from Alberta, *1242311 Alberta Ltd v Tricon Developments Inc* and *Great-West Life Assurance Company v King*, followed a similar approach, finding that carelessness does not preclude a payer from recovering funds paid under a mistake of fact.[147]

Another case which demonstrates the courts' disinclination to adopt the relative fault test is *CIBC v Bloomforex Corp*. Here, fraudsters impersonated customers of CIBC and BMO, tricking the two banks into wiring payments to Bloomforex, a money exchange in the business of transferring money between Canada and China. Bloomforex converted the funds to yuan and paid them out to the fraudsters' accounts in China. Since the transaction was not authorized by the customers, the banks reimbursed their customers and bore the loss. However, they sued to recover the funds transferred under a mistake of fact from Bloomforex. Bloomforex sought a motion to dismiss the claim, arguing *inter alia* that "as between two innocent victims of a fraud, the banks were better positioned

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141 *Ford*, *supra* note 102 at para 41.

142 *Ford*, *supra* note 102 at para 41.

143 *Credit Suisse*, *supra* note 104 at paras 70, 93.

144 *Ford*, *supra* note 102 at paras 30, 49; *Lipkin Gorman*, *supra* note 5 at 579.

145 *Chevron Canada Resources v Canada*, 2019 ABQB 418 at paras 70–72.

146 *Ibid* at para 73.

147 *1242311 Alberta Ltd v Tricon Developments Inc*, 2020 ABQB 411 [*Tricon*] at para 191, *Great-West Life Assurance Company v King*, 2013 ABQB 529 at para 14.

to avoid the loss and should bear the risk of that loss."[148] Bloomforex maintained that it was in no position to discover or interrupt the fraud, and even if it had taken action, it would not have prevented the loss in time.[149] In contrast, both banks had ample opportunity to detect and halt the fraud before sending the money to Bloomforex. Penny J. approached the case from the *Simms* framework, this being the test adopted by the Supreme Court for recovery of money paid under a mistake of fact in *BMP*.[150] Despite the defendant's reliance on *Rogers* and *Asia Pacific*, Penny J. refused to follow these cases, finding that "the 'two innocent parties' test involving an analysis of the relative fault or carelessness of both parties has no application to a claim for money paid under a mistake of fact and that the carelessness of the payor is, therefore, irrelevant to such a claim."[151] Although this was only a summary trial, the Court also indicated that the only relevant defence would be "whether the payee has, in good faith, changed its position."[152]

The above is not a universal survey and there are exceptions where the "two innocent parties" maxim has been applied. One example is *CropConnect v Bank of Montreal et al*, where a rogue impersonating the plaintiff's supplier tricked the plaintiff into transferring funds to an account owned by "9392", a company incorporated in Quebec.[153] The funds were used by the rogue to purchase land from 9392. Since both parties alleged that they were innocent parties to the fraud, Harris J. applied *Marvco* and found that "9392 was in a better position to prevent the fraud and is therefore the party that should bear the loss."[154] Alternatively, the outcome can also be explained through the *Simms* test. The plaintiff could *prima facie* recover the money under a mistake of fact and there were no qualifications to rebut this right. The money had not been paid in *bona fide* discharge of debt and the evidence indicated that the payee knew that the funds had been traced back to a fraudulent transaction. Since the change of position is not available to a wrongdoer, or "one who has changed his position in bad faith," the defendant could not plead the defence as the Court found he "was part of the fraud."[155] As a result, considering the relative fault of the parties was unnecessary and did not affect the outcome of the case.

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148 *Bloomforex*, *supra* note 102 at para 4.

149 *Ibid* at para 26.

150 *Ibid* at para 9; *BMP*, *supra* note 1.

151 *Bloomforex*, *supra* note 102 at para 44.

152 *Ibid* at para 45.

153 *CropConnect v Bank of Montreal et al*, 2020 MBQB 186 [*CropConnect*].

154 *Ibid* at para 43.

155 *Lipkin Gorman*, *supra* note 5 at 580; *CropConnect*, *supra* note 154 at paras 28, 33.

To summarize, the relative fault doctrine has not received wide adoption by Canadian courts. While some cases have cited or applied "the two innocent parties" principle, this has not been done in a freestanding fashion. Put differently, the maxim often offers an alternative justification for an outcome than can be explained using the *Simms* framework. This point is also in line with the principles of unjust enrichment more broadly. It is unfair for a payee who receives a mistaken payment to retain it. It would also be unfair to allow the payer's mistake to expose the payee to risk or disenrichment. Hence, the change of position defence protects a payee who has changed her position in good faith and in reliance of the funds. Importantly, the change of position defence already remedies the situation where it would be unfair for the payee to return the funds; there is no need for an additional balancing of equities.

Furthermore, the approach taken in *Bloomforex* and related cases can be defended on the basis that importing relative fault into mistaken payments regime adds unwarranted complexity. It risks burdening the courts with measuring numerous variables such as care, diligence, and competence. These are criteria which are largely irrelevant as to why mistaken payments can be reclaimed. These factors not only compound the problems at trial but also demand courts to loosely examine the position of the parties with no clear guiding principle to drive such an inquiry. In addition to confusing the prospective litigants as to how their disputes will be resolved, relative fault supplants *Simms'* coherent step-by-step legal analysis with an otherwise loose and arbitrary examination of what seems fair in the circumstances.

12. Conclusion

There remain important questions about the current state of unjust enrichment in Canada. Is unjust enrichment a cause of action or an organizing principle? What is the relationship between juristic reasons and the long-established categories of recovery? How can we explain the origin and bases of the defences which are available to defendants of restitutionary claims? This article also explored another contentious question: whether fault or carelessness is relevant to a recovery of mistaken payment. In the recent edition of *Goff & Jones, The Law Of Unjust Enrichment*, the leading treatise in the area, the authors remain unpersuaded by the Privy Council's reasoning in *Dextra* that relative fault makes the recovery of mistaken payments too uncertain.[156] They argue that restitution is no different from other areas of civil litigation, including contributory negligence, where courts routinely engage in comparing the

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[156] Goff & Jones 2016, *Unjust Enrichment*, *supra* note 19 at 795.

parties' respective fault of the parties.[157] If one takes the view that change of position is an equitable defence, looking at the parties' relative fault can be seen as necessary for securing an equitable allocation of the loss. This is the approach the New Zealand courts employed in *Waitaki* and has been officially endorsed by the *American Restatement*.[158] Further support for this view can be also drawn from terminology such as "equitable relief" or weighing the "equities" of the parties, phrasing which often appears in court decisions.[159]

It is indeed challenging, if not impossible, to offer a universal explanation for any matters on the law of unjust enrichment. This includes the topic of mistaken payments. The law in Canada has developed in such a pluralistic fashion that can be hardly unified under a single conceptual framework. Despite these challenges, this article offered the view that relative fault plays no role in the *Simms* test, a framework adopted by the Supreme Court as the primary means by which to recover mistaken payments. My argument relied on three interrelated points. First, it is difficult to reconcile carelessness with the rationale for recovery; the payment can be reclaimed because it was made based on a false belief or assumption. As the authorities dating back to *Kelly* indicate, the payer's carelessness is simply no good reason to permit the payee retain a windfall to which she is not entitled and faces no prejudice in returning due to a change of position.[160] Second, *Marvco*, which has been cited for the "two innocent parties" proposition does not support importing relative fault into the analytical framework for mistaken payments. *Marvco* precludes a defendant from raising the defence of *non est factum* where she has not even gone through the trouble of reading the contract, and by such carelessness, has exposed an innocent contracting party to loss.[161] Matters are different in mistaken payments where the payee has received a windfall to which she has no entitlement. Implanting relative fault into mistaken payments leads to the strange result of allowing the defendant to keep the windfall based on the plaintiff's carelessness, even though it is the payee's conduct which is subject to scrutiny. This is not to say that an inquiry into the payer's conduct is never relevant, but rather, that such inquiries should be made in a structured manner under other causes of action such as negligence in tort or estoppel. The reasonable banker standard was one such example which I explored in the context of banking. Third, based on

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157 *Ibid* at 795.

158 *Waitaki 1997*, *supra* note 92; *Waitaki 1999*, *supra* note 95; *American Restatement*, *supra* note 79 at § 142(1).

159 See e.g. *Garland*, *supra* note 32 at para 64; *National Trust Co v Newmaster*, [2003] OJ No 3830, 67 OR (3d) 310 at para 17; *Business Development Bank of Canada v 0792989 BC Ltd*, 2014 BCSC 611 at paras 130–134; *Bloomforex*, *supra* note 102 at para 42.

160 *Kelly*, *supra* note 12 at 322.

161 *Marvco*, *supra* note 9 at 783

the study undertaken by this article, it is evident that relative fault has not been widely adopted by Canadian courts. Many recent authorities have refused to consider relative fault, reasoning that it has no application to the recovery of payments by mistake. Further, in those authorities where the maxim of two innocent parties has been applied, the outcome can be explained based on established defences, such as a discharge of bona fide debt or a change of position, or an entirely different analytical framework such as breach of duty of care. The article preferred this alternative method as it would allow the court to conduct a structured analysis without having to loosely search for what seems like a fair solution.