MILESTONES IN THE LAW OF *UNJUST ENRICHMENT*, PETER BIRKS (OXFORD: OXFORD UNIVERSITY PRESS, 2003)

It is a remarkable feature of the law of unjust enrichment that some of its greatest milestones are not cases or statutes, but books. *Unjust Enrichment*, by Professor Peter Birks (who passed away in July 2004), may be another such milestone.[1] It was published in October 2003 by Oxford University Press in its Clarendon Law Series and is thus a relatively small book designed to be accessible to readers who are not familiar with the subject. However, like other books in that series, such as H.L.A. Hart's *The Concept of Law*,[2] F.H. Lawson's *The Law of Property*[3] and Barry Nicholas's *Introduction to Roman Law*,[4] *Unjust Enrichment* may have a profound effect on the law that goes far beyond the modestly stated objectives of the series. It is too early to predict its full impact. That can be assessed only after several years have passed and judges, lawyers and law students have had an opportunity to reflect on its arguments and their application to particular cases.

Whatever its reception elsewhere, *Unjust Enrichment* is already essential reading for anyone dealing with that subject in Canada. The recent judgment of the Supreme Court of Canada in *Garland v. Consumers' Gas*,[5] discussed below, marks a significant change of direction for the Canadian law of unjust enrichment. That new direction will need to be charted in the coming years and *Unjust Enrichment* is currently the only work that provides any real help with that task.

The academic contribution to the law of unjust enrichment is so prominent primarily because that branch of the law is so new. Of course, there are cases of unjust enrichment dating back centuries, but the formal recognition of unjust enrichment as a distinct part of the common law occurred only relatively recently. This year marks the golden anniversary of its recognition by the Supreme Court of Canada in *Deglman v. Guaranty Trust Co. of Canada*.[6] Recognition by the highest courts in Australia and England came later in *Pavey & Matthews Pty. Ltd. v. Paul*[7] and *Lipkin Gorman v. Karpnale Ltd.*,[8] respectively. Much of the responsibility for defining the structure and scope of this branch of the common law has fallen to academic lawyers, who now have a greater influence on the law than they did when older branches of the law, such as contract or tort, were in similar stages of development.

These observations are not intended to detract in any way from the bar or bench. Between them, they have primary responsibility for creating and developing the law of unjust enrichment, which consists of a continually expanding collection of cases supplemented here and there by statute. The formal recognition of unjust enrichment in each jurisdiction did not create that body of law, but proclaimed its existence, thereby identifying the common thread that ties together centuries of jurisprudence and providing the foundation for an explosion of new cases on the subject.

---

1 Peter Birks, *Unjust Enrichment* (Oxford: Oxford University Press, 2003).
2 (Oxford: Oxford University Press, 1961).
3 (Oxford: Oxford University Press, 1958, but now in its third edition by Lawson and Rudden).
4 (Oxford: Oxford University Press, 1962).
5 (2004), 237 D.L.R. (4th) 385 [*Garland*].
6 [1954] S.C.R. 725 [*Deglman*].
7 (1987), 162 C.L.R. 221 (H.C.A.).
8 [1991] 2 A.C. 548 (H.L.).

It has become standard practice to trace the modern law of unjust enrichment back to *Moses v. Macferlan*,[9] in which Lord Mansfield C.J. famously explained the basis of the now defunct action for money had and received and began the catalogue of what are known today as "unjust factors," that is, reasons why an enrichment might be unjust:

> It lies only for money which, ex aequo et bono, the defendant ought to refund.... [I]t lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.[10]

No doubt *Macferlan* deserves primacy of place in the law of unjust enrichment, but there is an older case on the Chancery side that should not be forgotten. In *Ryall v. Ryall*,[11] Lord Hardwicke L.C. invoked tracing and the resulting trust as the means of achieving restitution of unjust enrichment. That case has not just historical but continuing significance because, unlike the action for money had and received, tracing and the resulting trust are still vital features of the law of unjust enrichment.

Regardless of where the search for the law of unjust enrichment begins, it is not easy to follow its development through the cases alone. For much of its existence that body of law was not recognized as such, but existed in fragments, some found in books on contract law, others attached to the law of property or trusts and many others seemingly homeless. The coherence of the subject was well disguised by the wide variety of labels under which it could be found, such as actions for money had and received or money paid, constructive, implied or resulting trusts, equitable liens, *quantum meruit*, *quantum valebant*, rectification, rescission, subrogation, tracing, undue influence and unconscionability.

It was the academic writing on the subject that made it possible to see the connections between these cases and form them into the body of law we now call unjust enrichment. There are many books and many more articles that have contributed in one way or another to our understanding of the subject. Of these, three stand out as milestones in the development of the law because they transformed our perception of it: the *Restatement of the Law of Restitution: Quasi-Contract and Constructive Trusts*[12] produced by Austin Scott and Warren Seavey for the American Law Institute, *The Law of Restitution*[13] by Robert Goff and Gareth Jones and *An Introduction to the Law of Restitution*[14] by Peter Birks.

The *Restatement* followed a fascinating period of American legal scholarship that began near the end of the 19th century. As indicated by its subtitle, the *Restatement* collected a variety of previously unconnected cases from both common law and equity. It quickly caught the eyes of English judges and academics. In "Restitution,"[15] Seavey and Scott introduced the *Restatement* to the English legal community and explained their choice of the word "restitution." Professor P.H. Winfield wrote in his review, "The American Restatement of the Law of Restitution":

---

9. (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) [*Macferlan*].
10. *Ibid.* at 680-81.
11. (1739), 1 Atk. 59, 26 E.R. 39 (Ch.).
12. (St. Paul: American Law Institute Publishers, 1937) [*Restatement*].
13. (London: Sweet & Maxwell, 1966).
14. (Oxford, Oxford University Press, 1985).
15. (1938) 54 Law Q. Rev. 29.

I doubt whether any of the output of the American Law Institute is more important than this Restatement. It is particularly so to all of us on this side of the Atlantic who are anxious to find a scientific basis for our system as distinct from the purely practical application of isolated rules. For the law of quasi-contract has, until recently, been deplorably neglected in English legal literature. Our American brethren were far ahead of us in this respect.[16]

The *Restatement* also favourably impressed Lord Wright of Durley.[17] Undoubtedly, it contributed to his famous statement, in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*,[18] that "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment."

The Supreme Court of Canada's recognition of unjust enrichment in *Deglman*[19] can be traced back to the *Restatement* along two different lines. The Court quoted Lord Wright in *Fibrosa*[20] and also relied on *Williston on Contracts*.[21] Samuel Williston had been involved in the preparation of the *Restatement* and the distinction between contract and unjust enrichment was apparent in his work.[22]

The Law of Restitution,[23] known everywhere as "Goff and Jones," was first published in 1966. Now in its sixth edition, this great book gathered together the English cases on the law of restitution and a few closely related subjects. For the first time the English law of unjust enrichment could be found within the covers of one book. It has had a remarkable influence on the law, becoming a standard reference work, not just in England but throughout the Commonwealth. As Peter Birks wrote, in "Misnomer" in *Restitution Past, Present and Future*:

If we made a list of the common law's great achievements in this century, the work of Professor Jones and Lord Goff in the law of restitution would come near the top.... The publication of *Goff and Jones* revealed, and at the same time transformed, this huge area of law, not only here in England but all over the world.[24]

An Introduction to the Law of Restitution[25] was first published in 1985 and a revised edition came out in 1989. It is regarded by many as the greatest of these three milestones. No doubt Professor Birks would have protested this assessment and reminded us of the danger of undervaluing the great intellectual achievements of the past that have become accepted and seemingly obvious truths for subsequent generations. However, his *Introduction* has two main claims to greatness.

First, the *Introduction* provided a coherent structure for the collection of material provided by Goff and Jones. It identified, distinguished and explained each of the elements of unjust

16 (1938) 54 Law Q. Rev. 529 at 529.
17 See his review, "Restatement of the Law of Restitution" (1937) 51 Harv. L. Rev. 369 and his address, "*Sinclair v. Brougham*" (1938) 6 Cambridge L.J. 305.
18 [1943] A.C. 32 at 61 (H.L.) [*Fibrosa*].
19 *Supra* note 6.
20 *Supra* note 18.
21 Samuel Williston, *Williston on Contracts* (Mount Kisco, N.Y.: Baker, Voorhis, 1957).
22 See Lord Wright of Durley, *Legal Essays and Addresses* (Cambridge: The University Press, 1939) at 206 (author also known as Robert Alderson Wright, Baron).
23 *Supra* note 13.
24 W.R. Cornish *et al.*, eds., *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998) 1 at 2.
25 *Supra* note 14 [*Introduction*].

enrichment. Readers could see clearly why the paradigm of enrichment is the receipt of money and why that is different from the receipt of goods, performance of a service or payment of a debt. The various unjust factors were laid out and compared, revealing the essential similarities and differences among mistake, duress, undue influence, failure of consideration, *etc.* Never before was an area of law explained with such precision and logic.

Second, the influence of the *Introduction* was not limited to unjust enrichment or restitution, but reached many different areas of private law. By carefully distinguishing unjust enrichment from wrongful enrichment and from other sources of private legal rights and duties, Birks inspired legal scholars around the world to consider anew the boundaries between and within different branches of the law. There has been an explosion of exciting private law scholarship over the past 20 years and the *Introduction* deserves much of the credit for that revival.

Lists such as these tend to be controversial and strangely interesting. Few people agree on the ten greatest books, buildings, movies, songs, *etc.* No doubt scholars in the field would, if asked, produce very different lists of the top ten contributions to the law of unjust enrichment. However, I suspect (with only anecdotal evidence in support) that the *Restatement*, Goff and Jones and the *Introduction* would be found at or near the top of everyone's list, because they do hold special places in that body of literature. *Unjust Enrichment* is too new to be regarded in the same way. However, there are two main reasons to believe it may attain that stature and become the fourth great milestone in the subject.

First, *Unjust Enrichment*[26] seeks to do something that no other book has done before, which is to emancipate unjust enrichment from the law of restitution. The three great milestones are about the law of restitution, in which can be found the law of unjust enrichment. *Unjust Enrichment* is not a long awaited second edition of the *Introduction*. It is about a different, albeit overlapping subject. This difference is not merely one of form, but goes to the heart of the subject.

In private law, restitution refers to the goal of those legal rights (and corresponding duties) that cause one person to give up to another an asset or some other benefit. The term is used to distinguish them from rights that pursue other goals, such as compensation or punishment. In contrast, unjust enrichment is a source of rights. It is one of four main categories of events that create legal rights, along with manifestations of consent (such as contracts, gifts and declarations of trust), wrongs (such as torts, breach of contract and breach of fiduciary duty) and miscellaneous other events (such as statutes, judgments and detrimental reliance).

There is a strong connection between restitution and unjust enrichment, because restitution is the only coherent response to unjust enrichment. A defendant who is liable solely on the basis of unjust enrichment (for example, by receipt of a mistaken payment) should not be asked to do more than give up that enrichment or its value in money. In the absence of consent, wrongdoing, detrimental reliance, *etc.*, there is no justification for putting the defendant in a worse position than if the unjust enrichment had never occurred.

---

[26] *Supra* note 1.

Although unjust enrichment leads only to restitution, the converse is not true. Rights to restitution are created by a variety of different events and not only by unjust enrichment. Defendants who profit from their wrongs are sometimes required to give up those profits. People can make restitution by consent, as demonstrated by *LeClair v. LeClair Estate*.[27] Statutes and judgments can also require people to give up benefits received.

The failure in the past to separate unjust enrichment from restitution and, particularly, from other sources of rights to restitution has sometimes led to confusion and error. *Lac Minerals Ltd. v. International Corona Resources Ltd.*[28] provides a good example of the problems that can arise when the profits of wrongdoing are treated as if they are unjust enrichment. In that case, the defendant had breached a duty of confidence owed to the plaintiff and thereby acquired land containing commercially valuable gold deposits. In cases of wrongdoing like this, the main issues are whether the defendant breached a duty owed to the plaintiff, whether restitution is an appropriate response to that particular wrong and whether restitution should be effected by a personal right (through an account of profits) or a property right (by way of constructive trust). The elements of unjust enrichment (an enrichment of the defendant, a corresponding deprivation to the plaintiff and an absence of juristic reason for the enrichment) are not relevant.

However, *Lac Minerals* was decided on the basis of unjust enrichment. The Court struggled with the requirement that the plaintiff had suffered a corresponding deprivation. Even though the plaintiff had no prior interest in the land acquired by the defendant, the Court decided that the plaintiff had been deprived because the plaintiff probably would have acquired an interest in the land but for the defendant's intervention. This provided an artificial solution to a problem that did not exist, because this was not a case of unjust enrichment. The real issue was simply whether the defendant acquired the land as a result of a wrong done to the plaintiff and not whether the defendant was unjustly enriched at the plaintiff's expense.

By writing a book about unjust enrichment, rather than another book on restitution, Professor Birks has directed our attention to the independence and importance of unjust enrichment and the need to distinguish it carefully from other sources of rights to restitution. *Unjust Enrichment* begins with a "core case" of unjust enrichment, *Kelly v. Solari*, in which an insurer paid a death benefit to a widow, having overlooked the fact that the policy had lapsed for non-payment of premiums.[29] The widow was required to repay the death benefit even though she had done nothing wrong and the insurer had been careless. This is the perfect starting point because it unequivocally proves the existence of the law of unjust enrichment. The widow's liability to repay the death benefit cannot be explained in any other way. She did nothing but innocently and passively receive a payment to which she was not entitled.

Working out from this core case of mistaken payment, the broader boundaries of the category of unjust enrichment are established. The receipt of a payment is just one method of enrichment, which occurs in many different forms, such as the satisfaction of debts, the

---

27 (1998), 159 D.L.R. (4th) 638 (B.C.C.A.).

28 [1989] 2 S.C.R. 574 [*Lac Minerals*].

29 (1841), 9 M. & W. 54, 152 E.R. 24 (Ex. Ct.).

receipt of goods or interests in land and the performance of services. A mistake of fact is just one reason why an enrichment might be unjust. There are many others, such as mistake of law, duress, undue influence and failure of consideration. By generalizing from mistake to unjust and from payment to enrichment, Birks demonstrates that the core case is not the only case and establishes the core principles that link all cases of unjust enrichment in all its varieties.

If *Unjust Enrichment* succeeds in its mission of liberating the law of unjust enrichment from the law of restitution, it will, for that reason alone, come to be regarded as the next great milestone in the subject. However, there is a second reason why it may attain that status. The concept of unjust is explained in a way that is entirely new for the common law. Birks argues that the time has come to abandon the traditional common law approach of a catalogue of unjust factors, which can be traced back to *Macferlan*.[30] Instead, an enrichment should be regarded as unjust if there is an absence of basis for it. In other words, it is time for the common law to adopt the approach taken by the civil law.

The outcomes of most cases would not be affected by this choice of analysis. If an enrichment is unjust, normally there will be both an identifiable unjust factor and an absence of basis. However, the two methods of analysis are strikingly different. Where the common law asks whether there is a positive reason to reverse the enrichment (such as a mistake or duress), the civil law asks whether the defendant has a right to retain the enrichment (because of a valid contract, gift, statute, *etc.*). They are two entirely different ways of approaching the problem and the transition from one to other will not come easy. As Birks points out, the list of unjust factors "was accessible to ordinary intelligence."[31] A layperson can understand mistake or duress as reasons why an enrichment should be given back. In contrast, absence of basis is, in Birks's words, "lawyer's law. No passenger on the Clapham omnibus ever demanded restitution for want of legally significant basis."[32]

Birks notes that the seeds for both methods of analysis can be found in *Kelly v. Solari*.[33] According to Parke B., someone who receives money paid under a mistake of fact must make restitution because "the receiver was not entitled to it, nor intended to have it."[34] These are two different reasons. The receiver's entitlement is a question answered directly by the absence of basis approach, while the payer's intention is the primary focus of the list of unjust factors.

The change from unjust factors to absence of basis will have a unifying effect "[t]hat makes the law of unjust enrichment look less like the law of tort and more like the law of contract."[35] The law of tort is a collection of different torts (such as defamation and negligence) that are analyzed in different ways but linked by the common element that liability arises from breach of a duty recognized at common law or by statute. In contrast, different types of contracts, whether of agency, sale, hire, service, *etc.*, are linked by a number of common conceptual elements, such as *consensus ad idem* and consideration.

30 *Supra* note 9.
31 *Supra* note 1 at 94.
32 *Ibid.* at 100.
33 *Ibid.* at 88.
34 *Supra* note 29 at 26.
35 *Birks, supra* note 1 at 94.

Where the common law of unjust enrichment was understood previously as a collection of different reasons for restitution, absence of basis brings to the front the conceptual elements that tie them closely together.

There are several different reasons to abandon unjust factors in favour of juristic reasons. A stronger emphasis on unifying principles should lead to greater rationality and coherence in an area of law that has more than its fair share of inconsistency in the past. The new approach should also solve a few problems created by reliance on unjust factors. For example, the recovery of illegally collected taxes has been notoriously difficult. Courts have turned to duress and mistake in the past to explain why the taxpayer is entitled to a refund and have on occasion extended those concepts almost beyond recognition to achieve the desired result.[36] In *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, the House of Lords invoked as an unjust factor the policy of no taxation without parliamentary authority to explain the taxpayer's right to restitution.[37] With difficulty it achieved the result that flows easily and automatically through absence of basis.

Birks argues that the law of England and Wales has developed to the point where it has no choice but to abandon unjust factors for absence of basis. That argument is highly controversial and likely to remain so for some time. The same argument has dominated the Canadian law of unjust enrichment ever since *Pettkus v. Becker*,[38] in which the Supreme Court of Canada used a definition of unjust enrichment borrowed from Quebec civil law.[39] Most commentators assumed that the Supreme Court did not intend to replace the common law of unjust enrichment with its civilian counterpart. There was no discussion of that issue in *Pettkus* and, in several subsequent cases, the Supreme Court used the traditional common law approach of unjust factors, such as mistake and undue influence.[40] However, that assumption has been falsified by the Supreme Court of Canada's recent judgment in *Garland*.[41]

Like *Pettkus*, *Garland* introduced a bold new view of the law of unjust enrichment, almost entirely without judicial precedent or academic support. It is now clear that the law of unjust enrichment in common law Canada is based on a civilian model, but with a uniquely Canadian twist. To establish unjust enrichment, the plaintiff must first prove that there is no "established category" of juristic reason for the enrichment, such as a valid contract, gift or statute. If the plaintiff succeeds, the defendant is then given an opportunity to establish a juristic reason based on the legitimate expectations of the parties or on public policy. The first stage is borrowed from civil law. The second stage appears to be the entirely novel creation of the judges who heard and decided *Garland*.

The transition from common law to civil law will not be easy for common lawyers, who will need to learn the meaning of concepts such as *condictio indebiti* and *sine causa* if they

---

36. See *e.g. Eadie v. Brantford (Township)*, [1967] S.C.R. 573.
37. [1993] 1 A.C. 70 (H.L.).
38. [1980] 2 S.C.R. 834 [*Pettkus*].
39. See Lionel Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672 at 677; and Mitchell McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution" (1999) 37 Alta. L. Rev. 1 at 12.
40. See *CP Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; and *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353.
41. *Supra* note 5.

wish to master the civilian absence of juristic reason that now lies at the heart of the common law of unjust enrichment. *Unjust Enrichment* provides the perfect introduction. Written for common lawyers, it explains not just how the civilian model works, but also how the transition from common to civil law is best accomplished. There is also a chapter called "Persistent Fragments," which provides concise and very helpful explanations of the old language of unjust enrichment, such as money had and received, quasi-contract and constructive trust. This can help lawyers and students better understand the older cases and may make it easier for those who first learned their unjust enrichment in those older terms and are now making the transition to the modern law.

Unjust Enrichment can even help with the uniquely Canadian second stage, in which the defendant has the opportunity to establish a juristic reason for the enrichment based on legitimate expectations or public policy. It contains two chapters on the defences that are needed in a jurisdiction that uses a civilian model of unjust enrichment. Some of those defences, such as disenrichment and estoppel, are based on expectations, while others, such as stultification and natural obligation, are based on policy.

Like Hart's *The Concept of Law*,[42] Birks's *Unjust Enrichment* is essential reading for every student of Canadian common law. It should also be read by every lawyer and judge. It is the only guidebook to the future of the law of unjust enrichment in common law Canada and, without an understanding of the basic elements of the law of unjust enrichment, it is simply not possible to understand private law fully and properly.

Unjust Enrichment will probably become a victim of its own success. A few years from now, when the concepts explained in that book are well accepted and seemingly obvious, it will be read no longer as a groundbreaking work but as a standard introduction to basic principles. In the meantime, the Canadian law of unjust enrichment has just entered a difficult period of transition from a common law to a civil law concept of unjustness. Fortunately, the solutions to many of the problems that Canadian lawyers and judges will face in the wake of *Garland*[43] can be found in the pages of *Unjust Enrichment*.

For those reading *Unjust Enrichment* for the first time, a warning is in order. Like all books and articles by Peter Birks, it is extremely well written and easy to read. His straightforward and concise prose can lull readers to think that the concepts are simple. This is very different from some academic writing in which a few simple ideas are hidden in nearly impenetrable thickets of awkward sentences. *Unjust Enrichment* is a treasure trove of important ideas and information laid out in the most accessible manner and packed into the smallest possible space. After speeding through it for the first time, readers would be well advised to read it at least once more to achieve an even deeper level of understanding. That will not be a chore.

Robert Chambers
Professor
Faculty of Law
University of Alberta

---

42 *Supra* note 2.
43 *Supra* note 5.