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## THE REASON TO REVERSE: UNJUST FACTORS AND JURISTIC REASONS

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### INTRODUCTION

The *Restatement of Restitution: Quasi Contracts and Constructive Trusts*<sup>1</sup> had a profound impact not only in the United States but also throughout what used to be known as the British Commonwealth.<sup>2</sup> The project's success at home was to be expected, of course. Its impact abroad was more remarkable. Academics – and those of an academic bent<sup>3</sup> – responded quickly and enthusiastically in both England<sup>4</sup> and Canada.<sup>5</sup> Bar and bench, however, proved less welcoming. It fell to Lord Denning, fifteen years after the fact, to

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<sup>1</sup> RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1937).

<sup>2</sup> The *Restatement (First)*'s principal drafters introduced the project to an English audience in Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29 (1938).

<sup>3</sup> See R.A. Wright, *Sinclair v. Brougham*, 6 CAMBRIDGE L.J. 305 (1938) [hereinafter Wright, *Sinclair*]; R.A. Wright, *Restatement of the Law of Restitution*, 51 HARV. L. REV. 369 (1937) (book review) [hereinafter Wright, *Restatement of Restitution*].

<sup>4</sup> See D.W. Logan, *Restatement of Restitution*, 2 MOD. L. REV. 153 (1938) (book review); O. Hood Phillips, *Restatement of Restitution*, 2 MOD. L. REV. 170 (1938) (book review); P.H. Winfield, *The American Restatement of the Law of Restitution*, 54 L.Q. REV. 529 (1938) (book review).

<sup>5</sup> See E. Russell Hopkins, *The American Law Institute's Restatement of Restitution*, 3 U. TORONTO L.J. 140 (1939) (book review); see also W. Friedmann, *The Principle of Unjust Enrichment*, 16 CAN. B. REV. 243 (1938); Cecil A. Wright, *A Text-Book on the Law of Torts*, 16 CAN. B. REV. 237, 241 (1938) (book review).

explain why English law (and, by extension, Canadian law, which had yet to strike an independent path) was “obviously not a favourable soil in which to plant the *Restatement*.”<sup>6</sup> The very idea of a Restatement, he observed, was fundamentally at odds with the English legal tradition.<sup>7</sup> The law is to be found in the cases and not in broad, bold-fonted principles.<sup>8</sup> And whereas a textbook might helpfully serve as “a guide to the authorities but not to the law,” the *Restatement* stated propositions unsupported by precedent.<sup>9</sup> Worse yet, it was prepared not by a named (preferably dead) author dedicated to the cases, but rather by a committee! A committee “with a revising editor” that produced “compromised views of the members” that were “put into words by the secretary.”<sup>10</sup> Suffice to say, there was “not much to commend it in English eyes.”<sup>11</sup> Given the situation, the *Restatement* unsurprisingly suffered another disadvantage: it “was hard to find.”<sup>12</sup> Lord Denning was prepared to “suppose there [were] copies at Oxford and Cambridge,” but he noted that even a couple of years after publication, there was “only one copy of the *Restatement* available to English barristers and judges” in London.<sup>13</sup>

“Small wonder then,” that it took “some time for the *Restatement*” to become accepted into English courts.<sup>14</sup> But accepted it was, thanks in no small part to Lord Denning’s own pioneering – some might say heroic – efforts. Acting pro bono<sup>15</sup> in *United Australia, Ltd. v. Barclays Bank, Ltd.*,<sup>16</sup> he “looked for the first time at the *Restatement*,” adopted its position regarding the nature of “waiver of tort,” and provided the House of Lords with the means “to cut away the misunderstandings of the old authorities and to put the decisions on the right ground.”<sup>17</sup> The resulting judgment extended far beyond the immediate issue and “opened the way to the development of restitution as a separate branch of the law.”<sup>18</sup> Two years later, Lord Wright drew upon *United Australia* and, presumably, his own extra-judicial thoughts on the *Restatement*<sup>19</sup> in declaring that “any civilized system of law is bound to

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<sup>6</sup> Alfred T. Denning, *The Restatement of the Law: Its Place in the English Courts*, 37 A.B.A. J. 329, 329 (1951).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 330.

<sup>9</sup> *Id.* at 329.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 329-30.

<sup>14</sup> *Id.* at 330.

<sup>15</sup> Pro bono but not entirely without financial reward. The clients “were so pleased with the result that they . . . paid . . . an honorarium out of their own pocket.” *Id.* at 331.

<sup>16</sup> [1941] A.C. 1 (H.L.) (appeal taken from Eng.).

<sup>17</sup> Denning, *supra* note 6, at 330-31.

<sup>18</sup> *Id.* at 331.

<sup>19</sup> See R.A. WRIGHT, LEGAL ESSAYS AND ADDRESSES (1939); Wright, Sinclair, *supra* note

provide remedies for cases of what has been called unjust enrichment.”<sup>20</sup> The *Restatement*’s influence was even more pronounced in Canada. While English judges occasionally were skeptical or even dismissive of a generalized notion of unjust enrichment,<sup>21</sup> Canadian courts routinely looked south for guidance.<sup>22</sup> The impact of the *Restatement* in the Supreme Court of Canada was further heightened by the fact that the court was led, during a crucial period of restitutionary development in the 1970s and 1980s, by a former student of one of the *Restatement*’s principal reporters.<sup>23</sup>

The explanation as to why the *Restatement* overcame initial resistance and gained acceptance abroad is not difficult to discern. As Lord Denning observed, “local conditions” occasionally may “lead us to reach a different solution.”<sup>24</sup> For the most part, however, “our fundamental outlook is the same on all the things that really matter.”<sup>25</sup> The common-law jurisdictions on either side of the Atlantic “have the same concept of justice, the same tradition of freedom, and the same hatred of oppression.”<sup>26</sup> And because they share the

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3; Wright, *Restatement of Restitution*, *supra* note 3.

<sup>20</sup> *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] 1 A.C. 32 (H.L.) 61 (appeal taken from Eng.).

<sup>21</sup> *Orakpo v. Manson Investments Ltd.*, [1978] A.C. 95 (H.L.) 104 (appeal taken from Eng.) (“[T]here is no general doctrine of unjust enrichment recognised in English law.”).

<sup>22</sup> On the *Restatement*’s impact on Canadian law generally, see W.H. Angus, *Restitution in Canada Since the Deglman Case*, 42 CAN. B. REV. 529 (1964), J.L. Dewar, *The Development of the Remedial Constructive Trust*, 60 CAN. B. REV. 265 (1982), J.D. McCamus, *Chief Justice Dickson and the Law of Restitution*, 20 MANITOBA L.J. 338 (1991), and R.A. Samek, *Unjust Enrichment, Quasi-Contract and Restitution*, 47 CAN. B. REV. 1 (1964).

<sup>23</sup> As a graduate student at Harvard Law School in 1937 – the year of the *Restatement*’s publication – Chief Justice Bora Laskin studied torts and “quasi-contract” with Professor Warren Seavey. P. GIRARD, BORA LASKIN: BRINGING LAW TO LIFE 82, 556 (2005). The *Restatement*’s conception of unjust enrichment clearly informed Chief Justice Laskin’s unanimous opinion in *Canadian Aero Service Ltd. v. O’Malley*, [1974] S.C.R. 592, 622 (Can.). More significantly, it was his dissent in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423, 425 (Can.), that eventually gained majority support for the proposition that the doctrines of unjust enrichment and constructive trust provide appropriate means for achieving an equitable distribution of assets upon the dissolution of cohabitational relationships. See *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 835 (Can.); *Rathwell v. Rathwell* (1977), [1978] 2 S.C.R. 436, 438 (Can.). The cohabitational cases have played a dominant role in the development of the modern Canadian law of unjust enrichment. See *Kerr v. Baranow* (2010), [2011] 1 S.C.R. 269, 275 (Can.).

<sup>24</sup> Denning, *supra* note 6, at 405. The constructive trust provides a good example. For a variety of reasons, English courts have refused to join their Canadian counterparts in adopting the American conception of a remedial constructive trust. See *Pettkus*, 2 S.C.R. at 836; *Kerr*, 1 S.C.R. paras. 12-23. *But cf.* *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, para. 18-19 (Can.).

<sup>25</sup> Denning, *supra* note 6, at 405.

<sup>26</sup> *Id.*

same commitment to liberal values, individual autonomy, and personal property, they encounter the same types of disputes. Moreover, due in no small part to the *Restatement*, courts in all three countries came to employ essentially the same principle of unjust enrichment during the second half of the twentieth century.<sup>27</sup>

In the circumstances, it might be tempting to read the existing as the inevitable. Given so much common ground, how could the common-law jurisdictions possibly employ radically different conceptions of unjust enrichment? In truth, of course, legal rules are never pre-determined. The devil is in the details, and at that level, different choices may be exercised by different minds at different times in different contexts. From that perspective, it is interesting to observe that at the same moment the *Restatement (Third) of Restitution and Unjust Enrichment* is about to entrench a particular conception of unjust enrichment into American law for the foreseeable future, a very different movement is afoot in Anglo-Canadian law. The issue turns on the very heart of restitutionary liability: the nature of “injustice.”<sup>28</sup>

#### I. THE NATURE OF INJUSTICE

To say that an enrichment is “unjust” obviously is an insufficient explanation of liability. Individual conceptions of justice vary from one person to the next, and the availability of restitution cannot be left to judicial intuition. Broadly speaking, there are two models of justice, roughly corresponding to the two great legal systems of Western society.

##### A. *Unjust Factors*

The first possibility involves *unjust factors*. Even if that phrase is unfamiliar, the essential idea has been known to the common law for centuries. Lord Mansfield enumerated many of the most important unjust factors in *Moses v. Macferlan*,<sup>29</sup> when he explained that the action for money had and received “lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition . . . or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to

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<sup>27</sup> See *Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1999] 1 A.C. 221 (H.L.) 227 (appeal taken from Eng.); *Pettkus*, 2 S.C.R. at 847-48; RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 1 (1936).

<sup>28</sup> The *Restatement (Third)* broadly conceives of unjust enrichment in terms of (1) an autonomous cause of action that triggers true restitution, which requires the defendant to give back a benefit obtained from the plaintiff, and (2) a remedial response to civil wrongdoing (e.g., trespass, breach of fiduciary duty), which requires the defendant to give up benefits that were acquired, usually from a third party, as a result of violating the plaintiff’s rights. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011). The discussion in this paper is confined to the former category.

<sup>29</sup> (1760) 97 Eng. Rep. 676 (K.B.).

laws made for the protection of persons under those circumstances.”<sup>30</sup> That list bears a striking resemblance to the grounds of liability that appear in the *Restatement (Third)*: “Benefits conferred by mistake”; “Defective consent or authority”; and “Transfers under legal compulsion.”<sup>31</sup>

Though the scheme has not received judicial imprimatur, Professor Birks usefully distilled the various grounds of restitution into two or three categories.<sup>32</sup> First, in the vast majority of cases, restitution is available because the transferor acted with an *impaired intention*.<sup>33</sup> The plaintiff successfully claims, “I didn’t really mean it.” That category contains two main sub-species. Intention is *vitiated* if it is not a true expression of autonomy. The transferor’s apparent desire to confer a benefit upon the defendant may be a function of *mistake* or it may be the product of *illegitimate pressure* (e.g., duress, undue influence).<sup>34</sup> Alternatively, intention may be impaired insofar as it is *qualified* or *conditional*.<sup>35</sup> While the plaintiff fully intends for the defendant to receive the benefit, the enrichment ultimately is to be retained only if some state of affairs comes to pass. If the condition is not satisfied, the defendant holds the benefit contrary to the plaintiff’s intention.<sup>36</sup> Second, even if the transferor’s intention was not impaired, an enrichment may be considered unjust as a result of the defendant’s *unconscientious behavior*.<sup>37</sup> The plaintiff says, “It was bad of you to receive it.” The content of that category is unclear,<sup>38</sup> and as Birks came to believe,<sup>39</sup> it may be that every potential candidate is better recast under the first label. Third, regardless of the integrity of the plaintiff’s intention or the propriety of the defendant’s conduct, restitution may be *policy-based*.<sup>40</sup> In

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<sup>30</sup> *Id.* at 681.

<sup>31</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (headings of topic 1, topic 2, and topic 3, respectively).

<sup>32</sup> PETER BIRKS & ROBERT CHAMBERS, *RESTITUTION RESEARCH RESOURCE 2* (2d ed. 1997); Peter Birks, *The Law of Restitution at the End of an Epoch*, 28 U. W. AUSTL. L. REV. 13, 24-27 (1999).

<sup>33</sup> Birks, *supra* note 32, at 26.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Somewhat confusingly, lawyers traditionally spoke of a “total failure of consideration.” That phrase unfortunately had the tendency to foster the belief that restitutionary relief is contractual in nature.

<sup>37</sup> Birks, *supra* note 32, at 26.

<sup>38</sup> During the last quarter of the twentieth century, however, Canadian courts routinely awarded restitution in cases of *free acceptance*. Restitution was available because, notwithstanding a reasonable opportunity to reject, the defendant accepted a benefit despite knowing of the plaintiff’s expectation of payment. The reason for restitution was said to consist of the defendant’s unconscientious intention to disappoint that expectation. See *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 847 (Can.).

<sup>39</sup> Peter Birks & Charles Mitchell, *Unjust Enrichment*, in 2 ENGLISH PRIVATE LAW 543 (Peter Birks ed., 2000).

<sup>40</sup> Birks, *supra* note 32, at 26.

Birks's memorable encapsulation, "Mother says give it back anyway."<sup>41</sup> For fear that the category may collapse into "palm tree justice,"<sup>42</sup> the operative policies are narrowly drawn and carefully circumscribed. Public policy requires, for instance, that a government return money that it received as a result of an ultra vires demand.<sup>43</sup>

The list necessarily covers a great deal of ground, but the essential idea invariably is the same. A system of unjust factors requires the plaintiff to establish not only the provision of a benefit to the defendant but also a *positive reason* for reversing that transfer of wealth. Consistent with the common law's traditional orientation, the parties are presumed to be self-reliant and unaccountable. The plaintiff prima facie is left to deal with any losses; the defendant prima facie is entitled to enjoy any gains. The courts become involved only if the plaintiff, by means of a cause of action, provides a complete and compelling reason for judicial intervention. It is not enough to show that the defendant does not deserve the windfall. The claimant must demonstrate some overriding rationale as to why the legal system should redistribute wealth in accordance with the *status quo ante*.

All of that is apt to strike some readers as too obvious for words: the structure and operation of the unjust factors is so deeply ingrained in the common law's traditional approach to restitutionary liability as to seem the natural order of things. American law certainly maintains its confident allegiance to the unjust factors. Other jurisdictions, however, have witnessed a surprising turn of events in recent years.

#### B. *Juristic Reasons*

The civil law, derived from ancient Roman law, views the issues in a much different light. Common-law courts historically worked inductively, from the ground up. The common law – that wondrous "heap of good learning"<sup>44</sup> – consists of the accumulated wisdom of the ages. Its lawyers proceed "downward-looking to the cases," rather than upwards to "an unknowable justice in the sky."<sup>45</sup> Civilians, in contrast, proceed deductively, drawing down from broad principles. It also has been suggested that whereas the common law was concerned with the individual, the civil law was communitarian and hence more inclined to become involved in day-to-day life.<sup>46</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Pettkus*, 2 S.C.R. at 836.

<sup>43</sup> *Woolwich Bldg. Soc'y v. Inland Revenue Comm'rs*, [1993] A.C. 70 (H.L.) 71.

<sup>44</sup> THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND: OR, THE LAWS OF ENGLAND IN THEIR NATURAL ORDER, ACCORDING TO COMMON USE, at i (1722) (quoted in PETER BIRKS, ENGLISH PRIVATE LAW, at xlv (2000)).

<sup>45</sup> PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 19 (1985).

<sup>46</sup> See Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. L. STUD. 503, 511 (2001) ("At an ideological or cultural level, the civil-law tradition . . . elevates collective over individual rights.").

Whatever the reason, civilians undoubtedly have a much different understanding of unjust enrichment. The injustice pertains not to unjust factors, but rather to *juristic reasons*. Restitution is triggered not by the *presence* of a positive reason for reversing a transfer of wealth, but rather by the *absence* of any legal explanation for the defendant's gain. In effect, the two legal systems view the same social problem from opposite perspectives. The common law says, "No restitution unless . . . ," so that, by default, a transfer stands untouched. In contrast, the civil law says, "Restitution unless . . . ," so that every transfer presumptively is reversible.

### C. *A Momentous Shift*

Until very recently, the civilian conception of unjust enrichment was discussed in the common-law world only by a small handful of comparativists and legal polymaths.<sup>47</sup> All of that began to change near the end of the last century.

English law continues to adhere to the traditional unjust factors, and it may well continue to do so for the foreseeable future.<sup>48</sup> If so, it ultimately will have to overcome Professor Birks's powerful arguments to the contrary. Having once defended the common law against civilian incursion,<sup>49</sup> Birks dramatically converted shortly before his untimely death.<sup>50</sup> Though complicated, his reasons focused on the belief that the civilian model is simpler and more elegant and on the belief that the House of Lords had overstretched the concept of mistake – the most important unjust factor – beyond its breaking point.<sup>51</sup>

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<sup>47</sup> See CASES, MATERIALS AND TEXTS ON UNJUSTIFIED ENRICHMENT (Jack Beatson & Eltjo Schrage eds., 2003); JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 41-109 (1951); THOMAS KREBS, RESTITUTION AT THE CROSSROADS: A COMPARATIVE STUDY (2001); UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE (David Johnston & Reinhard Zimmermann eds., 2002); KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 537-94 (Tony Weir trans., Oxford Univ. Press 3d rev. ed. 1998); Brice Dickson, *Unjust Enrichment Claims: A Comparative Overview*, 54 CAMBRIDGE L.J. 100, 111-22 (1995); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403 (1995).

<sup>48</sup> See *Deutsche Morgan Grenfell Grp. plc v. Inland Revenue Comm'rs*, [2006] UKHL 49, [2007] 1 A.C. (H.L.) 558, 569, 611-13 (appeal taken from Eng.).

<sup>49</sup> See Peter Birks, *No Consideration: Restitution After Void Contracts*, 23 W. AUSTRALIAN L. REV. 195, 231-34 (1993).

<sup>50</sup> See Peter Birks, *Comparative Unjust Enrichment*, in THEMES IN COMPARATIVE LAW 137, 147 (Peter Birks & Arianna Pretto eds., 2002) (arguing for some "reconciliation" of the common-law and civil-law approaches as opposed to an "outright victory for one over the other"); PETER BIRKS, UNJUST ENRICHMENT 101-28 (2d ed. 2005) [hereinafter BIRKS, UNJUST ENRICHMENT].

<sup>51</sup> The key case is *Kleinwort Benson v. Lincoln County Council*, [1999] 2 A.C. (H.L.) 349 (appeal taken from Eng.). The plaintiff had made payment pursuant to a contract that the parties assumed to be valid. *Id.* at 349. Quite unexpectedly, a court subsequently declared, for the first time, that such agreements were ultra vires ("beyond the powers of")

In Canada, the momentous shift was actually realized. The story dates from the 1970s when, without discussion or explanation,<sup>52</sup> the Supreme Court of Canada began to use the civilian terminology (i.e., “absence of juristic reason for the enrichment”) while continuing to apply the traditional unjust factors.<sup>53</sup> Predictably, the Canadian law of unjust enrichment grew ever more confused as the court said one thing and did another. Those difficulties were exacerbated by a slim line of authorities in which judges took the civilian language at face value and ordered restoration when defendants could not justify the retention of their enrichments.<sup>54</sup> By 2004, the mess was little short of scandalous.

In *Garland v. Consumers’ Gas Co.*,<sup>55</sup> the Supreme Court of Canada finally recognized the problem and, again without much analysis, unequivocally decided to walk the civilian talk. The resulting test of injustice accordingly asks not whether the impugned transfer was caused by an unjust factor (e.g., mistake, compulsion, qualified intention) but rather whether there is any legal basis for the defendant’s gain.<sup>56</sup> To simplify matters, the court divided the inquiry into two parts. The first stage pertains to four “established categories” of juristic reason: contract, donative intention (i.e., gift), disposition of law (e.g., court order), and “other valid common law, equitable or statutory

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one of the parties. *Id.* The House of Lords then controversially awarded restitution on the ground that the payor had been mistaken. *Id.* at 350. Is it a mistake – as opposed to a non-actionable mis-prediction – if a party fails to appreciate a future change or clarification of the law?

<sup>52</sup> Various theories exist, but none suggest a genuine desire to abandon the common-law tradition for a civilian approach. The most likely explanation is that the phrase “absence of juristic reason” easily sticks in the mind. It was first used in resolution of a civilian case on appeal from Quebec. *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.* [1977] 2 S.C.R. 67 (Can.). When it came time two years later to formulate the common-law version of unjust enrichment, Justice Dickson fell back on the language of the judgment in which he had concurred. *See Pettkus v. Becker*, [1980] 2 S.C.R. 834, 835 (Can.); *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 455 (Can.).

<sup>53</sup> *See Pettkus*, 2 S.C.R. at 835 (phrasing the issue of injustice in terms of “an absence of juristic reason” but awarding restitution only after the plaintiff proved the unjust factor of free acceptance).

<sup>54</sup> *See Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 409 (Can.) (Gonthier, J., concurring) (explaining how the court has handled unjust enrichment claims between unmarried co-habitants by “linking the absence of a juristic reason for the enrichment . . . to the absence of any obligation on the part of the contributing spouse to perform the work and services carried out during the relationship”); *Reference Re: Goods & Servs. Tax*, [1992] 2 S.C.R. 445, 477 (Can.) (stating that if the statute authorizing a tax is within the scope of the government’s powers, then the statute itself is a “valid juristic reason for the retention of the benefit the federal government receives”).

<sup>55</sup> [2004] 1 S.C.R. 629 (Can.).

<sup>56</sup> *Id.* at 651 (articulating the proper test for unjust enrichment claims as a lack of any juristic reason to deny recovery).



obligations.”<sup>57</sup> The second stage pertains to “residual” reasons as to why an enrichment might be retained.<sup>58</sup> The focus at that point falls upon public policy and the parties’ reasonable expectations.<sup>59</sup>

Although the Supreme Court of Canada curiously characterized its judgment in terms of mere “redefinition and reformulation,”<sup>60</sup> *Garland*’s significance cannot be overstated. Centuries of common law were thrown over in favor of a civilian test of unjust enrichment. In a stroke, lawyers and judges were required to alter fundamentally their conception of injustice. Liability now responds to the *absence* of any reason for the defendant’s *retention*, rather than to the *presence* of some reason for the plaintiff’s *recovery*. The transition has not been seamless, and it will be many years before practice settles into the level of consistency and certainty that litigants have the right to expect from a mature system of law. It is not the purpose of this paper, however, to assess the wisdom of the Canadian adventure. The goal instead is to examine if and how the adventure matters.

## II. LIMITED RECONCILIATION

While the shift to a civilian model is profound, it need not be complete. The Canadian experience after *Garland* demonstrates that proposition. To begin, while the various elements obviously are related, questions concerning the defendant’s enrichment and the plaintiff’s expense can be separated from the inquiry into injustice. Canadian courts accordingly continue to rely upon the traditional common-law cases in determining whether or not a benefit has moved between the parties.

The much more interesting issue involves the relationship between unjust factors and juristic reasons. Does the adoption of a civilian-inspired model render the common-law cases entirely obsolete? Ultimately, of course, the competing models identify reversible transfers in very different ways. Perhaps surprisingly, however, the two conceptions of injustice are subject to a limited reconciliation.<sup>61</sup> The key to understanding that proposition lies in the fact that unjust factors and juristic reasons operate at different levels of abstraction.

Because of their shared history and values, all Western legal systems must deal with the same types of disputes. Services are rendered under one side of a contract that turns out to be invalid. Money is paid as a result of a mistake. Assets owned by one person fall into the hands of another. Is the aggrieved party entitled to restitution? Whether a case arises in, say, the United States, Canada, or France, the answer almost invariably will be the same. These are relatively simple disputes. The transfer ought not to have happened and the recipient must provide relief. Lawyers and judges, however, cannot operate at

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 650.

<sup>61</sup> See BIRKS, UNJUST ENRICHMENT, *supra* note 50, at 116.

the level of intuition. It is not enough to say that an enrichment is “unjust.” They must explain *why* that label is appropriate.

In the interests of convenience, the discussion can be confined to a single situation. A woman gives \$500 to her nephew as a birthday present. The next day, forgetting what she has done, she deposits another \$500 into his bank account. His second enrichment clearly is unjust and she certainly can recover, but *why*? A civilian model of unjust enrichment would say that the nephew’s windfall is unjust because it lacks legal explanation. As a Canadian court would say, there was no juristic reason for the woman’s second act.<sup>62</sup> It did not occur pursuant to contract, it did not reflect some disposition of law, and it did not fulfill any “other valid common law, equitable or statutory obligations.”<sup>63</sup> Finally, and most importantly, the second transfer was not a function of donative intent.<sup>64</sup> The first payment constituted a gift, but the second did not – not really.

The traditional common-law approach would reach the same conclusion, although for a more specific reason. The enrichment was unjust because it lacked juristic reason, and it lacked juristic reason because the woman made a *mistake*. Given the legal system’s commitment to personal property and freedom of choice, a transfer is effective only if it is a true expression of the transferor’s autonomy. And since the plaintiff made a mistake (i.e., she erroneously believed that she had not recently given a birthday present to her nephew), she is entitled to restitution.

### III. SIMPLICITY AND ELEGANCE

The civilian model sometimes is said to have the merit of simplicity. The earlier exercise may seem to support that belief. Since the civil model operates at a relatively high level of abstraction, it was enough to conclude that there was no legal basis for the impugned transfer. The common-law model, in contrast, requires greater specificity. It requires the aunt to prove not only that the second payment failed to take effect as a gift but also that the gift failed as a result of her mistake. All else being equal, less work is more attractive. The purported benefit of the civil law, however, turns out to be largely illusory.

The *Restatement (Third) of Restitution and Unjust Enrichment* is an enormous undertaking.<sup>65</sup> Similarly, *Goff & Jones*<sup>66</sup> and *Palmer, Law of Restitution*<sup>67</sup> require a great deal of shelf space. In contrast, it is not hard to imagine a slim textbook dealing with a civilian system of unjust enrichment. The discussion could be abbreviated. Assuming that an enrichment was not governed by contract, then X happens. Assuming that an attempted gift did not

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<sup>62</sup> See *supra* text accompanying notes 52-53.

<sup>63</sup> *Garland v. Consumers’ Gas Co.*, [2004] 1 S.C.R. 629, 651 (Can.).

<sup>64</sup> See *id.*

<sup>65</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

<sup>66</sup> LORD GOFF & GARETH JONES, THE LAW OF RESTITUTION (8th ed. 2011).

<sup>67</sup> GEORGE E. PALMER, LAW OF RESTITUTION (1978).

succeed, then *Y* happens. And so on. Because the unjust enrichment scholar's job is to explain the restitutionary implications of transfers that lack juristic reason, much of the heavy lifting could be farmed out. If and when a contracts colleague down the hall has determined that the parties failed to create an enforceable agreement, then any conferred benefits lack legal basis and recovery is available.

The flaw in that thinking is obvious. Although an unjust enrichment lawyer lacking in energy and ambition might be able to dodge some of the responsibility, the same hard work ultimately has to be done in either system. In Canada, as in traditional civilian jurisdictions, the restitutionary cause of action formally operates at the level of juristic reasons. Nevertheless, in substance if not in name, the unjust factors are indispensable, just as they are under the common-law analysis. To explain why the apparent gift failed and why the aunt's second transfer lacked juristic reason, the civilian must have some concept of mistake. And as in the context of traditional unjust factors, that concept serves a variety of functions. It does not merely allow a court to conclude that an intention was vitiated. Beneath the surface, it strikes a sensitive compromise between competing interests. It mediates a balance between the plaintiff's desire to reverse a transfer that was not a function of autonomy, the defendant's desire for security of receipts, society's desire for both efficient rules and fair results, and so on. Moreover, while there is substantial common ground across borders, the specific concept of mistake that exists in each jurisdiction reflects the compromise that is thought appropriate for that society at that time. Precisely the same is true of other concepts that, at some level, trigger the right to restitution. The idea of economic duress, for instance, has come to bear considerable weight as courts have attempted to formulate rules that reflect the shifting nature of the marketplace.<sup>68</sup>

Accordingly, while it is true that the civilian model is more elegant, in the sense that the operative reason for restitution invariably is the same (i.e., absence of juristic reason), it generally is not simpler. That statement, however, does admit of at least one important exception. Broadly speaking, there are two ways in which a claimant in a civil system may establish that a transfer lacked legal basis. In the preceding example, as in the vast majority of actual cases, it is necessary to show that the transfer occurred for some purpose that somehow failed. Although the plaintiff acted for the purpose of performing a contract, fulfilling an obligation, or giving a gift, either no contract was created, the obligation did not exist, or a gift already was given. Alternatively, the defendant's enrichment may lack legal basis because the plaintiff never had any purpose at all. Money may be lost and found, stolen, or transferred between the parties by some intervenor. Because the plaintiff did not act purposefully, there is no question of drawing upon the unjust factors in

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<sup>68</sup> See Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 *LOY. U. CHI. L.J.* 175, 192-94 (2009) (discussing how modern contract law has attempted to police coercion in the marketplace through doctrines such as economic duress).

order to invalidate a seemingly effective transaction. There is no possible justification for the enrichment, and the defendant obviously must give it back. Nothing could be simpler.

The common law, in contrast, has surprising difficulty with such cases. Relief could not be denied without intolerably weakening the concept of property, and courts inevitably will find a way to compel restitution. North American courts are inclined to employ constructive trusts,<sup>69</sup> and English courts have begun to entertain a powerful argument involving the resulting trust as a generalized response to unjust enrichment.<sup>70</sup> A simple claim for personal restitution, however, has proved elusive and controversial. A complete absence of intention seems *a fortiori* error, so that if mistake serves as an unjust factor, so too, it has been said, must ignorance or powerlessness.<sup>71</sup> Nevertheless, the courts have been slow to endorse that view,<sup>72</sup> and a respectable body of opinion urges judges to refrain from doing so.<sup>73</sup> It has been argued, for instance, that since a non-consensual transfer cannot pass title, the recipient cannot legally be enriched.<sup>74</sup> Whether or not that position eventually carries the day, the current law is not as clear as one would hope.

#### IV. DIFFERENT RULES – DIFFERENT CONCLUSIONS

Given human nature and the basic structures of society, certain types of disputes routinely arise in both common-law and civilian jurisdictions. And

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<sup>69</sup> See *Kolari (Re)* (1981), 36 O.R. 2d 473 (Can. Ont. D.C.); *Goodbody v. Bank of Montreal* (1974), 4 O.R. 2d 147 (Can. Ont. Sup. Ct.); *Blackhawk Downs, Inc. v. Arnold* (1972), 3 O.R. 729 (Can. Ont. Sup. Ct.); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55.

<sup>70</sup> See *Twinsectra Ltd. v. Yardley*, [2002] UKHL 12, [2002] 2 A.C. 164, [91]-[100] (appeal taken from Eng.); *Air Jamaica Ltd. v. Charlton*, [1999] 1 W.L.R. 1399 (P.C.) 1411-13 (appeal taken from Jam.) (finding that surplus funds from a company's pension scheme are held in a resulting trust for those who provided them); ROBERT CHAMBERS, *RESULTING TRUSTS* 104-10 (1997); cf. *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669 (H.L.) 707-11 (appeal taken from Eng.).

<sup>71</sup> ANDREW BURROWS, *THE LAW OF RESTITUTION* 403-06 (3d ed. 2011).

<sup>72</sup> See *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.) 414-15 (appeal taken from Eng.) (rejecting an ignorance-of-law defense); *David Securities Pty. Ltd. v. Commonwealth Bank of Austl.* (1992) 175 CLR 353, 374 (Austl.).

<sup>73</sup> See GOFF & JONES, *supra* note 66, at 187-89; William Swadling, *A Claim in Restitution?*, 1996 LLOYD'S MAR. & COM. L. Q. 63, 65 (arguing that an "ignorant" payor does not satisfy the criteria for a successful restitutionary claim"); Tang Hang Wu, *Restitution for Mistaken Gifts*, 20 J. CONTRACT L. 1, 12-20 (2004) ("[I]gnorance or lack of belief is not a mistake."). *But cf.* R.B. Grantham & C.E.F. Rickett, *Restitution, Property and Ignorance – A Reply to Mr. Swadling*, 1996 LLOYD'S MAR. & COM. L. Q. 463.

<sup>74</sup> See William Swadling, *Ignorance and Unjust Enrichment: The Problem of Title*, 28 OXFORD J. LEGAL STUD. 627, 657 (arguing that when a pickpocket steals a wallet, "title remains with the victim," and as a result, "there is no enrichment of the thief at his victim's expense").

again, as a result of shared values, results tend to be remarkably consistent from one place to the next. While the forms of analysis differ, the various paths generally converge at the same destinations. Mistaken payments are recoverable, improperly induced transactions are reversed, and so on. Exceptions nevertheless exist. At the margins – in the truly interesting cases – unjust factors may point one way, while juristic reasons lead another. Because it is difficult to disentangle individual outcomes from complex backgrounds, there is no cause for alarm if, say, a particular type of restitutionary claim generates liability in France but not in the United States. For all their similarities, French and American societies obviously differ and, unsurprisingly, occasionally disagree. Inconsistency might be more worrisome, however, if it occurs within a single jurisdiction as a result of a shift in the form of legal analysis.

In Canada, *Garland* has not yet generated results noticeably different from those previously produced under the traditional common-law model of unjust enrichment. It likely will do so in the future. In England, in contrast, a case arose that clearly turned on the difference between unjust factors and juristic reasons.<sup>75</sup> The facts of *Deutsche Morgan Grenfell Group plc v. Inland*

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<sup>75</sup> As Professor Dannemann observed during the 2011 Boston University School of Law Conference on Restitution and Unjust Enrichment, *C.T.N. Cash & Carry Ltd. v. Gallaher Ltd.*, [1993] EWCA (Civ) 19, [1994] 4 All E.R. 714 (Eng.), also illustrates the importance of the nature of the test of injustice. The plaintiff retailer obtained its supply of cigarettes from the defendants under a series of contracts. *Id.* at 716. The plaintiff ordered a consignment worth £17,000 to be delivered to one of its stores, but as a result of an error, the defendants delivered to a different store in the plaintiff's chain. *Id.* When the mistake was discovered, the defendants agreed to collect the goods and take them to the right location. *Id.* Unfortunately, before they could do so, the cigarettes were stolen. *Id.* Honestly, but wrongly, believing that the property and risk had passed to the plaintiff, the defendants announced that they would withdraw credit facilities unless the plaintiff paid for the missing goods. *Id.* Because the defendants were the exclusive supplier of many popular brands of cigarettes, the plaintiff felt practically compelled to capitulate to the demand. Some time later, however, the plaintiff demanded restitution of the £17,000. *Id.*

Despite conceding that his analysis led to an “unattractive result, inasmuch as the defendants [were] allowed to retain a sum which . . . was not in truth due to them,” Lord Justice Steyn rejected the plaintiff's claim. *Id.* at 719. He did so on the basis that the doctrine of economic duress generally did not – and should not – extend to situations in which the claimant complies with a good faith demand received from a commercial party operating at arm's length. *Id.* Restitution was denied for want of an unjust factor.

The result *prima facie* would be different under a regime of juristic reasons. Since the property and risk in the cigarettes had not passed prior to the theft, the plaintiff was not actually indebted to the defendant. And since the payment of £17,000 was not actually made in discharge of a legal obligation, it presumptively occurred without legal basis and consequently was recoverable. It may be argued, however, that while the plaintiff had not incurred liability for the original delivery, it did pay for the purpose of settling a disputed claim.

*Revenue Commissioners*<sup>76</sup> can be simplified. The plaintiff company, resident in the United Kingdom, incurred a tax liability as a result of paying dividends to its parent, which was resident in Germany.<sup>77</sup> If both companies had been resident in the United Kingdom, then they could have made an election that would have deferred payment of the tax for several months.<sup>78</sup> Later, the European Court of Justice held that a tax advantage could not be premised upon residency. The plaintiff then sought restitution.<sup>79</sup> The relevant enrichment consisted not of the principal sum, but rather the time value of the money.<sup>80</sup> But for the improper regulation, the tax would have been paid later and the interim use of the money would not have passed from the plaintiff to the defendant.<sup>81</sup>

Counsel raised the nature of injustice, and Lords Hoffmann and Walker, in dicta, found the juristic reason analysis somewhat attractive.<sup>82</sup> The House of Lords, however, maintained the traditional common-law approach, with the result that the plaintiff had to prove that the defendant's enrichment was attributable to an unjust factor.<sup>83</sup> The plaintiff did so by persuading the court that the early payment occurred by mistake.<sup>84</sup> That finding is controversial.<sup>85</sup> Nevertheless, the important point for present purposes is that restitution was available only because the court accepted that the plaintiff had demonstrated a positive reason for reversing the defendant's enrichment.

Now consider how the dispute would have been resolved on a civilian analysis. There is no question that the basic tax was valid. Even if the plaintiff and its parent company had enjoyed the option of postponing payment, they would have remained liable for the early payment unless and until they actually exercised the election. As a result, hypothetical situations aside, the plaintiff paid pursuant to an enforceable obligation. The basic taxing provision provided a legal basis for the impugned transfer or, as a Canadian court would say under *Garland*, the statute constituted a juristic reason for the defendant's enrichment.<sup>86</sup>

It is not surprising that different tests may produce different results. Furthermore, reasonable people might disagree as to whether a party in the plaintiff's position ought to enjoy restitution. It generally is possible to take

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<sup>76</sup> [2006] UKHL 49, [2007] 1 A.C. 558 (appeal taken from Eng.).

<sup>77</sup> *Id.* at 598-99.

<sup>78</sup> *Id.* at 564.

<sup>79</sup> *Id.* at 565.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 569, 611-13.

<sup>83</sup> *Id.* at 569.

<sup>84</sup> *Id.* at 572.

<sup>85</sup> Robert Chambers, *Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners*, 6 OXFORD U. COMMONWEALTH L.J. 227, 230-34 (2006).

<sup>86</sup> See *supra* text accompanying notes 52-59.

comfort, however, from the belief that the results obtained in court are a function not merely of rules written on a page but also of deeper societal truths. For example, in a simple case of mistaken payment – one not complicated by retroactive changes or clarifications in the law – a rule that allows recovery speaks to the sensitive balance that has been struck, over many years, between competing interests – respect for personal autonomy, protection of private property, the desire for finality of transactions, and so on. It therefore is disconcerting to find that, with no discernible shift in the surrounding context, *Garland's* juristic reasons would justify retention of the tax in *Deutsche Morgan Grenfell*, whereas the traditional unjust factors required restitution. The taxpayer legitimately might feel aggrieved by the seemingly arbitrary shift to a new model of unjust enrichment.

#### V. SUPPORTING RULES

Truth be told, Canadian law has handled the shift from unjust factors to juristic reasons reasonably well. The process has been far from perfect, but judges generally have understood the basic nature of the exercise. Many of the details, in contrast, remain untouched, as the courts have yet to appreciate the extent of the change wrought by *Garland*.

The problem arises in connection with the specific reasons for awarding or refusing restitution. Common-law lawyers already are familiar with some types of juristic reason. Benefits falling within the allocated risks of a contract, for instance, are irrecoverable on any reckoning. Moreover, as previously explained, unjust factors often operate by negating a purported basis of payment. Duress, for example, may become relevant if the defendant claims that an enrichment was received as a gift. Likewise, the doctrine of ultra vires demand is apt to arise as a result of a government's claim that the plaintiff paid pursuant to statute or disposition of law. Some juristic reasons, however, are virtually unknown to the common law. That largely is true of "natural obligations." A natural obligation exists if the operative norms are too weak to compel the transfer of a benefit but strong enough to justify retention of any benefit that is received. Lord Mansfield recognized several possibilities in *Moses v. Macferlan*,<sup>87</sup> but the concept effectively disappeared from the common law at the beginning of the nineteenth century.<sup>88</sup> Civilian

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<sup>87</sup> (1760) 97 Eng. Rep. 676 (K.B.) 680-81; 2 Burr. 1005, 1012-13 (explaining that restitution is available "only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering").

<sup>88</sup> The concept of natural obligations largely was obliterated by the purported rule that allowed recovery for mistakes of fact but not mistakes of law. *See* *Bilbie v. Lumley*, (1802)

jurisdictions, in contrast, often deny recovery of benefits received by virtue of natural obligations.<sup>89</sup>

More subtle, and consequently perhaps more worrisome, the primary rules of restitutionary recovery (i.e., unjust factors and juristic reasons) are supported by a complex network of subsidiary or secondary rules, many of which affect other areas of law as well. That point nicely emerges from a hypothetical formulated by Professor Birks.<sup>90</sup> The plaintiff, who lives below the defendant in a poorly insulated apartment building, spends a small fortune heating her unit during a long winter. The defendant takes advantage of the laws of convection and is saved the expense of heating his unit. Is the plaintiff entitled to restitution for the enrichment? Of course not. Under a traditional common-law scheme, the claim would be hopeless. The plaintiff's intention was not impaired, the defendant did not act badly, and no policy compels the upstairs neighbor to share the expense. Canadian courts under *Garland*, however, will struggle to reach the same result. There is no obvious juristic reason to justify the defendant's retention of the benefit without payment. The claimant was not obligated, contractually or otherwise, to heat her apartment. Birks falls back on the idea of a "grudging gift," but that uncharacteristically comes close to saying that the plaintiff acted with a "deemed" or "quasi" gratuitous intention.<sup>91</sup> The best solution ultimately will be found in some notion of "incidental benefit," but because the common law traditionally had little need for such ideas, the Canadian court would have to start from close to scratch. So too, in other situations, Canadian courts will have to develop detailed rules that deny relief to officious meddlers,<sup>92</sup> a policy that prevents voluntary transactions from being re-opened,<sup>93</sup> and so on.

#### CONCLUSION

What does it matter if a legal system adopts one model of unjust enrichment rather than another? If one were to start from scratch – not merely with respect

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102 Eng. Rep. 448 (K.B.); 2 East 469. Natural obligations almost invariably arise in conjunction with mistakes of law. Money might be paid, for instance, in the mistaken belief that a waging debt is enforceable in law. Although an action in unjust enrichment to recover such a payment ultimately would have failed by reason of natural obligation, *Bilbie v. Lumley* saw it defeated at an earlier stage of analysis by the rule that prohibited a restitutionary claim being founded on a mistake of law. *Id.* at 449-50.

<sup>89</sup> That certainly is true in Louisiana. See David V. Snyder, *The Case of Natural Obligations*, 56 LA. L. REV. 423, 432-33 (1995).

<sup>90</sup> See BIRKS, UNJUST ENRICHMENT, *supra* note 50, at 158; see also *Ulmer v. Farnsworth*, 15 A. 65, 66-67 (Me. 1888).

<sup>91</sup> BIRKS, UNJUST ENRICHMENT, *supra* note 50, at 159.

<sup>92</sup> As when a person, without intending to confer a gift, knowingly provides an unsolicited and non-obligatory benefit.

<sup>93</sup> As when a person, without creating a contractual compromise and without intending to confer a gift, prefers to capitulate to a claim rather than litigate the matter immediately.



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to the rules of restitutionary recovery but to private law as a whole – the choice between unjust factors and juristic reasons arguably would not matter. Each has its benefits; both are perfectly serviceable; the results generally are the same in either event. Barring catastrophic social upheaval, however, lawmakers are never presented with a blank slate.

The real issue pertains to the desirability and advisability of shifting from one model to the other. Prior to the last quarter of the twentieth century, the question seldom was asked. As a result, if American lawyers interested in restitution glance at their closest cousins, Canada and England, they are apt to be quite surprised to find serious debate regarding the civilian model of unjust enrichment. At precisely the same time that the *Restatement (Third)* is laying the foundations for the foreseeable future, those foundations are being called into question elsewhere in the common-law world. It is fascinating to consider the path that English law might have followed if Professor Birks had not died so soon after undergoing his civilian conversion. Given everything else that he accomplished, it is just possible that by force of personality and persistent argument, he might have won the day. The basic materials and propositions remain, of course, but the movement toward a juristic reason analysis in England seems to have lost steam. Turning then to the Canadian scene, the picture is not altogether encouraging. The Supreme Court of Canada's puzzling decision to abandon the unjust factors has not been as disastrous as some had feared. It nevertheless has caused a substantial measure of grief. Fundamental principles need to be re-conceived, textbooks must be re-written, and precedents have to be re-interpreted. Along the way, errors arise, lapses occur, and concepts are confounded.<sup>94</sup> Canadians eventually will sort themselves out, but when a future generation looks back at the mess, they may well regret that they did not have a Restatement of their own to keep them from wandering.

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<sup>94</sup> That has been true even at the highest level. The Supreme Court of Canada unequivocally adopted the civilian model in 2004, *see Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (Can.), and reiterated that decision in 2011, *see Kerr v. Baranow*, [2011] 1 S.C.R. 269 (Can.). In between, however, it suggested in one case that unjust factors continue to play a decisive role, *see Pacific Nat'l Inv. Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575 (Can.), and it decided another case without ever mentioning juristic reasons or even unjust enrichment, *see B.M.P. Global Distrib. Inc. v. Bank of Nova Scotia*, [2009] 1 S.C.R. 504 (Can.).