Goff & Jones: The Law of Unjust Enrichment

By C. Mitchell, P. Mitchell & S. Watterson
10th ed. (London: Sweet & Maxwell, 2022, cxlvii and 1093, £349)

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While Canadian law no longer reflexively looks across the Atlantic for direction, it does continue to benefit by being a member of the common law family. Having grown from the same foundations, common law jurisdictions naturally share the same basic patterns of private law thought. The categories and grounds of liability are much the same whether a dispute arises in, say, Canada, England, or Australia. So too, because common law jurisdictions largely continue to share values, developments that originate in one place may be equally appropriate in another. And, of course, that process works in both directions. Just as Canadian courts sometimes look abroad for help, Canadian decisions occasionally exert a substantial influence elsewhere.[2] While each jurisdiction is free to chart its own path, membership in the common law family is mutually beneficial.

All of that is obvious from a glance at any well-stocked law school or law firm library. The shelf devoted to the law of contract will certainly contain books by Waddams,[3] Fridman,[4] and Swan,[5] but it will likely hold titles by Anson[6] and Treitel[7] as well. A search through the torts section will uncover both *Fridman's The Law of Torts in Canada*[8] and *Fleming's*

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2 The doctrine of private law illegality that Justice McLachlin presented in *Hall v Hebert*, [1993] 2 SCR 159 at 169, 1993 CanLII 141 (SCC) is a leading example. It substantially informed the decision of the United Kingdom's Supreme Court on the same issue: *Patel v Mirza*, [2016] UKSC 42.

3 Stephen M Waddams, *The Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022).

4 Jason Neyers, ed, *Fridman's The Law of Contract in Canada*, 7th ed (Toronto: Thomson Reuters, 2024).

5 Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018).

6 Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020).

7 Edwin Peel, *Treitel: The Law of Contracts*, 15th ed (London: Sweet & Maxwell, 2020).

8 Erika Chamberlain & Stephen Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters, 2020).

The Law of Torts.[9] Any Canadian interested in the law of trusts will want access to not only *Waters' Law of Trusts in Canada*[10] and *Oosterhoff on Trusts*,[11] but also *Underhill & Hayton on Trusts*.[12] And so on. While the reader must be alert to differences, the international texts are invaluable.

Until relatively recently, the same pattern uncontroversially held true on the subject of restitutionary liability. In fact, given the paucity of domestic authorities,[13] works from abroad played a particularly prominent role in the development of the Canadian law of unjust enrichment. Until 2014,[14] *Maddaugh & McCamus*[15] largely had the Canadian field to itself. It was—and remains—an exceptional body of work, but for additional information or alternative perspectives, lawyers and judges necessarily looked abroad. Above all else, Canadian courts have relied heavily on *Goff & Jones: The Law of Restitution*, since its first appearance in 1966.[16]

It would be difficult to overstate the role that that publication has played in the development of the modern law of unjust enrichment. The American *Restatement of Restitution*[17] appeared thirty years earlier,

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9 Carolyn Sappideen & Prue Vines, eds, *Fleming's The Law of Torts*, 10th ed (Sydney: Thomson, 2011).

10 Donovan Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021).

11 Albert Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 10th ed (Toronto: Thomson Reuters, 2024).

12 Paul Matthews et al, *Underhill and Hayton Law of Trusts and Trustees*, 20th ed (London: LexisNexis, 2022).

13 Two texts, very useful in their day, were overtaken by developments within the law of unjust enrichment: George B Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983); GHL Fridman, *Restitution*, 2nd ed (Scarborough: Carswell, 1992).

14 Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014). See now Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Toronto: LexisNexis, 2022) [McInnes, *Unjust Enrichment and Restitution*, 2nd].

15 Peter D Maddaugh & John D McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 2004) (loose-leaf).

16 Robert Goff & Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966). Lord Goff remained with the work through the third edition in 1986; Gareth Jones continued on through the seventh edition in 2007. The current authors assumed responsibility beginning with the eighth edition in 2011. See also Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1985) [Birks, *Introduction to Restitution*]; Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) [Birks, *Unjust Enrichment*, 2nd ed].

17 American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St Paul: American Law Institute, 1937). See now American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (St Paul: American Law Institute, 2011).

but *Goff & Jones* was the first work within the Commonwealth to draw together the disparate strands of restitutionary liability and explain them in terms of the three-part principle. Even today, with virtually every resource instantly available electronically, the basic research would be daunting. It is not merely that the caselaw is enormous. The primary challenge is that courts rarely spoke of "restitution," let alone "unjust enrichment." Reflecting the variety of contexts in which the claims arose, as well as the pleading systems that governed practice until the close of the 19th century, the primary materials were organized under a bewildering assortment of labels.[18] Simply finding the cases was a massive undertaking. Developing the principle of unjust enrichment and connecting it to the historical precedents required scholars of the highest calibre.

Goff & Jones provided Commonwealth lawyers, for the first time, with both a comprehensive understanding of restitutionary liability and a reasonable means of accessing the cases. Its impact was immediate and enormous. That was as true in Canada as it was in England.[19] Presented with restitutionary claims, the Supreme Court of Canada reached, time and again, for *Goff & Jones*.[20] That practice continues to this day.[21]

The circumstances have, however, changed. The law of unjust enrichment looks far different today than it did in 1966 when *Goff & Jones* first appeared. Indeed, the Canadian rules governing restitutionary liability look far different than they did in 2003, when the text was in its sixth edition.[22] All of that is true in at least three respects. In light of those changes, it is necessary to ask whether *Goff & Jones* remains relevant to Canadian law.

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[18] To take but one illustration from Law, the writ of *indebitatus assumpsit* encompassed the concepts of money had and received, money paid, *quantum meruit*, and *quantum valebat*—all of which can be translated, in some instances but not others, into the language of unjust enrichment and restitution. Much the same is true of rescission, subrogation, resulting trust, constructive trust, knowing receipt, and so on.

[19] Justice Seaton appears to have been the first Canadian judge to recognize the value of *Goff & Jones*: *Samilo v Phillips* (1968), 69 DLR (2d) 411 at 422, 1968 CanLII 696 (BCSC). In England, Justice Edmund-Davies cited "the recently published and admirable *Law of Restitution*, by Goff and Jones" within weeks of its release: *Chesworth v Farrar*, [1966] 2 WLR 1073 at 1079 (QB).

[20] *Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario*, 1992 CanLII 21 (SCC) [*Peel*]; *Peter v Beblow*, 1993 CanLII 126 (SCC) [*Peter*]; *Nepean Hydro Electric Commission v Ontario Hydro*, [1982] 1 SCR 347, 1982 CanLII 42 (SCC) [*Nepean Hydro* cited to SCR]; *Air Canada v British Columbia*, 1989 CanLII 95 (SCC).

[21] *Moore v Sweet*, 2018 SCC 52 [*Moore*]; *Kerr v Baranow*, 2011 SCC 10 [*Kerr*]; *BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15 [*BMP*]; *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet Investments*].

[22] Gareth Jones, *Goff & Jones: The Law of Restitution*, 6th ed (London: Sweet & Maxwell, 2002).

1. Juristic Reasons and Unjust Factors

The most dramatic change came in 2004 when the Supreme Court of Canada fundamentally reformulated the action for unjust enrichment.[23] Since the story has been told many times,[24] a summary is sufficient for present purposes.

Following common law tradition,[25] Canadian courts historically demanded proof that a transfer between the parties was the product of an "unjust factor." The plaintiff bore the burden of showing a positive reason for recovery. While there were other possibilities, restitution was typically available because the plaintiff had acted with an impaired intention.[26] Mistake was the paradigm, but by the same logic, liability was also available if, for instance, a transfer arose from duress or fraud or a qualified intention ("failure of consideration"). Because of the system's commitment to personal autonomy and private property, a claimant was entitled to resile from an unintended transfer.

In 1980, the Supreme Court of Canada authoritatively stated the cause of action in *Pettkus v Becker*.[27] Justice Dickson held that an unjust enrichment consisted of an enrichment, a corresponding deprivation, and an "absence of any juristic reason—such as a contract or disposition of law—for the enrichment."[28] Though the point was largely missed at the time, the law had dramatically shifted, at least semantically. "Absence of juristic reason" is a civilian phrase.[29] As a test of injustice, it imposes liability unless there is reason for the defendant to retain an enrichment. That is true, for example, if a transfer entails performance of an enforceable contract or fulfillment of a genuine donative intention.

At that point, the regime governing restitutionary claims in Canada's common law jurisdictions became confused. It said one thing and

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

24 McInnes, *Unjust Enrichment and Restitution*, 2nd, *supra* note 14 at §1.02.

25 *Moses v Macferlan* (1760), 2 Burr 1005, 97 ER 676 (KB).

26 Alternatively, an unjust factor might be based on the defendant's unconscientious receipt (as with "free acceptance") or policy (such as *ultra vires* taxation or, perhaps, emergency intervention).

27 [1980] 2 SCR 834, 1980 CanLII 22 (SCC) [*Pettkus* cited to SCR].

28 *Ibid* at 848.

29 The phrase appeared, three years before *Pettkus*, when Justice Beetz formulated the civilian action for unjustified enrichment: *Cie Immobilière Viger v L Giguère Inc*, [1977] 2 SCR 67 at 77, 1976 CanLII 4 (SCC). It seems that the phrase simply stuck in the memory of Justice Dickson, who joined Justice Beetz's opinion.

did another. Following the Supreme Court of Canada's lead,[30] judges habitually expressed the restitutionary action in civilian language but actually allowed recovery only on satisfaction of the common law rule. Juristic reason in theory; unjust factors in practice. That was true in *Pettkus* itself.[31] Justice Dickson ultimately awarded relief only because the plaintiff established the requirements for the unjust factor of free acceptance.[32]

The problem escaped immediate notice because the Canadian law of unjust enrichment attracted little academic attention and because the two models of liability, rooted in similar cultural values, generate broadly similar results. Exceptions do, however, arise. A claim may fail on one approach and succeed on the other.[33] Moreover, principle matters. The two traditions come at the problem of injustice from opposite perspectives. The common law says, "No restitution unless there is a good reason to reverse"; the civil law says, "Restitution unless there is a good reason to retain." The situation was intolerable.

The issue came to a head, somewhat unexpectedly, in *Garland v Consumers' Gas Co*.[34] While neither party had asked it to do so, the Supreme Court of Canada elected to endorse a civilian-inspired test of injustice. Liability is now premised on an absence of juristic reason for a transfer. To establish a *prima facie* right to restitution, the plaintiff must negate the "established categories" of juristic reason: "contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations."[35] The defendant may nevertheless escape liability by demonstrating some residual juristic reason, which typically pertains to the parties' reasonable expectations or public policy.[36]

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30 *Palachik v Kiss*, 1983 CanLII 53 (SCC) ("failure of consideration"); *Peel*, *supra* note 20; *Peter*, *supra* note 20, Cory J (free acceptance). On occasion, the court walked the civilian talk: *Peter*, *supra* note 20, McLachlin J; *Reference Re Goods and Services Tax*, [1992] 2 SCR 445 at 476, 1992 CanLII 69 (SCC); *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 165.

31 *Pettkus*, *supra* note 27 at 849.

32 The victory was pyrrhic. Frustrated by Lothar Pettkus' efforts to prevent judgment enforcement, Rosa Becker committed suicide. For an enlightening account of the heartbreaking story behind the case, see Samuel Schwisberg, *Swarm Before Me: The Tragic Case of Becker v Pettkus* (Victoria: Friesen Press, 2015).

33 *Aboutaleb-Maragheh v Khanlari*, 2023 ONCA 695*; Deutsche Morgan Grenfell Group v IRC*, [2006] UKHL 49.

34 *Supra* note 23.

35 *Ibid* at para 44 (citations omitted).

36 *Ibid* at para 45. The defendant is also entitled to plead defences, such as change of position. The relationship between residual juristic reasons and defences has not been properly explored.

Unlike *Pettkus*, *Garland*'s impact was civilian in both form and substance. Unjust factors are no longer relevant in Canadian law.[37] A transfer is now "unjust," and hence reversible, if it is unsupported by a juristic reason.[38] As a result of *Garland*, the Canadian action for unjust enrichment is now profoundly different than its counterparts elsewhere in the common law world. Does that mean that the newest edition of *Goff & Jones*, which remains firmly within the common law tradition, is irrelevant to Canadian law? It does not. That is true for three reasons:

- *Issues Other Than Injustice*. While the Canadian test of injustice is unique within common law jurisdictions, its rules regarding other restitutionary concepts continue to operate along traditional lines. While differences exist,[39] *Goff & Jones* generally remains helpful on issues like enrichment, deprivation, and defences.

- *Justifying Grounds*. Even within systems that continue to employ unjust factors, the idea (if not the language) of juristic reasons has a role to play. *Goff & Jones*, previously silent on point, now addresses that matter.[40] It explains that even if an unjust factor

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37 *Kerr*, *supra* note 21 at para 118. That is not to say that the traditional cases are irrelevant. As discussed below, the older decisions continue to inform the application of the juristic reason analysis.

38 *Pacific National Investments Ltd v Victoria (City) (No 2)*, 2004 SCC 75; *Jedfro Investments (USA) Ltd v Jacyk*, 2007 SCC 55; *Gladstone v Canada (Attorney General)*, 2005 SCC 21; *Kingstreet Investments*, *supra* note 21; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9; *Kerr*, *supra* note 21; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*]; *Moore*, *supra* note 21. *BMP*, *supra* note 21, stands as a curious and isolated exception. It makes no mention of *Pettkus*, *Garland*, "unjust enrichment," "juristic reasons," or "unjust factors." It consequently reads like a judgment written prior to the Supreme Court of Canada's recognition of the unjust enrichment principle in *Deglman v Guaranty Trust Co of Canada*, 1954 CanLII 2 (SCC). Interestingly, it was delivered by a civilian justice from Quebec, rather than a member of the court from one of Canada's common law jurisdictions.

39 For instance, in comparison to their English counterparts, Canadian courts are far more willing to impose liability despite the lack of a direct connection between the parties: *Elder Advocates*, *supra* note 38; *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2013 SCC 58 at para 36; *cf Prudential Assurance Co Ltd v Revenue and Customs Commissioners*, [2018] UKSC 39 at para 68. The willingness to award restitution proprietarily, in the form of a remedial constructive trust, also marks a significant difference between the jurisdictions: *Moore*, *supra* note 21 at para 91; *cf Angove's Pty Ltd v Bailey*, [2016] UKSC 47 at para 27; *FHR European Ventures LLP v Mankarious*, [2014] UKSC 45 at para 47; *JSC VTB Bank v Skurikhin*, [2019] EWHC 1407 at para 243.

40 The change was introduced in the eighth edition, when the current team of authors assumed responsibility and substantially re-structured the book: Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (London: Sweet & Maxwell, 2011) at chs 2–3.

has been established—as when, for example, the plaintiff proves that a payment was caused by a mistake—the right to restitution may be overridden by some "justifying ground." Part II of the text accordingly examines how a statute, a judgment or court order, a natural obligation, or a contract may defeat an otherwise valid claim for restitution. Those "justifying grounds" are directly analogous to Canada's "juristic reasons."

- *Pyramid of Reconciliation*. While unjust factors no longer play any role in Canadian law, the associated cases remain indispensable. That proposition is explained by the fact that the competing models of "injustice" occupy different levels of a pyramid.[41] Take a simple example. Money is paid pursuant to a purported contract. The plaintiff, however, subsequently rescinds that agreement on the basis of the defendant's illegitimate pressure. Restitution follows. The explanation for that result can be stated at three levels of abstraction. At the pyramid's apex, the transfer is reversible simply because it was *unjust*. At an intermediate level, the transfer was unjust because it occurred despite *an absence of juristic reason*. The plaintiff paid for the purpose of fulfilling a contractual obligation, but that contract was ultimately wiped away *ab initio*. The transfer consequently served no legal basis. That is the level at which a Canadian court would express its decision today. As a practical matter, however, the plaintiff would sustain that proposition by demonstrating that the contract was defeated by *duress*. Duress is, of course, a complex doctrine. Its scope was worked out over centuries, the product of countless judges deciding countless cases. The same is true for the decisions that historically represented other unjust factors. Those decisions consequently remain essential.[42] They hold the genius of the common law, the accumulated wisdom contained within that magnificent "heap of good learning."[43] *Garland* merely changed the *manner* in which those decisions apply. As a result, while Canadian readers must translate the lessons from unjust factors to juristic reasons, the chapters in *Goff & Jones* that are

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41 Birks, *Unjust Enrichment,* 2nd ed, *supra* note 16 at 116–117.

42 In a typical Canadian claim for restitution, the plaintiff argues that a benefit was transferred to the defendant pursuant to some legal purpose that for some reason failed. The legal purpose consists of a juristic reason; the reason for failure traditionally would have consisted of an unjust factor. Occasionally, however, the absence of juristic reason is more profound. As in cases of theft, a transfer may be entirely non-purposive from the plaintiff's perspective. Liability will be imposed: *Pershad v Lachan*, 2015 ONSC 5290.

43 Thomas Wood, *An Institute of the Law of England* (1722), as quoted in Peter Birks, ed, *English Private Law* (Oxford: Oxford University Press, 2000) at xliv.

devoted to unjust factors will continue to guide the resolution of restitutionary claims in this country.

2. Restitution for Unjust Enrichment and Disgorgement of Wrongful Gains

The Supreme Court of Canada fundamentally changed the law of "unjust enrichment" during the last quarter century. In that respect, only *Garland* has had a greater impact than *Atlantic Lottery Corp Inc v Babstock*.[44]

The dispute in *Atlantic Lottery* turned on an allegation that video lottery terminals (VLTs) were deceptive and capable of causing psychological injuries, including addiction and suicidal thoughts. The tort of negligence might have seemed the most natural path to relief, but proceedings took the form of a class action, and it was impossible to prove that each member had been injured by the defendant's carelessness. With compensatory damages out of the question, counsel pursued "gain-based" relief instead. Broadly speaking, there were two possibilities. First, the plaintiffs sought to reverse the transfers that occurred when they paid to play the VLTs; second, they sought to strip the profits that the defendant wrongfully earned from the VLTs.

Confusingly, Canadian courts had fallen into the practice of conflating the two types of claims. The phrase "unjust enrichment" was said to encompass not only (1) the situation in which, regardless of any wrongdoing, the defendant receives a benefit from the plaintiff despite the absence of any juristic reason, but also (2) the situation in which the defendant, by committing a civil wrong against the plaintiff, obtains a benefit from a third party. Likewise, the word "restitution" was said to consist of either (1) a remedy that reverses an unjustified transfer between the parties or (2) a remedy that strips the defendant of a wrongfully-acquired profit.

The ambiguous use of the two terms inevitably led to confusion[45] and, occasionally, injustice.[46] In that respect, however, Canadian courts were not alone. The modern law of unjust enrichment began in 1937 with the publication of the *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts*.[47] In its initial attempt to make sense of the enormous and unwieldy mass of cases dealing with "gain-based" relief, the

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44 2020 SCC 19 [*Atlantic Lottery*].

45 *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57; *Lac Minerals Ltd v International Corona Resources Ltd*, 1989 CanLII 34 (SCC).

46 *Rosenfeldt v Olson*, 1986 CanLII 997 (BCCA) (plaintiff incorrectly demanded restitution for unjust enrichment rather than disgorgement of wrongful gains).

47 American Law Institute, *supra* note 17.

American Law Institute had to make decisions regarding the nature, size, and shape of the subject. The decision to conceive of "unjust enrichment" as a two-part concept proved to be enormously influential. Other authors, beginning with Goff and Jones,[48] followed suit.[49] The subject's conceptual framework appeared to be set.

In time, however, the error at the heart of the *Restatement*—and, by extension, the early editions of *Goff & Jones*—was revealed.[50] Despite some historical overlap,[51] the two sides of the "unjust enrichment" enterprise never belonged together. They are animated by different philosophies, established through different causes of action, and remedied by different measures of relief.

Justice Brown ended that error in *Atlantic Lottery*. "Unjust enrichment," he explained, is a unitary concept that governs unjustified transfers in the absence of any wrongdoing. The phrase refers exclusively to the three-part cause of action that was formulated in *Pettkus* and revised in *Garland*. Similarly, "restitution" is invariably the "response to the causative event of unjust enrichment … where there is correspondence between the defendant's gain and the plaintiff's deprivation."[52] Action and remedy are inextricably linked. A transfer occurred between the parties without legal explanation; the judge looks at the defendant and says, "give it back," *tout court*. The transfer is reversed and both parties are restored to the *status quo ante*. The defendant gives back what was gained from the plaintiff; the plaintiff gets back what was transferred to the defendant.

In contrast, Justice Brown explained, the phrase "unjust enrichment" has nothing to do with stripping away wrongful profits. In that situation, the cause of action consists of some type of civil wrong (such as trespass, conversion, or breach of contract). The analysis is unusual only because the plaintiff, instead of asking for compensation for its own loss, demands a benefit that the defendant obtained through its breach. And since that

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48 Goff & Jones, *supra* note 16.

49 Maddaugh & McCamus, *supra* note 15; Klippert, *supra* note 13; Fridman, *supra* note 13; Birks, *Introduction to Restitution*, *supra* note 16; Andrew Burrows, *The Law of Restitution*, 3rd ed (London: Butterworths, 2011).

50 Peter Birks, *Unjust Enrichment* (Oxford: Oxford University Press, 2003).

51 The ancient writs of action, too few in number, were necessarily pressed into multiple service. For instance, analyzed in modern terms, the action for money had and received was used to reverse unjustified transfers, disgorge tortious gains, and even enforce contractual promises: See JH Baker, "The History of Quasi-Contract in English Law" in William Cornish et al, eds, *Restitution: Past, Present & Future* (Oxford: Hart, 1998) at ch 3. From the perspective of the 21st century, that obviously does not mean that unjust enrichment, tort, and contract should be regarded as one subject.

52 *Atlantic Lottery*, *supra* note 44 at para 24 (citations omitted).

benefit was obtained from a third party rather than the plaintiff,[53] the defendant is asked to give it *up* rather than give it *back*. That remedy is not "restitution." It is "disgorgement," which, Justice Brown observed, is "calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all."[54]

Somewhat surprisingly, many texts on "unjust enrichment" or "restitution" continue to deal with both the reversal of unjustified transfers and the stripping away of wrongful gains.[55] In addition to conceptually doubling the size of the subject, that practice encourages the conflation or confusion of distinct sets of ideas. In contrast, *Goff & Jones* now endorses the view expressed in *Atlantic Lottery*. It focuses exclusively on the law of unjust enrichment. The discussion of gain-based remedies for wrongdoing that appeared in earlier editions has been removed, and the current authors have stated their intention to publish a separate volume devoted entirely to disgorgement.[56] In that respect, Canadian lawyers can rely on *Goff & Jones* safe in the knowledge that references to "unjust enrichment" and "restitution" pertain to the three-part cause of action that reverses unjustified transfers between the parties.

3. The Scope of Unjust Enrichment

The first edition of *Goff & Jones* marked the beginning of a period of unprecedented growth for the law of restitution. Notwithstanding the unfortunate foray into gain-based relief for civil wrongs, unjust enrichment proved to have remarkable explanatory power. A wide range of seemingly distinct doctrines could be explained by the three-part principle. In the belief that like cases ought to be decided alike, doctrines were deconstructed and re-examined in terms of enrichment, deprivation, and injustice. In addition to making the grounds of restitutionary recovery more accessible and more easily understood, that process led to the identification and eradication of harmful anomalies.[57]

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53 That option was available when, for example, the defendant committed a breach of confidence by using the plaintiff's secret recipe for Clamato juice and sold the concoction to consumers: *Cadbury Schweppes Inc v FBI Foods Ltd*, 1999 CanLII 705 (SCC) (plaintiff opted for compensation). The plaintiff suffered the breach but the profits were materially provided to the defendant by the consumers.

54 *Atlantic Lottery*, *supra* note 44 at 23.

55 Maddaugh & McCamus, *supra* note 15.

56 Mitchell, Mitchell & Watterson, *supra* note 40 at *v*.

57 Andrew Burrows, "In Defence of Unjust Enrichment" (2019) 78:3 Cambridge LJ 521.

The mistake of law doctrine provides a vivid illustration. Under the authority of *Bilbie v Lumley*,[58] courts traditionally refused to reverse transfers that were caused by errors of law rather than errors of fact. As suggested by the many exceptions that emerged over the years, the mistake of law rule was unprincipled in theory and often unjust in operation. It nevertheless persisted until the adoption of the generalized principle of unjust enrichment led the Supreme Court of Canada to recognize that restitution should *prima facie* be available any time that the plaintiff's decision to pay money to the defendant was vitiated by error.[59]

A similar story can be told regarding the rules governing recovery of payments made under mistakes of fact. While courts had always been open to reversing such transfers, the traditional "mistaken payment" doctrine[60] carried a number of inappropriate requirements: a mistake *between the parties*, a *liability* mistake, and a *fundamental* mistake. It was the principle of unjust enrichment that allowed Canadian courts to see the errors underlying those rules.[61]

Those developments created a great deal of excitement. Suddenly, after a long dormancy,[62] the law of unjust enrichment was revealed to be fertile ground for research. Unjust enrichment generated enormous attention, particularly after Professor Birks—an energetic and charismatic proselytizer—entered the picture.[63] For approximately two decades, beginning in the late 1980s, the subject enjoyed a period of unprecedented

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58 (1802), 2 East 469, 102 ER 448 (KB).

59 *Air Canada v British Columbia*, [1989] 1 SCR 1161 at 1200, 1989 CanLII 95 (SCC) ("the judicial development of the law of restitution or unjust … enrichment renders otiose the distinction between mistakes of fact and mistakes of law"); *Nepean Hydro*, *supra* note 20 at 364 ("Goff and Jones suggest the general test … that the money should be returned if … it would be unjust to allow the recipient of the benefit to retain it. In short, the question of mistake of law should be seen as just one more category in the general law of unjust enrichment"). See also *Canadian Pacific Air Lines Ltd v British Columbia*, 1989 CanLII 94 (SCC). Recognition similarly followed in other Commonwealth jurisdictions: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992), 175 CLR 353 (HCA); *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349 (HL).

60 Justice Dysart's judgment in *Royal Bank v R*, 1931 CanLII 304 (MBKB), continues to exercise an unfortunate role in Canadian law: *Bank of Nova Scotia v Jorgensen*, 2008 CanLII 16461 (ONSC) [*Jorgensen*].

61 *Central Guaranty Trust Co v Dixdale Mortgage Investment Corp* (1994), 121 DLR (4th) 53 at 65, 1994 CanLII 1429 (ONCA); *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd*, [1980] 1 QB 677 (QB).

62 The subject largely disappeared for much of the 20th century, the victim of the erroneous belief that restitutionary liability, which historically sounded in quasi-contract, was an appendage to the law of contract and could therefore be relegated to the very end of contract texts: *Sinclair v Brougham*, [1914] AC 398 (HL).

63 Birks, *Introduction to Restitution*, *supra* note 16.

growth. It is difficult to find an issue of the *Law Quarterly Review* or the *Cambridge Law Journal* from that time that does not contain some new development.[64] A generation of graduate students, including many Canadians, joined the effort to explore the outer reaches of unjust enrichment. It was heady stuff.

Even at the height of unjust enrichment's imperial phase, however, there were skeptics.[65] In the last decade, criticism has grown. A number of leading scholars now insist that it was a significant error—indeed, a "disaster"[66] according to Professor Stevens—to bring so many disparate instances of liability under the same umbrella.[67] The temptation to elegance, they argue, resulted in square pegs being pounded into round holes. On that view, claims that are animated by different concerns, that respond to different events, or that generate different measures of relief have been improperly expressed through the language of enrichment, deprivation (or expense), and injustice. The unjust enrichment project, the critics say, must be reversed. Many, if not all, of the doctrines that had been brought under the unjust enrichment label must be expelled to stand on their own.

That movement is largely English in origin, but strands can be seen in Canada as well. Judges, particularly in British Columbia, continue to treat unjust enrichment as an *alternative* to restitutionary claims framed in terms of unjust enrichment's historical ancestors. That practice is doubly dangerous. At the very least, it creates confusion and inhibits the principled evolution of the subject. Pleading in the alternative is appropriate as between actions that represent different theories of liability. That is true with respect to, say, negligence and breach of contract.[68] It is

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64 Similar articles appeared, albeit with less regularity, in leading Canadian journals: see e.g. Lionel D Smith, "The Province of the Law of Restitution" (1992) 71:4 Can Bar Rev 672.

65 Steve Hedley, "Implied Contract and Restitution" (2004) 63:2 CLJ 435; Steve Hedley, "Unjust Enrichment" (1995) 54:3 CLJ 578; Steve Hedley, "Unjust Enrichment as the Basis of Restitution — An Overworked Concept" (1985) 5:1 LS 56; Steve Hedley, *A Critical Introduction to Restitution* (London: Butterworths, 2001); Peter Watts, "'Unjust Enrichment'—The Potion that Induces Well-Meaning Sloppiness of Thought" (2016) 69 Current Leg Probs 289.

66 Robert Stevens, "The Unjust Enrichment Disaster" (2018) 134 Law Q Rev 574.

67 Robert Stevens, *The Laws of Restitution* (Oxford: Oxford University Press, 2023); Robert Stevens, "Faute de Mieux" in Sagi Peari & Warren Swain, eds, *Rethinking Unjust Enrichment* (Oxford: Oxford University Press, 2023); Lionel Smith, "Restitution: A New Start?" in Peter Devonshire & Rohan Havelock, eds, *The Impact of Equity and Restitution in Commerce* (Oxford: Hart, 2019) 91.

68 *Central Trust Co v Rafuse*, 1986 CanLII 29 (SCC); *BG Checo International Ltd v British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC).

not appropriate as between different expressions—one old and the other new—of the *same* theory of liability. That is true with respect to unjust enrichment and, say, "*quantum meruit*,"[69] "money had and received,"[70] or "mistake of fact."[71] Those last three concepts are merely instances of the first. They stand as species to the genus. The problem is not, however, limited to redundancy. Far worse, the historical concepts carry historical baggage. A court that analyzes a restitutionary claim in terms of, say, "mistake of fact" is apt to rely on the precedents that historically spoke that language. And, as previously observed, those precedents impose requirements that the generalized principle of unjust enrichment has revealed to be flawed.[72]

Appellate courts have occasionally observed that the traditional heads of restitution are now subsumed within the action for unjust enrichment,[73] but the danger remains. Canadian lawyers continue to rely on older Canadian texts,[74] which necessarily fail to reflect the extraordinary developments that have occurred in the last twenty years. The new edition of *Goff & Jones* provides a useful counterweight. It presents a modern perspective on the grounds for restitutionary liability (albeit in English form). Consistent with the model that the Supreme Court of Canada has formulated, *Goff & Jones* views unjust enrichment as a generalized principle with many manifestations. The law continues to be informed by historical decisions, but it is no longer bound by the restrictions imbedded in the ancient writs. Nor does *Goff & Jones* demonstrate any desire to

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69 *Consulate Ventures Inc v Amico Contracting & Engineering (1992) Inc*, 2011 ONCA 418; *Maver v Greenheat Energy Corp*, 2012 BCSC 1139; *Gregory N Harney Law Corp v Angleland Holdings Inc*, 2016 BCCA 262 at para 73.

70 *International Longshore & Warehouse Union Local 502 v Ford*, 2016 BCCA 226 at paras 23–25; *Jaswal v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCCA 245 at para 34; *Barafield Realty Ltd v Just Energy (BC) Limited Partnership*, 2015 BCCA 421; *cf Boale, Wood & Company Ltd (Trustee of) v Whitmore*, 2017 BCSC 1917 at para 113.

71 *Newman v Beta Maritime Ltd*, 2018 BCSC 1442; *CIBC v Bloomforex Corp*, 2020 ONSC 69 at para 9; *Huang v Li*, 2020 BCSC 1727 at para 439; *1242311 Alberta Ltd v Tricon Developments Inc*, 2020 ABQB 411 at paras 190–195; *cf Bank of Montreal v Asia Pacific International Inc*, 2018 ONSC 4215 at para 37 (mistake of fact "originate[d] from the doctrine of unjust enrichment"); *CropConnect v Bank of Montreal*, 2020 MBQB 186 at paras 44, 46.

72 *Balmoral Holdings Inc v Rogers Communications Inc*, 2021 BCSC 2330; *Pattison Outdoor Advertising Ltd v Winchester Real Estate Investment Trust Ltd*, 2018 ONSC 4277 at para 23; *Jorgensen*, *supra* note 60 at para 28; *Walsh v Quoddy Holdings Ltd*, 2006 NBQB 356 at paras 38–39; *CIBC Trust Corp v Bayly*, 2005 BCSC 133 at para 53; *Dyson Estate v Moser*, 2003 BCSC 1720 at para 43.

73 *Chevron Canada Resources v Canada*, 2022 ABCA 108 at para 43; *Van Camp v Laurentian Bank of Canada*, 2015 ABCA 83 at paras 40–41; *BNSF Railway Co v Teck Metals Ltd*, 2016 BCCA 350 at para 10; *Best v Hendry*, 2021 NLCA 43 at para 124.

74 Fridman, *supra* note 13; *cf* Maddaugh & McCamus, *supra* note 15.

roll back the last fifty years. Having played an instrumental role in the emergence of the unifying principle of unjust enrichment, it stands as a bulwark against academic attempts to return restitution to a hundred and one discrete heads of liability, each governed by a distinct set of rules.