THE CANADIAN PRINCIPLE OF UNJUST ENRICHMENT: COMPARATIVE INSIGHTS INTO THE LAW OF RESTITUTION

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In this article, the author explores the principle of unjust enrichment as formulated by courts of common law jurisdictions in Canada. He analyzes and assesses that principle in light of comparable principles applied in England, Australia and Quebec. He argues that while sound in many respects, the Canadian principle of unjust enrichment often is characterized by a relative lack of analytical rigour. He concludes by suggesting that Canadian courts might profitably consider the approaches adopted in other jurisdictions.

L'auteur examine le principe d'enrichissement sans cause tel que le formulent les cours de common law au Canada. Il analyse et évalue le principe à la lumière de principes comparables appliqués en Angleterre, en Australie et au Québec. Il soutient que, bien que solide à de nombreux égards, le principe canadien d'enrichissement injustifié se caractérise souvent par une absence relative de rigueur analytique. Il suggère en conclusion que les cours canadiennes s'inspirent des approches adoptées ailleurs.

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I. INTRODUCTION

It generally is accepted throughout the common law world that restitutionary relief is based upon a principle of unjust enrichment.[1] It therefore may be tempting to assume that the *same* principle is applied across jurisdictions. In fact, that leap from terminological uniformity to analytical uniformity would be dangerous. Absent the unifying force of a common court of last resort, the species of unjust enrichment developed in Canada differs, perhaps inevitably, from that which has been developed in, say, England or Australia. Of course, in some respects, such differences are not problematic. Indeed, when the domestic socio-political context so demands, the Supreme Court of Canada *should* formulate rules appropriate for this country, rather than blindly follow the House of Lords or the High Court. In other respects, however,

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1 *Deglman* v. *Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785 (S.C.C.); *Pettkus* v. *Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.); *Lipkin Gorman* v. *Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.); *Pavey & Matthews Pty. Ltd.* v. *Paul* (1986), 162 C.L.R. 221 (H.C.A.); and American Law Institute, *Restatement of the Law of Restitution: Quasi-Contract and Constructive Trusts* (St. Paul: American Law Institute Publishers, 1937) § 1.

the international co-existence of different principles of unjust enrichment provides pause for thought, if not cause for concern. As new technologies[2] bring the world closer together, and as the general trend toward globalization encourages judges and jurists to look abroad when resolving legal disputes,[3] it increasingly becomes necessary to search beneath semantic similarity for signs of substantive difference. Failure to do so entails the risk of importing concepts which, while superficially attractive, can not properly be reconciled with domestic law. At the same time, however, it also is necessary to guard against blind provincialism. While each jurisdiction obviously is free to devise its own means of identifying and remedying unjust enrichments, autonomy is no excuse for error.

In light of the preceding considerations, the two-fold aim of this article is to describe and assess the Canadian version of the principle of unjust enrichment. Neither goal is uncontroversial. Description always is difficult because the law constantly is in a state of evolution and hence invariably is marked by ambiguity and inconsistency. Those difficulties are particularly pronounced in the present context. Although the foundations of the modern law of restitution date back many centuries,[4] the subject only recently was re-born after a long period of substantial dormancy. And as McLachlin J. has conceded, the Supreme Court of Canada's task of parenting it from childhood through to maturity understandably entails occasional error. "As might be expected ... we sometimes flounder. ... Sometimes we take a wrong step ... and have to step back. Sometimes we start out one way ... and find we must backtrack and take a different course."[5] In such circumstances, it is impossible to present a definitive and exhaustive picture of the Canadian principle of unjust enrichment. Accordingly, the more modest goal of this article merely is to sketch an overview of currently evolving theory and practice. In many instances, that exercise will be undertaken on a comparative basis; the Canadian principle often can be brought into sharper definition by contrasting it with its Anglo-Australian counterparts.

The second aim of this article — assessment — is even more controversial. Assessment presumes the existence of a standard against which measurements can be made; something can be adjudged right or wrong only in relation to a paradigm. The source and composition of that paradigm, however, raises an interesting question: on what basis can a decision of the Supreme Court of Canada ever be characterized as being either correct or incorrect (as opposed to the brute fact of technically being

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2 For example, the Restitution Discussion Group (majordomo@maillist.ox.ac.uk) allows restitution scholars from around the world to share information and ideas by means of the internet, while another website (http://www.law.cam.ac.uk/restitution/restitution.htm) contains links related to the law of restitution.

3 See *e.g. Soulos* v. *Korkontzilas* (1997), 146 D.L.R. (4th) 214 at 228 (S.C.C.) McLachlin J., cf. 239-40, Sopinka J.; and A. Mason, "Swearing in of Sir Anthony Mason as Chief Justice" (1987) 162 C.L.R. ix.

4 J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 409-26; G.H.L. Fridman, *Restitution*, 2d ed. (Scarborough, Ont.: Carswell, 1992) c. 1 [hereinafter Fridman, *Restitution*]; P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) c.1 [hereinafter Maddaugh & McCamus, *The Law of Restitution*].

5 B. McLachlin, "Restitution in Canada" in W.R. Cornish *et al.*, eds., *Restitution: Past, Present & Future* (Oxford: Hart Publishing, 1998) 275 at 276.

binding on lower courts)? Two related sets of answers can be given. From an internal perspective, it seems obvious that the Canadian law of unjust enrichment should be, amongst other things, coherent and comprehensible. Accordingly, the Supreme Court of Canada properly is subject to criticism if, with respect to essentially similar situations, it adopts different analyses or employs different rules. So, too, it properly is open to criticism if its approach to the subject, even if coherent, defies reasonable comprehension. In that regard, adoption of a sound taxonomy is crucial, not merely for classificatory purposes *per se*, but also as a means of promoting awareness.[6] Few legal rules are so complex that they can not readily be grasped in isolation. Rather, difficulties usually arise only when it becomes necessary to relate different sets of rules and to recognize similarities and dissimilarities. Consequently, it is important, particularly with respect to a subject of which most lawyers have relatively little knowledge, that the law be organized in a manner that allows the proper connections to be made easily.

Those internal standards of assessment can be supplemented by external standards. Although in one sense self-contained, the Canadian law of unjust enrichment in another sense represents a particular branch of a much larger tree. The roots of that tree furrow back hundreds of years and today support off-shoots, not only in Canada, but also in other common law jurisdictions, most notably England and Australia. Consequently, given those shared origins, it often is instructive to test the Canadian principle against its Anglo-Australian equivalents. Occasionally, such comparisons reveal that one country has developed the same basic materials more coherently or to better effect. Moreover, given the manner in which the doctrine of precedent generally restricts the scope of judicial innovation, the Supreme Court of Canada in some degree is accountable to the past.[7] Granted, in the present context, the past may seem an uncertain guide given that the historical development of the individual heads of restitutionary recovery at times appeared haphazard. The genius of modern scholarship, however, has been to discern order in that apparent chaos and to distill from the cases a common structure according to which the governing rules can be understood.[8] The resulting scheme of unjust enrichment presents a logical system which, while admitting of some variation, constrains the possibilities of deviation at a fundamental level.

II. PRINCIPLES OF UNJUST ENRICHMENT

The need for the conceptual transition from discrete heads of restitutionary recovery to a unified principle of unjust enrichment arose during the last century when the writ system was abolished and it became necessary to re-organize the law along the lines

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6 See *e.g.* J.D. McCamus, "Unjust Enrichment: Its Role and Its Limits" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) 129 at 131-41.

7 *Soulos* v. *Korkontzilas*, *supra* note 3 at 227, McLachlin J.; *Peel (Regional Municipality)* v. *Canada* (1992), 98 D.L.R. (4th) 140 at 151-55 (S.C.C.) McLachlin J.; *White* v. *Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at 244 (N.B.C.A.) La Forest J.A.

8 See especially *Restatement of the Law of Restitution*, *supra* note 1; R. Goff & G. Jones, *The Law of Restitution*, 1st ed. (London: Sweet & Maxwell, 1966); and P. Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, 1985) [hereinafter Birks, *An Introduction to the Law of Restitution*].

of causes of actions rather than remedies. Prior to that time, for historical reasons that need not fully be pursued here,[9] restitutionary liability, long discussed under the misleading label of *quasi*-contract,[10] generally was premised upon the notion of an "implied contract."[11] That implication, properly understood, was pure legal fiction;[12] as judges initially appreciated, it simply was an expedient by which litigants seeking restitutionary relief bypassed the Court of Common Pleas and invoked the more efficient and convenient procedures available in the Court of King's Bench. Then, as now, such liability had no necessary connection with the law of contract.[13] Unfortunately, however, when the time for re-organization arrived, the legal fiction was transformed into a pernicious reality. The historical foundations of the law of restitution were overlooked as the body of civil obligations was dichotomized into tort and contract. Because of the contractual overtones of "*quasi*-contract" and "implied contract," restitution was marginalized as a mere sub-species of contract, rather than recognized as a third head of recovery based on the principle of unjust enrichment.[14] That error reached its peak in 1914 when the House of Lords, in *Sinclair* v. *Brougham*, held that "the law cannot *de jure* impute promises to repay ... which, if made *de facto*, it would inexorably avoid."[15] Purportedly, if the parties could not have entered into an actual contract, neither could they have recourse to the type of "implied contract" that supported restitutionary relief. The law of restitution temporarily appeared to lose its independence.

The critical element in its struggle for recovery, ironically, was found in the past, long before the confusion of the "implied contract" theory firmly took hold. In 1760, Lord Mansfield recognized in *Moses* v. *Macferlan* that the seemingly discrete instances of restitutionary relief in fact were explicable on common, non-contractual grounds.

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9 G.B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) c. 1 [hereinafter Klippert, *Unjust Enrichment*].

10 The phrase "*quasi*-contract" was derived from the Roman law term *quasi ex contractu*. Notwithstanding its apparent overtones, that term was *not* used by Roman lawyers to refer to contractual obligations. To the contrary, it was used to denote obligations that, like contract, arose without delict (wrongdoing), but that unlike contract, arose as a matter of law rather than by consent: P. Birks, "English and Roman Learning in *Moses* v. *Macferlan*" (1984) 37 Curr. Leg. Probs. 1 at 8-13.

11 P. Birks & G. McLeod, "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century Before Blackstone" (1986) 6 Oxford J. of Leg. Stud. 46.

12 The "implied contract" underlying restitutionary relief was "implied-in law" and entirely fictitious. In contrast, a contract "implied-in fact" supports an actual contract in circumstances in which, although they proceeded in silence, the parties were *ad idem* on all essential terms: *St. John Tug Boat Co. Ltd.* v. *Irving Refinery Ltd.* (1964), 46 D.L.R. (2d) 1 (S.C.C.).

13 For example, one instance of "implied contract" was the species of the *indebitatus assumpsit* known as "money had and received" that allowed a claimant to, amongst other things, "waive" a tort and compel a tortfeasor to disgorge his wrongful gain, rather than provide compensatory relief: *Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216.

14 See *e.g.* F. Pollock, *Principles of Contract at Law and in Equity* (London: Stevens & Sons, 1879) at 29.

15 [1914] A.C. 398 at 452. See also *Cowern* v. *Nield*, [1912] 2 K.B. 419; *R. Leslie Ltd.* v. *Sheill*, [1914] 3 K.B. 607 (C.A.). To their credit, Canadian courts regularly ignored the "implied contract" theory expounded in *Sinclair* v. *Brougham*: see *e.g. Hooper Grain Co.* v. *Colonial Assurance Co.*, [1917] 1 W.W.R. 1226 (Man. K.B.); *Trades Hall Co.* v. *Erie Tobacco Co.* (1916), 29 D.L.R. 779 (Man. C.A.).

> If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu" as the Roman law expresses it).... This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund.... In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.[16]

Although that analysis was scorned at the height of the "implied contract" theory as "well meaning sloppiness of thought,"[17] it eventually provided the basis for recognition of the principle of unjust enrichment. In 1937, the American Law Institute produced the *Restatement of the Law of Restitution.*[18] Influenced by Lord Mansfield's earlier effort at conceptual unification,[19] its reporters collected together the various situations in which restitutionary relief historically was awarded and placed them all on the footing that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Likewise, although his comments had little immediate impact on English law, Lord Wright offered the following observations in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort.
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> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.[20]

In 1954, the Supreme Court of Canada adopted Lord Wright's *dicta* and thereby gave Canada the distinction of becoming the first Commonwealth jurisdiction to acknowledge authoritatively that the principle of unjust enrichment underlies the availability of restitutionary relief. In *Deglman* v. *Guaranty Trust Co.*,[21] a nephew promised to provide household services to his aunt in exchange for her promise to devise a house to him upon her death. Although the nephew dutifully performed, the aunt died without

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16 (1760), 2 Burr. 1005 at 1012. See also *Sadler* v. *Evans* (1766), 4 Burr. 1984 at 1986; *Jestons* v. *Brooke* (1778), 2 Cowp. 793 at 795.

17 *Holt* v. *Markham*, [1923] 1 K.B. 504 at 531 (C.A.), Scrutton L.J.

18 *Supra* note 1.

19 W.A. Seavey & A.W. Scott, "Restitution" (1938) 54 L.Q. Rev. 29.

20 [1943] A.C. 32 at 61-62 (H.L.(E.)).

21 *Supra* note 1.

having made the requisite provision in her will. The parties' express contract was unenforceable for want of writing under the *Statute of Frauds* and the Court refused to imply any other contract as a ground for relief. On the basis of the principle of unjust enrichment, however, it did recognize that the aunt was subject to a non-contractual obligation to return the fair value of the benefit that she had received from her nephew.[22] Her estate accordingly was liable for restitution of $3000, representing the price that the deceased would have been required to pay to obtain the same services in an open market.

Although Canadian courts frequently relied upon *Deglman* for the imposition of restitutionary relief,[23] it was not until 1980 that the Supreme Court of Canada settled upon a formulation of the underlying principle of unjust enrichment. As discussed below,[24] *Pettkus* v. *Becker*[25] was the culmination of a series of decisions in which the Court devised a means of providing relief to non-titled partners upon the dissolution of cohabitational relationships. Its facts followed a consistent pattern. While Rosa Becker and Lothar Pettkus both contributed the labour needed to acquire and operate a bee farm, that property was placed in his name alone. When the couple ended their *de facto* marriage after nearly twenty years, Ms Becker sought a one-half interest in the land and assets that had been accumulated through the joint effort. In such circumstances, Dickson J. held that the desired relief was available, in the form of a constructive trust, upon proof of unjust enrichment. Reiterating the language from his earlier decision in *Rathwell* v. *Rathwell*,[26] he further specified that:

> ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.[27]

In contrast to Canada, England and Australia were very late in accepting the significance of the principle of unjust enrichment. Decades after *Deglman*, Lord Diplock held that "there is no general doctrine of unjust enrichment recognised in English law"[28] and Sir Anthony Mason, writing extra-judicially, noted that the principle had been "so far rejected in Anglo-Australian law."[29] It was not until 1987 that the High Court of Australia expressly placed restitutionary relief on the footing of

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22 *Ibid.* at 788, Rand J., 794-5, Cartwright J.

23 See *e.g. County of Carleton* v. *City of Ottawa* (1965), 52 D.L.R. (3d) 220 (S.C.C.); *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1 (S.C.C.); cf. *City of Moncton* v. *Stephen* (1956), 5 D.L.R. (2d) 722 (N.B.S.C. App. Div.); *Peter Kiewit Sons Ltd.* v. *Eakins Construction Co.* (1960), 22 D.L.R. (2d) 465 (S.C.C.); and *Lazarenko* v. *Borowsky* (1966), 57 D.L.R. (2d) 577 (S.C.C.). See generally Klippert, *supra* note 9 at c. 2.

24 Section III(A)(2).

25 *Supra* note 1.

26 (1978), 83 D.L.R. (3d) 289 at 306 (S.C.C.).

27 *Pettkus* v. *Becker*, *supra* note 1 at 273-74.

28 *Orakpo* v. *Manson Investments* (1977), [1978] A.C. 95 at 104 (H.L.).

29 Hon. Sir A. Mason, "Themes and Prospects" in P.D. Finn, ed., *Essays in Equity* (Sydney: Law Book Company, 1985) 242 at 246.

unjust enrichment[30] and it was another four years after that before the House of Lords finally reached a similar conclusion.[31] Significantly, however, the test applied in those countries differs somewhat from the Canadian version. Although the courts in Australia and England have been relatively less inclined to specify the constituent elements,[32] they quite clearly consider the principle of unjust enrichment to be comprised of: (i) an enrichment to the defendant, (ii) gained at the plaintiff's expense, (iii) as a result of an unjust factor.[33]

Interestingly, the very fact that they came late to the principle of unjust enrichment may have saved Australian and English courts from some of the errors that have been committed by Canadian courts. The intellectual environment that influenced the High Court and the House of Lords was much different from that in which the Supreme Court of Canada acted. At the time of *Deglman* v. *Guaranty Trust Co.*, unjust enrichment had been the subject of relatively little analysis. The fact that the Court's supportive references in that ground-breaking case consisted of Lord Wright's *dicta* in *Fibrosa*, the *Restatement of Contract*[34] (rather than the *Restatement of Restitution*) and *Williston on Contract* is telling.[35] Moreover, notwithstanding the appearance of Goff and Jones' pioneering text in 1966,[36] the situation was little different when Dickson J. articulated his three-part test in *Rathwell* and *Pettkus* v. *Becker*. Aside from a handful

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30 *Pavey & Matthews Pty. Ltd.* v. *Paul*, *supra* note 1. See also *Australia & New Zealand Banking Group Ltd.* v. *Westpac Banking* (1988), 164 C.L.R. 662 (H.C.A.); and *David Securities Pty. Ltd.* v. *Commonwealth Bank of Australia* (1992), 175 C.L.R. 353 (H.C.A.).

31 *Lipkin Gorman* v. *Karpnale Ltd.*, *supra* note 1. See also *Woolwich Building Society* v. *I.R.C. (No. 2)*, [1993] A.C. 70 (H.L.); and *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.*, [1996] A.C. 669 (H.L.).

32 For that reason, it may be that Anglo-Australian courts are less willing than Canadian courts to treat the principle of unjust enrichment as a cause of action *per se*, rather than as (what admittedly may amount to almost the same thing) a unifying rationale for historically existing causes of action and a guide for the development of new causes of action: cf. Maddaugh & McCamus, *The Law of Restitution*, *supra* note 4 at 21-27; J.D. McCamus, "Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle" (1991) 2 Supreme Court L.R. (2d) 505 at 532-42; *Peel (Regional Municipality)* v. *Canada*, *supra* note 7 at 151-52; *Winterton Constructions* v. *Hambros Australia* (1991), 101 A.L.R. 363 at 374-76 (F.C.) Gummow J.; K. Mason & J.W. Carter, *Restitution Law in Australia* (Sydney: Butterworths, 1995) at 31-33, 75-79, 970-71; Birks, *An Introduction to the Law of Restitution*, *supra* note 8 at 16-27; and A. Burrows, *The Law of Restitution* (London: Butterworths, 1993) at 54-56 [hereinafter Burrows, *The Law of Restitution*].

33 Mason & Carter, *ibid.* at 38; G. Jones, *Goff & Jones: The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993) at 16 [hereinafter Jones, *Goff & Jones*]; Burrows, *The Law of Restitution*, *ibid.* at 7. For the sake of completeness, the principle sometimes is said to include a fourth element pertaining to the absence of a defence. The plaintiff is responsible for proving the first three elements, the defendant for the fourth.

34 *Restatement of Contract*, § 355 (1932).

35 S. Williston, *A Treatise on the Law of Contracts*, vol. 2 (New York: Baker, Voorhis & Co., 1936) at § 536.

36 R. Goff & G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) [hereinafter Goff & Jones, *The Law of Restitution*].

of committed scholars,[37] the Canadian legal community largely was indifferent to the subject and, as a whole, certainly did not possess the sophistication needed to fulfil the potential of the emerging doctrine. In contrast, by the late 1980s and the early 1990s, Australian and English courts were able to draw upon not only *Goff & Jones*,[38] but also *An Introduction to the Law of Restitution*,[39] in which Birks brought unprecedented structure and coherence to unjust enrichment. So, too, the development of that principle in England and, to a lesser extent, Australia, benefited from the enthusiastic efforts of a generation of Oxbridge graduates who had studied under Professors Jones and Birks, amongst others, and who accordingly were well-versed in the intricacies of unjust enrichment theory. Consequently, while Canadian law certainly developed more favourably in some respects, it was subject to relatively less rigour and discipline during its formative stages.[40] As shall be seen, it continues to bear signs of that leniency.

III. DEFINING THE CANADIAN PRINCIPLE OF UNJUST ENRICHMENT

To reiterate, the Canadian formulation of the principle of unjust enrichment differs semantically from the Anglo-Australian version in several respects.

PRINCIPLES OF UNJUST ENRICHMENT	
The Canadian Formulation	The Anglo-Australian Formulation
1. enrichment to the defendant	1. enrichment to the defendant
2. corresponding deprivation to the plaintiff	2. gained at the plaintiff's expense
3. absence of juristic reason for enrichment	3. as a result of an unjust factor

37 See *e.g.* G.H.L. Fridman, "The Quasi-Contractual Aspects of Unjust Enrichment" (1956) 34 Can. Bar Rev. 393; G.B. Klippert, "The Juridical Nature of Unjust Enrichment" (1980) 30 U.T.L.J. 356; J.D. McCamus, "The Self-Serving Intermeddler and the Law of Restitution" (1978) 16 Osgoode Hall L.J. 515; A.J. McClean, "Unjust Enrichment — Common Law Wine in Civil Law Bottles" (1969) 4 U.B.C. L. Rev. 1; and R.A. Samek, "The Synthetic Approach and Unjustifiable Enrichment" (1977) 27 U.T.L.J. 335.

38 Lord Goff & G. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986).

39 *Supra* note 8.

40 The suggestion that early formulation of the Canadian principle of unjust enrichment may have prevented its proper development is further evidenced by experience elsewhere. Americans quickly recognized the fallacy inherent in the "implied contract" theory (F.C. Woodward, *The Law of Quasi-Contracts* (Boston: Little Brown & Co., 1913)) and placed the subject on a proper theoretical foundation by 1937: *Restatement of the Law of Restitution*, *supra* note 1. Today, however, the law of unjust enrichment generally is ignored by all but a handful of scholars: see *e.g.* A. Kull, "Rationalizing Restitution" (1995) 83 Cal. L. Rev. 1191; D. Laycock, "The Scope and Significance of Restitution" (1989) 67 Texas L. Rev. 1277; and C.T. Wonnell, "Replacing the Unitary Principle of Unjust Enrichment" (1996) 45 Emory L.J. 153.

The remainder of this article will identify and assess how those semantic differences translate into substantive differences.[41] For reasons of convenience, the three elements will be considered in reverse order.

A. ABSENCE OF JURISTIC REASON FOR THE ENRICHMENT

The principle of unjust enrichment historically struggled for acceptance because, for many observers, the first part of that phrase suggested broad standards of fairness that were ill-suited to the essentially positivistic approach of the common law. As late as 1980, Martland J. railed against the allegedly "nebulous" principle on that basis.

> It would clothe Judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guide-lines. By what test is a Judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.[42]

That statement is inaccurate; properly understood, the principle of unjust enrichment does not grant a judicial licence to award or withhold restitutionary relief on the basis of individual conscience. Nevertheless, Martland J.'s comments do indicate the need for caution on two levels. First, if unjust enrichment is to avoid an unprincipled slide into "palm tree justice," courts must adhere to clear standards of liability. Likewise, while evolution undoubtedly is necessary and beneficial, change should occur incrementally, by analogy to existing heads of relief[43] and in a manner that is consistent with the general principle.[44] Second, however, at the current stage of development, it is insufficient for the courts simply to award restitution on appropriate grounds. They also must appear to do so. In an area that remains unusually impressionable, perception is as important as reality. Accordingly, the Supreme Court of Canada assiduously should avoid conveying any suggestion that the availability of restitutionary relief turns upon an appeal to conscience. An instance of loose analysis or an unfortunate turn of a phrase easily may lead practitioners and lower courts to mis-perceive the essential nature of the exercise.

1. POSITIVE REASONS FOR REVERSING ENRICHMENTS

Because the third element of the international principle of unjust enrichment generally is formulated to require proof of an "unjust factor," there appears to be relatively little danger that Anglo-Australian courts will fall prey to the danger of "palm

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41 Important issues also arise in the law of unjust enrichment with respect to defences and remedies. Although, for reasons of brevity, those issues can not be discussed separately in this article, they will be addressed in passing.

42 *Pettkus* v. *Becker*, *supra* note 1 at 262. Similarly, in *Baylis* v. *Bishop of London*, Hamilton L.J. rejected Lord Mansfield's opinions on the ground that "whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'": [1913] 1 Ch. 127 at 140 (C.A.).

43 To borrow Birks' useful description, then, the "unjust" part of the equation generally should "look downward to the cases" and not to "an unknowable justice in the sky": *An Introduction to the Law of Restitution*, *supra* note 8 at 19, 23.

44 *Peel (Regional Municipality)* v. *Canada*, *supra* note 7 at 151-53, 164-66.

tree justice." On that version, a claimant clearly must do more than merely suggest that, in some vague sense, it would be "unjust" for the defendant to retain an enrichment; she must establish a specific and positive reason why she should enjoy relief.[45] And while the scheme has not received judicial imprimatur, it often is said that an enrichment may be characterized as "unjust," and hence reversible, for any of three reasons:[46] (i) the plaintiff did not truly intend for the defendant to receive or retain the enrichment,[47] (ii) the defendant unconscientiously acquired the enrichment,[48] or (iii) regardless of the integrity of the plaintiff's intention or the quality of the defendant's conduct, there exist policy considerations that demand the availability of relief.[49] In each instance, specific rules, derived from precedent and refined by analysis, provide concrete guidance as to when restitution may be ordered. And in each instance, the plaintiff bears the burden of establishing the existence of one such rule.

Dickson J.'s judgment in *Pettkus* v. *Becker* might appear to point Canadian law in a much different direction. To say that restitution should be available if there is an "absence of any juristic reason for the enrichment" seems to suggest that, upon proof of the defendant's enrichment and the plaintiff's deprivation, liability is the default position. On that view, the Canadian formulation of the third element of the principle of unjust enrichment would relieve the plaintiff of the obligation of establishing a positive reason for an award of restitution and instead would place a burden on the defendant to specifically justify the denial of relief.[50] The function served by the third element in Anglo-Australian law seemingly would be abandoned as courts would turn

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45 Thus, as Deane J. noted in *Pavey & Matthews Pty. Ltd.* v. *Paul*, the principle of unjust enrichment does not provide "a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate": *supra* note 1 at 256. In *David Securities Pty. Ltd.* v. *Commonwealth Bank of Australia*, Mason C.J. accordingly stated that "recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality": *supra* note 30 at 379.

46 Birks, *An Introduction to the Law of Restitution*, *supra* note 8.

47 Restitution is available under this heading if the plaintiff's intention in transferring wealth to the defendant was absent (because, for example, she was ignorant of the event in question), vitiated (because, for example, she acted on the basis of a mistake) or qualified (because, for example, she transferred wealth in the unfulfilled expectation that she would receive some benefit in return). Because such grounds are "plaintiff-sided," in the sense that they support relief for reasons pertaining to the claimant's state of mind, it is irrelevant that the defendant was free of fault: *Air Canada* v. *Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 (S.C.C.). Nor is it relevant that the plaintiff was careless: *Kelly* v. *Solari* (1841), 9 M. & W. 54; and *Royal Bank* v. *The King*, [1931] 2 D.L.R. 685 (Man. K.B.).

48 Restitution is available under this heading if, for example, the defendant freely accepted an enrichment from the plaintiff despite knowledge that she expected payment and despite a reasonable opportunity to reject the benefit: *Pettkus* v. *Becker*, *supra* note 1; *Pavey & Matthews Pty.* v. *Paul*, *supra* note 1; and P. Birks, "In Defence of Free Acceptance" in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991) 105 [hereinafter Birks, "In Defence of Free Acceptance"].

49 Restitution may be available under this heading, for example, as a means of preventing the state from retaining an enrichment acquired under an *ultra vires* taxing statute: *Woolwich Equitable Building Society* v. *I.R.C.*, *supra* note 31; *Mason* v. *N.S.W.* (1959), 102 C.L.R. 108 (H.C.A.), Windeyer J.; cf. *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.) Wilson J.

50 Cf. M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta. L. Rev. 407 at 431-34.

directly from proof of enrichment and deprivation to a consideration of possible defences.

That possibility finds some support in recent Canadian cases. In *Peter* v. *Beblow*,[51] a woman sought recovery of the value of the domestic services that she had rendered during the course of a cohabitational relationship. McLachlin J.'s majority opinion allowed the claim on the basis of the principle of unjust enrichment. Having held that the housework and child care services in question constituted an enrichment to the defendant and a corresponding deprivation to the plaintiff, she stated that "since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment."[52] By way of clarification, McLachlin J. rejected the defendant's submission that relief could be denied on the grounds that the services were provided by way of a gift, performed in fulfilment of obligation or, because they occurred in the context of a domestic relationship, fell outside the scope of private law regulation. Significantly, although the final proposal was somewhat unusual, all three of the defendant's arguments pertained to defences that might be invoked to defeat an otherwise sustainable claim. Moreover, although the facts might have raised a positive reason why the plaintiff should have received relief,[53] nothing in McLachlin J.'s judgment pointed to an unjust factor. Rather, her opinion appears to proceed on the basis that, once enrichment and deprivation were established, restitution followed because the defendant could not adduce reasons to the contrary.

Notwithstanding the manner in which he formulated the third element of the principle of unjust enrichment, it seems clear that Dickson J. did not actually intend to sanction such an approach.[54] True, the illustrative "juristic reasons" ("contract or disposition of law") that he offered in *Rathwell* v. *Rathwell*[55] pertained to defences and not to positive reasons for awarding relief. Significantly, however, he imposed liability in *Pettkus* v. *Becker* only because the plaintiff had established the unjust factor of free acceptance.[56] His unorthodox phrasing of the operative element therefore seems

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51 (1993), 101 D.L.R. (4th) 621 (S.C.C.). See also *Giffen, Lee & Wagner* v. *Zellers Ltd.* (1993), 10 O.R. (3d) 387 (G.D.). Similarly, courts often have imported defences into the third element of the principle of unjust enrichment as a means of denying relief: see *e.g. Cherrington* v. *Mayhew's Perma-Plants Ltd.* (1990), 71 D.L.R. 371 (B.C.C.A.); and *McDiarmid Lumber* v. *C.I.B.C.* (1993), 94 D.L.R. (4th) 227 (B.C.S.C.).

52 *Ibid.* at 644.

53 In a concurring opinion, Cory J. specifically invoked an unjust factor and awarded relief on the basis of the plaintiff's proof of the defendant's free acceptance: *ibid.* at 636.

54 Cf. J. Beatson, "Restitution in Canada: Commentary" in Cornish *et al.*, eds., *supra* note 5, 297 at 298 ("once an enrichment has been shown, restitution is allowed subject to specified defences, rather than, as under the traditional common law approach, only where a ground for restitution (mistake, failure of consideration *etc.*) is established").

55 *Supra* note 26 at 306.

56 *Supra* note 1 at 274. Likewise, in *Sorochan* v. *Sorochan*, another cohabitational property dispute, Dickson C.J.C. noted that the plaintiff had been under no obligation to perform services for the defendant, but he also held that the defendant had freely accepted those services: (1986), 29 D.L.R. (4th) 1 at 7 (S.C.C.).

attributable not to any desire to endorse the mode of analysis found in *Peter* v. *Beblow*, but rather to some other factor.

That other factor appears to be a semantically unfortunate civilian influence.[57] Two years prior to delivering his reasons in *Rathwell* v. *Rathwell*, Dickson J. sat on *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*,[58] in which Beetz J. authoritatively articulated the civil law principle of "unjustified enrichment" that exists in Quebec. Under the action *de in rem verso*, as it is called, Beetz J. premised the availability of restitutionary relief upon six criteria:

1. an enrichment;
2. an impoverishment;
3. a correlation between the enrichment and the impoverishment;
4. the absence of justification;
5. the absence of evasion of law;
6. the absence of any other remedy.[59]

In undertaking the task of formulating the third element of the common law principle of unjust enrichment, it may have seemed natural to Dickson J. to adapt and adopt the language of the fourth element of the civil law principle of unjustified enrichment.[60] Nevertheless, the decision to do so was misguided. Although the availability of relief in the absence of a positive reason for restitution is consistent with civilian tradition,[61] it is utterly foreign to the common law. As Dickson J. himself recognized in *Pettkus* v. *Becker*,[62] the common law never has been moved to action by the mere coincidence of an enrichment and a correlative loss; it always has demanded an additional, specific reason for imposing liability.[63] To their credit, most Canadian judges appreciate that fact and, despite the semantic hurdle erected by the criterion of "absence of any juristic

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57 Klippert, *Unjust Enrichment*, *supra* note 9, at c. 12; and L.D. Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672 at 677. If, as Smith suggests, Dickson J.'s formulation of the third element of the principle of unjust enrichment was intended to tie the availability of relief to specific unjust factors, and thereby to minimize the danger of "palm tree justice," it has not been a great success. As evidenced in *Peter* v. *Beblow*, courts sometimes interpret the notion of an "absence of any juristic reason" as a licence to dispense with the need for proof of a positive unjust factor.

58 (1976), [1977] 2 S.C.R. 67.

59 *Ibid.* at 77. See now arts. 1493-96 C.C.Q.

60 Dickson J. similarly relied upon the civil law in denouncing the traditional common law rule that precluded recovery of payments made under mistake of law, as opposed to mistake of fact: *Nepean (Township) Hydro Electric Commission* v. *Ontario Hydro* (1982), 132 D.L.R. (3d) 193 (S.C.C.). That rule effectively has been overruled: *Air Canada* v. *British Columbia*, *supra* note 49.

61 J.G. Challies, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec*, 2d ed. (Montreal: Wilson & LaFleur, 1952); J.-L. Baudouin, *Les Obligations*, 4e éd., (Cowansville, Que.: Yvon Blais, 1993) at 344-45; and B. Dickson, "Unjust Enrichment Claims: A Comparative Overview" (1995) 54 Cambridge L.J. 100 at 115.

62 *Supra* note 1 at 274. See also *Woolwich Building Society* v. *I.R.C.*, *supra* note 31 at 172, Lord Goff; *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.*, *supra* note 31 at 682-83, Lord Goff.

63 See *e.g.* *The Ruabon S.S.* v. *London Assurance* (1899), [1900] A.C. 6 at 10 (H.L.(E.)), Lord Halsbury L.C., 15, Lord Mcnaghten.

reason," generally mirror their Anglo-Australian counterparts[64] in requiring proof of an unjust factor.[65] While not unique, McLachlin J.'s reasoning in *Peter* v. *Beblow* fortunately is unusual.

2. DOCTRINE AND JUSTICE IN COHABITATIONAL PROPERTY DISPUTES

However, even when they do insist upon proof of an unjust factor, Canadian courts occasionally appear to be involved in a somewhat different exercise than their English and Australian counterparts. Specifically, several of the most significant Canadian judgments exhibit relatively less concern with principles and relatively more concern with results. While quite properly insisting that claimants do more than invoke vague notions of justice,[66] judges sometimes fail to rigorously analyze and apply the reasons for awarding restitutionary relief.

Most of the cases in question arise from property disputes brought upon the dissolution of cohabitational relationships. Given the history of such litigation, it perhaps was inevitable that some principle of law would evolve (or, less charitably, be distorted) to accommodate such claims.[67] Even after legislation in the last century granted married women the right to acquire and hold property, social reality changed very little. Almost invariably, a couple's assets were placed in the man's name alone and upon the breakdown of a marriage or marriage-like arrangement, the woman was left with nothing to show for her contributions to the relationship. The resulting trust occasionally provided a means of relief, but, unless the non-titled partner had provided cash toward the purchase price of a property, she bore the burden of proving that she indirectly had contributed toward its acquisition or operation and that the couple had shared a common intention that she would enjoy a property right.[68] Although reform-minded judges frequently were able to discern the requisite intention on meagre

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64 Although it appears to have had no ill effect, Mason C.J.'s judgment in *Commissioner of State Revenue (Vic.)* v. *Royal Insurance Australia* (perhaps inadvertently) flirted with civilian terminology by contemplating an award of relief on the basis of an "absence of any legitimate basis for retention" of an enrichment: (1994), 182 C.L.R. 51 at 67 (H.C.A.). See M. McInnes, "Bases for Restitution: A Call for Clarity with Unjust Factors" (1996) 10 J. of Contract L. 73.

65 While errors occasionally appear in lower courts, the Supreme Court of Canada quite consistently has premised the availability of relief upon proof of a positive reason for reversing the defendant's enrichment: see *e.g. Sorochan* v. *Sorochan, supra* note 56 (free acceptance); *Air Canada* v. *British Columbia, supra* note 49 (mistake per La Forest J., *ultra vires* demand per Wilson J.); *Peel (Regional Municipality)* v. *Canada, supra* note 7; *Air Canada* v. *Ontario (Liquor Control Board), supra* note 47 (mistake); *Citadel General Assurance Co.* v. *Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 (knowing receipt). That also was true before Dickson J. formulated the modern principle of unjust enrichment in *Pettkus* v. *Becker*: see *e.g. Deglman* v. *Guaranty Trust Co., supra* note 1 (free acceptance/failure of consideration); *County of Carleton* v. *City of Ottawa, supra* note 23 (mistake); *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd., supra* note 23 (mistake); *Nepean (Township) Hydro Electric Commission* v. *Ontario Hydro, supra* note 60 (mistake).

66 See *e.g. Peel (Regional Municipality)* v. *Canada, supra* note 7 at 164-66.

67 For an overview of the social forces underlying the application of the principle of unjust enrichment to cohabitational relationships, see D.W.M. Waters, "Chief Justice Dickson, The Court, and Restitution" (1991) 20 Man. L.J. 368.

68 *Pettitt* v. *Pettitt* (1969), [1970] A.C. 777 (H.L.); *Gissing* v. *Gissing* (1970), [1971] A.C. 886 (H.L.).

evidence,[69] the appalling result of the Supreme Court of Canada's decision in *Murdoch* v. *Murdoch*[70] illustrated that women could not rely upon such largesse. Consequently, as public outrage over the decision in *Murdoch* indicated, some other tactic desperately was required if the law was to retain the community's respect.

The response came in two forms. In the same year that *Murdoch* was decided, Ontario took the step, eventually followed across Canada, of statutorily implementing a scheme for the division of matrimonial property.[71] More significantly for present purposes, the same social forces that led to the enactment of such legislation also produced a change in the common law. The seeds of that development lay in Laskin J.'s dissenting opinion in *Murdoch* that, regardless of doctrine of resulting trust, relief was available in the form of a constructive trust by means of the principle of unjust enrichment.[72] Dickson J. expanded upon that theory three years later in his plurality opinion in *Rathwell*[73] and, as noted above, ultimately attracted the support of enough colleagues in *Pettkus* v. *Becker*[74] to establish it as the law of Canada. Of course, there can be no argument with the practical result of those decisions; for too long, women had been denied the fruits of their labours because of the cramped scope of traditional legal doctrine. Nevertheless, while the application of the unjust enrichment principle now is firmly entrenched, it remains doubtful that the Supreme Court of Canada chose the appropriate tool by which to effect reform.

The problem, simply stated, is that the Court has been unable to isolate an unjust factor consistently capable of convincingly supporting restitutionary relief in cohabitational property disputes. The concept of free acceptance, which provided the basis for liability in *Pettkus* v. *Becker*, routinely is invoked by Canadian courts. As formulated by Dickson J., it holds that:

> ... where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[75]

That test, however, is riddled with difficulties.

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69 D.W.M. Waters, "Matrimonial Property Disputes — Resulting and Constructive Trusts — Restitution" (1975) 53 Can. Bar Rev. 366.

70 (1973), 41 D.L.R. (3d) 367 (S.C.C.). Although she had laboured for many years as a ranch hand on the couple's properties, the plaintiff was denied relief because, in the majority's opinion, she simply had fulfilled the usual role of a wife in such circumstances and consequently had not acted in the expectation of receiving an interest in the land.

71 *Family Law Reform Act*, S.O. 1975, c. 41. Such legislation does not, however, apply in all instances or necessarily supplant non-statutory actions: *Rawluk* v. *Rawluk* (1990), 65 D.L.R. (4th) 161 (S.C.C.).

72 *Supra* note 70 at 389.

73 *Supra* note 26.

74 *Supra* note 1.

75 *Ibid.* at 274.

Undetected or ignored in Canada, those difficulties are better appreciated elsewhere. While free acceptance has found judicial favour in Australia,[76] it has yet to be authoritatively sanctioned in England. Nor does that latter situation appear likely to change. English courts are apt to be influenced by the fact that free acceptance has been subject to sustained attack in academic circles.[77] For present purposes, the most telling criticisms pertain to the nature of the concept. According to Birks, its most ardent defender,[78] free acceptance justifies the imposition of liability on the basis of unconscientious receipt of an enrichment without payment. However, as even he concedes, the requisite form of unconscientiousness rarely arises when an enrichment takes the form of services. The reasons, though complex, can be sketched briefly. The *receipt* of services is not unconscientious unless, at the outset, the recipient had: (i) a fixed intention of refusing payment, and (ii) knowledge that if that intention had been made known, the person about to provide the services would have refrained from doing so. Absent the first criterion, the recipient had no reason for refusing the services; there was nothing wrong with acquiring benefits for which he intended to pay.[79] And absent the second criterion, the recipient had no reason for expressing an intention to refuse payment; the services would have been rendered regardless. Moreover, there is nothing unconscientious in the *retention* of services, despite a refusal of payment, if those services were received in good conscience. The reason is that once rendered, services can not be restored; unconscientiousness involves a bad faith exercise of choice, but upon receipt, the time for choice has passed. As Pollock C.B. famously said, "One cleans another's shoes; what can the other do but put them on?"[80]

In the context of cohabitational property disputes, the implications of the preceding analysis are clear. First, relief should not be available on the basis of free acceptance unless the titled party took receipt of his partner's services with the initial intention of denying recompense. Consequently, free acceptance has no role to play if, as commonly occurs, the titled partner failed to address his mind to the issue of payment at the relevant time because he assumed that he had entered into a life-long union. Second, relief should not be available on the basis of free acceptance unless the titled party failed to avail himself of an opportunity to prevent his partner from conferring a benefit that, if fully informed, she would have withheld. Consequently, free acceptance should

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76 See *e.g. Pavey & Matthews Pty. Ltd.* v. *Paul, supra* note 1; *Brenner* v. *First Artists' Management Pty. Ltd.* (1992), [1993] 2 V.R. 221 (S.C.). Arguably, however, many of the Australian cases that purportedly support the concept of free acceptance are subject to the analysis provided below and are better explained on other grounds (such as failure of consideration): A. Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 L.Q. Rev. 576 [hereinafter Burrows "Free Acceptance and the Law of Restitution"].

77 See *e.g.* Burrows, *The Law of Restitution, supra* note 33 at 315-20; G. Mead, "Free Acceptance: Some Further Considerations" (1989) 105 L.Q. Rev. 460; M. Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 Oxford J. Leg. Stud. 42 [hereinafter Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment"].

78 Birks, "In Defence of Free Acceptance," *supra* note 48.

79 "Free acceptance, if it works at all, works because of the unconscientiousness of the recipient in not availing himself of an opportunity to save the intervener from the risk [of non-payment].... It is obvious that 'supervening unconscionability' has little or no weight in breaking the balance between a risk-taking intervener and the initially innocent recipient": *ibid.* at 111.

80 *Taylor* v. *Laird* (1856), 25 L.J. Ex 329 at 332, Pollock B.

have no role to play if, as commonly occurs, the titled partner took receipt of services after indicating that he had no intention of sharing the wealth. And third, relief should not be available on the basis of free acceptance merely because the titled partner decided upon the breakdown of the relationship to refuse payment for services that he previously had received.

Consistent with the thesis that they are more concerned with results than with principle, Canadian courts may be willing to dismiss the preceding analysis as being excessively technical. Problems nevertheless remain because even on its own, less rigorous terms, the Canadian concept of free acceptance ought to fail where often it succeeds.[81] *Pettkus* v. *Becker*[82] is a case in point. In essence, Dickson J.'s test requires proof that the defendant accepted the plaintiff's services despite (actual or constructive[83]) knowledge of her reasonable expectation of receiving some benefit in return. On the facts, however, it is difficult to see how that test was satisfied.[84] As previously noted, although Rosa Becker and Lothar Pettkus both contributed toward the acquisition and operation of an apiary, that property was placed in his name alone. Indeed, a defining feature of the parties' relationship was the defendant's selfishness. For that reason, the Supreme Court of Canada was unable to award relief in the form of a resulting trust; the evidence simply did not support the plaintiff's contention that she and the defendant had shared a common intention that she would enjoy a beneficial interest in the farm.[85] But if that was true, there surely also was no basis for holding that Ms Becker entertained a reasonable expectation of receiving such an interest or that Mr. Pettkus should have known of such an expectation.[86] Dickson J.'s finding to the

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81 Cf. B. Hovius & T.G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991) at 123-26.

82 *Supra* note 1. See also *Sorochan* v. *Sorochan*, *supra* note 56.

83 Given that the concept of free acceptance is based on unconscientious conduct, it is doubtful that constructive knowledge should have any role to play. A person may accept services, despite having a fixed intention from the outset to refuse payment, because he honestly, but unreasonably, believes that they are being rendered free of charge. If so, his receipt properly may be labelled as being "imperceptive" or "careless," but not "unconscientious." There is nothing unconscionable in his conduct.

84 The problem is not confined to Canada. While Australian courts do not resolve cohabitational property disputes on the basis of unjust enrichment, they do rely upon a doctrine of unconscionability that, like the concept of free acceptance, turns upon the parties' "reasonable expectations." And, like Canadian courts, they often award relief even though, on a strict application of that test, it is clear that the non-titled partner did not have a reasonable expectation of receiving a property interest: see *e.g. Baumgartner* v. *Baumgartner* (1987), 164 C.L.R. 137 (H.C.A.). Cf. *Gillies* v. *Keogh*, [1989] 2 N.Z.L.R. 327 (C.A.) (test of reasonable expectations not satisfied on facts). English law, while rejecting Lord Denning M.R.'s attempt to effect social justice by means of the "new model constructive trust" (*Hussey* v. *Palmer*, [1972] 1 W.L.R. 1286 (C.A.)), similarly uses benign fictions to secure relief for non-titled partners: *Grant* v. *Edwards*, [1986] Ch. 638 (C.A.); S. Gardner, "Rethinking Family Property" (1993) 109 L.Q. Rev. 263.

85 *Supra* note 1 at 271-72.

86 The trial judge went so far as to state that the plaintiff's contributions were "risk capital invested in the hope of seducing a younger defendant into marriage." The Supreme Court of Canada characterized that finding of fact as "gratuitously insulting" (*ibid.* at 265, Ritchie J.) and "lack[ing] ... in ... gallantry" (at 272, Dickson J.), but did not overturn it.

contrary speaks volumes of a resolve to impose liability,[87] but also of a very relaxed approach to doctrine.[88]

3. THE "EQUITABLE" ACTION IN UNJUST ENRICHMENT

The Supreme Court of Canada's approach to cohabitational property disputes clearly is informed by a desire to effect a fair distribution of family assets. But so, too, it likely is informed by the Court's frequent classification of unjust enrichment as an "equitable" action.[89]

Unfortunately, "equity" is an ambiguous term and the meaning of the Court's characterization is not always clear.[90] Two possibilities exist. First, the Court may be referring to the historical, jurisdictional basis of the claim. If so, its characterization generally is incorrect. Granted, some traditional heads of recovery now subsumed under the modern principle of unjust enrichment originated in the Court of Chancery: for

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87 As illustrated by the Manitoba Court of Appeal's decision in *Kshywieski* v. *Kunka*, strict application of the concept of free acceptance often will preclude relief: (1986) 50 R.F.L. (2d) 421 (Man. C.A.).

88 The same attitude re-surfaces in the Supreme Court of Canada's quantification of relief. Very often, an ostensibly "restitutionary" remedy actually is non-restitutionary. Restitution, which logically is the only possible response to an action in unjust enrichment, by definition consists of the defendant giving back to the plaintiff a benefit that he gained at her expense: discussed below at note 113. In contrast, the remedy awarded in many family property disputes consists of requiring the defendant to fulfill the plaintiff's reasonable expectations. The overlap between restitution and fulfilment of expectations, however, is entirely coincidental; the plaintiff may expect to get back that which the defendant gained from her, but she also may expect more or less. The tendency to ignore restitutionary principles nevertheless is further encouraged by the Supreme Court's inclination to impose liability in the form of a (proprietary) constructive trust, rather than a (personal) money judgment. As Cory J. conceded in *Rawluk*, the former remedy is favoured for its flexible capacity to achieve "that treasured and essential measure of individualized justice and fairness": *supra* note 71 at 181, Cory J. (On the relationship between unjust enrichment and constructive trusts, see M. McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1998) 26 Man. L.J. (forthcoming) [hereinafter McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada"]. Taken as a whole, then, the Court's jurisprudence in the area quite clearly suggests that, to a significant extent, the principle of unjust enrichment instrumentally is used as a mechanism for fairly distributing assets upon the dissolution of relationships. The end is laudable, but it really has little to do with the chosen means.

89 See *e.g. Pettkus* v. *Becker*, *supra* note 1 at 276, Dickson J.; *Peter* v. *Beblow*, *supra* note 51 at 642-43, McLachlin J.; *Air Canada* v. *British Columbia*, *supra* note 49 at 167, Wilson J.; *Storthoaks* v. *Mobil Oil Canada* (1975), 55 D.L.R. (3d) 1 at 9-13, Martland J. (S.C.C.); *Dominion Bank* v. *Union Bank of Canada* (1908), 40 S.C.R. 366 at 381, Duff J. (S.C.C.); cf. *Communities Economic Development Fund* v. *Canadian Pickles* (1991), 85 D.L.R. (4th) 88 at 107, Iacobucci J. (S.C.C.). See also B. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in Waters, ed., *supra* note 6, 37 at 47.

90 On the relationship between equity and unjust enrichment, see P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 U. of Western Australia L. Rev. 1 at 66-97; and P.M. Perell, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990) c. 12. On the Supreme Court of Canada's understanding of "equity" generally, see D. Klinck, "Nous sumus a arguer la consciens icy et nemy la ley: Equity in the Supreme Court of Canada" in *Mélanges Presented by McGill Colleagues to Paul-André Crépeau* (Montreal: Quebec Research Centre of Private & Comparative Law, 1997) 535.

example, undue influence, breach of confidence and breach of fiduciary duty. Likewise, several significant restitutionary remedies can be traced, at least in part, to the Chancellor's authority: for example, constructive trusts, equitable liens and subrogation. For the most part, however, the principle of unjust enrichment is the product of the common counts that arose in the Law under the action of *indebitatus assumpsit*: money had and received, money paid, *quantum meruit* and *quantum valebat*. That is true, for example, of claims for the recovery of mistaken payments (money had and received) or, as in the cohabitational property disputes, for the value of services rendered (*quantum meruit*).

To the extent that Canadian courts have committed the error of attributing *all* claims in unjust enrichment, regardless of actual origin, to the Chancellor's historical jurisdiction, they may be excused on the basis of the confusing terminology found in the leading case of *Moses* v. *Macferlan*. In seeking to articulate a unifying rationale for the various instances in which restitutionary relief was awarded under the Common Law action for money had and received, Lord Mansfield stated that:

> [i]f the defendant be under an obligation, from the ties of natural justice, to refund, the law ... gives this action, founded in the *equity* of the plaintiff's case.... This kind of *equitable* action, to recover back money ... lies only for money which, ex aequo et bono, the defendant ought to refund.... In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and *equity* to refund the money.[91]

To the modern reader, that passage is apt to be misleading; it appears to state that the relevant action originated in the Court of Chancery. In fact, Lord Mansfield's aim was much different; his references to "equity" were intended to invoke natural law and to indicate that both Law and Equity were founded upon rules of fairness.[92] The action for money had and received, he was explaining, should not be confined to discrete heads of restitutionary recovery, but rather should be developed, with due regard to principle and precedent,[93] in accordance with basic notions of morality.[94]

On a proper understanding of Lord Mansfield's comments, then, the second possible interpretation of the Supreme Court of Canada's characterization of unjust enrichment as an "equitable" action reveals not a jurisdictional error, but rather a revival of the traditional view that all legal rules, whether derived from Law or from Equity, should

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91 *Supra* note 16 at 1012 [emphasis added].

92 *Baylis* v. *Bishop of London*, *supra* note 41 at 137, Farwell L.J.; *Bradford Corporation* v. *Ferrand* (1901), [1902] 2 Ch. 655 at 662-63, Farwell J.

93 Despite the liberality of his language, Lord Mansfield was attentive to the danger of overstating the scope of restitutionary recovery: *Weston* v. *Downes* (1778) 1 Dougl. 23 at 24 ("I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it"); C.H.S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936) at 150-52.

94 P.H. Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931) at 127-34; P.H. Winfield, *The Law of Quasi-Contracts* (London: Sweet & Maxwell, 1952) at 9-13; R.A. Samek, "Unjust Enrichment, Quasi-Contract and Restitution: A Study in Organising Legal Rules" (1969) 47 Can. Bar Rev. 1 at 15-17.

effect justice.[95] That interpretation, while perhaps generous in some instances, certainly is more acceptable. Particularly in an era in which they frequently are expected to balance competing interests in order to serve the goals underlying the *Charter of Rights and Freedoms*,[96] it hardly is surprising to find Canadian judges relying upon standards of fairness in deciding the scope of restitutionary relief and especially in defining the role of the third element of the principle of unjust enrichment. Thus, as McLachlin J. noted in *Peel (Regional Municipality)* v. *Canada*, "[t]he term 'unjust', as well as the term 'absence of juristic reason' ... lend themselves" to an "approach of general principle" in which "the court may have to make decisions based on the equities of the particular case before them."[97] Accordingly, the Canadian approach, by steering a middle course between the twin dangers of excessive formalism and palm tree justice, "adher[es] to legal principles, but recogniz[es] that those principles must be sufficiently flexible to permit recovery where justice so requires."[98]

The situation is somewhat different in England and Australia. First, a legal system that maintains a Chancery Division of the Court of Queen's Bench,[99] or that until quite recently featured a separate Chancery Bar,[100] is far less likely to engender confusion as to the jurisdictional source of particular rules. Accordingly, English and Australian lawyers do not share their Canadian colleagues' tendency to historically mis-attribute the whole of unjust enrichment to the Court of Chancery. Second, and more significantly, the House of Lords and the High Court are less inclined than the Supreme Court of Canada to indulge in language reminiscent of Lord Mansfield's *aequum et bonum*. While certainly attentive to considerations of justice when guiding the evolution of new unjust factors,[101] those Courts avoid broad references to "equity" and generally adopt a more restrained approach. That attitude undoubtedly reflects the fact that they came much later, and much more cautiously, than the Supreme Court of Canada to a unifying principle of unjust enrichment.

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95 See *e.g. Pettkus* v. *Becker*, *supra* note 1 at 273, Dickson J. ("The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.").

96 While holding that the *Charter of Rights and Freedoms* technically applies only to governmental actions, the Supreme Court of Canada has stated that "the judiciary ought to apply and develop the principles of the common law consistent with the fundamental values enshrined in the Constitution": *Dolphin Delivery* v. *R.W.D.S.U., Local 586* (1986), 33 D.L.R. (4th) 174 at 198, McIntyre J.

97 *Supra* note 7 at 152.

98 *Ibid.* at 164.

99 *Supreme Court of Judicature (Consolidation) Act* 1925, s. 56(1)(a).

100 *Law Reform (Law and Equity) Act* 1972 (N.S.W.).

101 See *e.g. Woolwich Equitable Building Society* v. *I.R.C.*, *supra* note 31 at 172, Lord Goff (invoking the notion of "common justice" when recognizing *ultra vires* demand as an unjust factor); *Pavey & Matthews Pty. Ltd.* v. *Paul*, *supra* note 1 at 257, Deane J. (while insisting that the principle of unjust enrichment does not confer a "judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate," recognizing that it does "assist in the determination, by the ordinary processes of legal reasoning, of the question of whether the law should, in justice, recognize such an obligation in a new or developing category of case").

B. CORRESPONDING DEPRIVATION TO THE PLAINTIFF

The second element of the principle of unjust enrichment is formulated in Canadian law to require that the defendant's enrichment be matched by the plaintiff's *corresponding deprivation.* In contrast, Anglo-Australian law speaks of the defendant's benefit being gained *at the plaintiff's expense.*[102] Once again, the semantic differences translate into substantive differences.

1. ECONOMIC LOSS AND MEASURES OF RELIEF

Just as the Supreme Court of Canada's formulation of the third element of the principle of unjust enrichment seems to be informed by the position taken in Quebec,[103] so, too, its phrasing of the second element appears (especially when contrasted with the Anglo-Australian version) to bear a civilian influence. Dickson J.'s reference in *Rathwell* and *Pettkus* v. *Becker* to a "corresponding deprivation" closely echoes Beetz J.'s reference in *Cie Immobilière Viger Ltée.* v. *Lauréat Giguère Inc.* to a "correlation between the enrichment and the impoverishment." And, significantly, the similarities are more than merely terminological.

Under the civil law principle of unjustified enrichment, the availability of restitutionary relief is premised upon proof that the defendant enjoyed an enrichment *and* that the plaintiff suffered a correlative impoverishment. Moreover, the gain and the loss must be economic ("patrimonial") or at least quantifiable in economic terms; for example, it will not suffice if the claimant establishes merely that she experienced a moral impoverishment.[104] It logically follows from those requirements that the measure of relief is limited to the lesser of the two amounts; the defendant can never be held liable for more than he acquired and the plaintiff can never recover more than she lost.[105]

Although Dickson J. authoritatively articulated the second element of the common law principle of unjust enrichment in 1980 in *Pettkus* v. *Becker*, it was not until 1989 that the Supreme Court of Canada specifically addressed its content. For present

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102 Canadian courts occasionally adopt the international formulation: see *e.g. Citadel General Assurance Co.* v. *Lloyds Bank Canada, supra* note 65 at 424-25, 434 (S.C.C.), La Forest J.; *Gold* v. *Rosenberg* (1997), 152 D.L.R. (4th) 385 at 396 (S.C.C.), Iacobucci J.

103 Section III(A)(1).

104 For example, a person who assists in the apprehension of armed robbers may claim for the value of his actual services (which have economic value), but not for the value of his courage (which has moral, but not economic, value): Challies, *supra* note 61 at 80. See also Baudouin, *supra* note 61 at 343-44.

105 *Cie Immobilière Viger Ltée.* v. *Lauréat Giguère Inc., supra* note 58 at 77; T. Rinfret, "The Doctrine of Unjustified Enrichment in the Law of Quebec" (1937) 15 Can. Bar Rev. 331 at 336; Baudouin, *ibid.* at 348. *Tanguay* v. *Price* is illustrative: (1906), 37 S.C.R. 657. The defendant's logs were prevented from being swept down river and lost in the St. Lawrence River only because they were captured by the plaintiff's boom. Although the defendant undoubtedly had been enriched, liability was denied on the ground that the plaintiff had not suffered a correlative impoverishment. The plaintiff had placed his boom in the water to catch his own logs and he incurred no greater expense as a result of also catching the defendant's logs.

purposes, the relevant issue in *Air Canada* v. *British Columbia*[106] was whether or not relief was barred by the defence of "passing on." To simplify matters somewhat, the facts in that case can be approached on the basis that, having mistakenly paid money to the defendant government for taxes that were not due, the plaintiff companies recouped their expense by raising the fares that they charged to their customers. Although no judgment attracted a majority of the six member panel, La Forest J. wrote for himself, Lamer C.J. and L'Heureux-Dubé J.[107] Interestingly, while sitting some five years earlier in the New Brunswick Court of Appeal, La Forest J. had referred to *Cie Immobilière Viger Ltée.* v. *Lauréat Giguère Inc.* and had suggested that "a universal principle such as [unjust enrichment] affords an excellent opportunity for cross-fertilization between Canada's two legal systems."[108] That cosmopolitan attitude appears to have re-surfaced in *Air Canada.* Despite Wilson J.'s forceful dissent,[109] La Forest J. stated that:

> ... the evidence supports that the airlines had passed onto their customers the burden of the tax imposed upon [the airline]. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth ... it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense.[110]

Although those observations were offered in *dicta*,[111] they subsequently have been

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106 *Supra* note 49.

107 Wilson J. wrote a dissenting opinion that disagreed with La Forest J.'s reasoning on point. Beetz and McIntyre JJ. resolved the case on other grounds and did not consider the availability of restitutionary relief. LeDain J. heard the appeal, but took no part in the judgment.

108 *White* v. *Central Trust Co.*, *supra* note 7 at 245-46.

109 In a vigorous dissent, Wilson J. emphatically rejected La Forest J.'s suggestion that restitutionary relief should be withheld on the basis that the plaintiff suffered no loss: *supra* note 49 at 169-70. Significantly, however, she viewed the relevant unjust factor as being the defendant's *ultra vires* demand for taxes, rather than the plaintiff's mistaken belief that the taxes were due. And while she likely intended to reject the passing on defence altogether, her decision perhaps is better confined to the specific type of situation with which she was dealing. Even if the passing on defence generally is sound in *theory*, it should be displaced on *policy* grounds where its operation would allow a government to retain taxes demanded without authority and hence to violate a fundamental constitutional principle. (Going further, it seems that, while sound in theory, the passing on defence perhaps invariably should be rejected on the *practical* ground of impossibility of accurate application. Given the complexities associated with pricing, supply and demand, the extent to which an enterprise ultimately succeeds in shifting the burden of a purported tax onto its customers rarely, if ever, can be established. Increased price will result, to some unknown degree, in decreased demand: M. McInnes, "'Passing On' in the Law of Restitution: A Re-Consideration" (1997) 19 Sydney L. Rev. 179.)

110 *Supra* note 49 at 194.

111 A majority of the Court actually denied recovery on the basis of legislation, enacted after the constitutional defect affecting the first taxing statute was discovered, that retroactively made the disputed amounts payable. Moreover, on the restitutionary issue, La Forest J. generally favoured recovery of payments made under mistake of law, but held that an exception typically was warranted with respect to payments made pursuant to unconstitutional demands. He feared that the imposition of liability in such circumstances often would involve very large sums and hence would

followed in lower courts[112] and may be taken as good law. Consequently, in Canada, the common law position and the civil law position are the same: the plaintiff can not recover more than she lost.[113]

The position in Anglo-Australian law is much different. Both the High Court and the English Court of Appeal have rejected the passing on defence on the ground that, while the defendant's enrichment must be gained "at the plaintiff's expense," the claimant need not ultimately suffer an economic loss corresponding to the defendant's gain. It is enough that she was the initial source of his enrichment. Accordingly, those courts also reject the view that the measure of restitutionary relief is limited by the lesser of the defendant's gain and the plaintiff's loss. Thus, Mason C.J. stated in *Commissioner of State Revenue* v. *Royal Insurance Australia Ltd.* that:

> Restitution relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched.... The subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff" notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties. On this approach, it would not matter that the plaintiff is or will be over-compensated because he or she has passed on the tax or charge to someone else.[114]

Likewise, in *Kleinwort Benson* v. *Birmingham Council*, Saville L.J. held that:

> ... [t]he expression "at the payer's expense" is a convenient way of describing the need for the payer to show that his money was used to pay the payee. ... What this expression does not justify is the importation of concepts of loss or damage with their attendant concepts of mitigation, for these have

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be unduly disruptive of public finances.

112 *Air Canada* v. *Ontario (Liquor Control Board)* (1995), 126 D.L.R. (4th) 301 (Ont. C.A.); *Cherubini Metal Works Ltd.* v. *Nova Scotia (Attorney General)* (1995), 137 N.S.R. (2d) 197 (C.A.); and *Allied Air Conditioning Ltd.* v. *British Columbia (No. 2)* (1994), 109 D.L.R. (4th) 463 (B.C.C.A.). See also *Air Canada* v. *Ontario (Liquor Control Board)*, *supra* note 47.

113 In common law jurisdictions, however, the family property disputes once again prove anomalous. In such cases, the gist of the plaintiff's claim is not truly restitutionary; she is not asking the court to compel the defendant to give back that which he received from her. Rather, she is seeking relief that will, as a matter of social justice, address the full range of social, economic and political factors that tend to unevenly distribute wealth within intimate relationships. Accordingly, as previously indicated (*supra* note 88), the Supreme Court of Canada is willing to disregard fine calculations of gain and loss in order to award relief that will fulfil her expectations, rather than effect restitution. In that regard, *Deglman* v. *Guaranty Trust Co.* provides an interesting contrast. Except for the fact that the nephew rendered fewer services and, of course, did not share an intimate relationship with his aunt, the case in many respects is similar to the cohabitational cases: above at text accompanying note 21. In quantifying relief, however, the Court disregarded his expectation of receiving a house in exchange for his efforts and instead allowed him to recover the market value of his services — *i.e.* that which he lost and the aunt gained.

114 *Supra* note 64 at 75. See also *Mason* v. *N.S.W.*, *supra* note 49 at 146, Windeyer J. ("The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law").

nothing whatever to do with the reason why our law imposes an obligation on the payee to repay to the payer what he has no right to retain.[115]

The Canadian view is preferable.[116] When the defendant's gain exceeds the plaintiff's loss, it is inevitable that one party will enjoy a windfall; either the plaintiff will be granted more than she actually lost or the defendant will be accountable for less than he actually gained. In choosing between those two possibilities, it is not sufficient to hold, as the civilians do, that liability must be denied in order to prevent an unjust enrichment from accruing in the claimant's favour.[117] Such reasoning simply begs the question as to which of two equally (un)deserving parties should enjoy a benefit to which neither positively can lay claim. Nevertheless, it is appropriate to deny liability of the excess amount on practical grounds. Simply stated, there is no reason why societal resources should be expended to re-distribute the surplus from the defendant to the plaintiff. The legal system, already over-burdened, can not afford the luxury of undertaking an exercise that produces no social value and that is not compelled by principle.

2. AUTONOMOUS UNJUST ENRICHMENT AND RESTITUTION FOR WRONGS

A civilian influence, therefore, appears to have helped spare the Canadian common law from the doubtful Anglo-Australian practice of measuring relief under an action in unjust enrichment solely by reference to the defendant's gain. The phrase "corresponding deprivation," more clearly than the phrase "at the plaintiff's expense," directs the judicial mind to the need for proof that the claimant ultimately suffered an economic loss correlative to the defendant's enrichment. At the same time, however, the Canadian formulation of the second element of the principle of unjust enrichment likely has contributed to a set of mistakes, frequently seen in the Supreme Court of Canada, but rarely encountered in the House of Lords or the High Court, regarding the availability of restitution for wrongs.

The discussion to this point has proceeded upon the basis that unjust enrichment is a unitary principle. In fact, it is a binary principle, comprised of two related, but distinguishable, branches. The first branch consists of the autonomous action in unjust enrichment. That action is autonomous because it is not dependent upon proof of the elements of some other cause of action; rather, the availability of relief is premised exclusively upon proof of the three elements of unjust enrichment.[118] And, in such

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115 [1996] 4 All E.R. 733 at 744 (C.A.); see also 749, Morritt L.J. ("the words 'at the expense of the plaintiff' ... do no more than point to the requirement that the immediate source of the unjust enrichment must be the plaintiff") and *Kleinwort Benson* v. *South Tyneside B.C.*, [1994] 4 All E.R. 972 at 985 (Q.B.), Hobhouse J.

116 For a more thorough discussion on point, see M. McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" (1998) 57 Cambridge L.J. 471.

117 Challies, *supra* note 61 at 148-49.

118 It remains an open question whether a claimant need merely plead the three elements of unjust enrichment or whether she must frame her action in terms of a traditional category of recovery now subsumed under the general rubric of "unjust enrichment": *supra* note 32.

cases, the measure of relief invariably is (or, at least, should be[119]) restitutionary. Indeed, there is no rational reason for a court to inquire into the existence of the defendant's gain and the plaintiff's loss except as a prelude to ordering the defendant to return to the plaintiff that which he unjustly acquired from her. A legal response logically must relate to its triggering event.

The second branch of the principle of unjust enrichment consists of the purely remedial concept of restitution for wrongs. That concept is purely remedial because it plays no part in formulating the constituent elements of a triggering event; rather, it pertains only to the manner in which the law responds to a triggering event other than the autonomous action unjust enrichment. Thus, the concept of restitution for wrongs may be invoked, for example, in response to a trespass to land. In such a case, the plaintiff's first task is to satisfy the requirements of the relevant cause of action. Those requirements are set exclusively by the law of tort; the principle of unjust enrichment is silent on the matter. Having established an action in trespass, the plaintiff's task under the concept of restitution for wrongs is to then satisfy the court that trespass is a wrong that supports not only loss-based, compensatory relief, but also gain-based, restitutionary relief.[120] As trespass, in fact, is such a wrong,[121] the plaintiff should have the choice of compelling the defendant to provide compensation for her loss or restitution of his gain.

There are, then, significant differences between the autonomous action in unjust enrichment and the concept of restitution for wrongs. Because restitution for wrongs constitutes a legal response to a triggering event other than the autonomous action in unjust enrichment, its availability is not premised upon proof of the elements of that action. Accordingly, a claimant seeking restitution for a wrong need not establish the existence of an unjust factor. Nor need she prove that she suffered an economic loss corresponding to the defendant's economic gain. Indeed, restitution often sanctions a wrong that caused no loss at all and that provided the defendant with a gain that could not possibly have been acquired by the plaintiff. For that reason, gain-based remedies for wrongs sometimes are called "disgorgement," rather than "restitution."[122]

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119 Again, in Canada, the cohabitational property cases are anomalous in so far as they involve relief that fulfils expectations, rather than effects restitution: *supra* notes 88 and 113.

120 Not all wrongs support gain-based remedies. Unfortunately, the law is in an unsatisfactory state and a great deal of work must be done if the matter is to be put on a rational foundation. (For an excellent attempt at rationalization, see I.M. Jackman, "Restitution for Wrongs" (1989) 48 Cambridge L.J. 302.) Lists of restitution-yielding wrongs are found in the major texts: Fridman, *Restitution*, *supra* note 4, c. 11; Burrows, *The Law of Restitution*, *supra* note 32, c. 14; Jones, *Goff & Jones: Restitution*, *supra* note 33, c. 32-38; and Mason & Carter, *supra* note 32, c. 15-19.

121 *Hambly* v. *Trott* (1776), 1 Cowp. 371; *Daniel* v. *O'Leary* (1976), 14 N.B.R. (2d) 564 (Q.B.); cf. *Phillips* v. *Homfray* (1883), 24 Ch.D. 439 (C.A.).

122 The language of restitutionary remedies is problematic. Aside from failing consistently to distinguish true restitution ("giving back") from disgorgement ("giving up"), the Supreme Court of Canada on several occasions has used the term "restitution" (which properly focuses on the defendant's obligation to give back a benefit that he received) to mean "compensation" (which entails the defendant's obligation to redress losses that the plaintiff sustained): *Hodgkinson* v. *Simms* (1994), 117 D.L.R. (4th) 161 at 199 (S.C.C.), La Forest J; and *Canson Enterprises Ltd.* v. *Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.), McLachlin J. See also *Swindle* v. *Harrison*,

"Restitution" means to "give back" and therefore presumes that the defendant received value previously held by the plaintiff. Consequently, as the concept of restitution for wrongs may apply regardless of any diminution to the plaintiff's holdings, it more accurately is described as "disgorgement," a term that simply describes the defendant's act of "giving up" his ill-gotten gain.

Notwithstanding those differences, the autonomous action in unjust enrichment and the concept of restitution for wrongs share the crucial similarity of focussing on the reversal of gains enjoyed by the defendant. (In contrast, the bulk of private law focuses on redressing wrongful losses to the plaintiff.) Indeed, that fact provides the primary justification for their union under the generic principle of unjust enrichment.[123] The Anglo-Australian formulation of the second element of that principle, as derived from the American *Restatement of Restitution*, nicely captures that unity by referring to enrichments obtained "at the plaintiff's expense." It is natural to speak of the defendant's gain coming at the claimant's "expense" if, as occurs under the autonomous action in unjust enrichment, he receives a benefit subtracted from her. So, too, it is natural, if somewhat less common, to speak of his gain coming at her "expense" if he acquires the enrichment by committing a wrong against her. Unfortunately, the Canadian version of the operative phrase is not so easily bifurcated. An instance of enrichment by subtraction under the autonomous action in unjust enrichment clearly involves a "corresponding deprivation"; the defendant acquires wealth that the plaintiff lost. However, it is awkward to speak of an enrichment by wrong as a "corresponding deprivation" under the concept of restitution for wrongs. As the remedial focus of that concept is on the defendant's economic gain, the obvious correspondent would be the plaintiff's economic loss. But, as noted above, restitution often sanctions a wrong that violated the plaintiff's rights without causing her any loss whatsoever.[124]

[1994] 4 All E.R. 705 (C.A.). That error may be encouraged by provisions in the Criminal Code that are said to effect "restitution," but that actually compel an offender to provide compensation for his victim's losses: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 738-41; P. Burns, *Criminal Injuries Compensation*, 2d ed. (Toronto: Butterworths, 1992) at 4. As previously discussed, the Court also has used the language of restitution while achieving the distinct goal of fulfilling expectations: *supra* note 88.

123 To an extent, the two branches of the generic principle of unjust enrichment also are unified by a common lineage. The historical action for money had and received provided restitutionary relief in many cases now found under the autonomous action in unjust enrichment (*e.g.* money paid under mistake or compulsion). But so, too, it provided a basis for awarding a gain-based remedy in response to some wrongs: *United Australia Ltd.* v. *Barclays Bank Ltd.* (1940), [1941] A.C. 1 (H.L.(E.)). Moreover, a single, bifurcated principle may be desirable as a matter of convenience. Facts that support a gain-based remedy for a wrong often also support an autonomous action in unjust enrichment. For that reason, Maddaugh & McCamus argue that it would be "uneconomical" to approach the same event under entirely separate headings: *The Law of Restitution*, *supra* note 4 at 34.

124 See text accompanying note 122.

Regardless of the difficulty created by the phrase "corresponding deprivation," it is clear that Canadian law, like Anglo-Australian law,[125] does contain a two-part, generic principle of unjust enrichment. Cases of subtractive enrichments almost invariably are considered under the rubric of "unjust enrichment"; cases of wrongful enrichments are brought into the fold by decisions like *Canadian Aero Services Ltd.* v. *O'Malley*.[126] There, the defendants used information acquired while they were officers of the plaintiff company to competitively outbid that corporation for a lucrative project. Laskin J. held that such behaviour constituted a breach of a fiduciary obligation and ordered the defendants to disgorge the profits earned under the ill-gotten contract.

> Liability ... for breach of fiduciary duty does not depend upon proof by [the company] that, but for [the officers'] intervention, it would have obtained the ... contract; nor is it a condition of recovery of damages that [the company] establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on *unjust enrichment*, I would not interfere with the quantum [calculated by the trial judge].[127]

The problem in Canada, then, is not that the two branches of the generic principle of unjust enrichment do not exist, but rather that, while they clearly do exist, they are not consistently recognized and distinguished. That problem generally takes one of two forms: (i) while properly awarding gain-based relief in response to a wrong, a judge may fail to appreciate that the effect of that restitutionary remedy is the reversal of an unjust enrichment, or (ii) while addressing one branch of the generic principle of unjust enrichment, a judge may invoke notions that properly apply only under the other branch of that principle.

a. Recognizing Restitution for Wrongs

Of the two errors, the first is far less serious. Indeed, it would be possible to reconfigure the law of obligations in many different ways,[128] some of which would not unify gain-based actions and remedies under the rubric of "unjust enrichment." Moreover, so long as substantive rules remained the same, treating the concept of restitution for wrongs entirely separately from the autonomous action in unjust enrichment might impede the rational evolution of the subject as a whole, but generally

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125 Several English and Australian authorities expressly recognize the ambiguity inherent in the phrase "at the plaintiff's expense": see *e.g. Halifax Building Society* v. *Thomas* (1995), [1996] Ch. 217 (C.A.); *Commissioner of State Revenue (Vic.)* v. *Royal Insurance Australia Ltd., supra* note 64 at 73, Mason C.J.; *Winterton Constructions Pty. Ltd.* v. *Hambros Australia Ltd.* (1991), 101 A.L.R. 363 at 374 (F.C.), Gummow J.; *Bryson* v. *Bryant* (1992), 29 N.S.W.L.R. 188 at 222 (C.A.) Sheller J.A.

126 (1973), 40 D.L.R. (3d) 371 (S.C.C.).

127 *Ibid.* at 392 [emphasis added]; cf 383-84 (referring to the plaintiff's expense in the subtractive sense).

128 See *e.g.* J. Stapleton, "A New 'Seascape' for Obligations: Reclassification on the Basis of Measure of Damages" in P. Birks, ed., *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 193.

would not alter the outcome of individual disputes. The Supreme Court of Canada's decision in *Soulos* v. *Korkontzilas*[129] is illustrative. A real estate agent breached the fiduciary duty that he owed to his client by failing to report an offer made by the vendor of a property and by purchasing that property for himself. McLachlin J., writing for a majority of the Court, imposed a constructive trust as a means of compelling the agent to disgorge his ill-gotten gain. However, in doing so, she repeatedly denied that the effect of that remedy was the reversal of the defendant's unjust enrichment. She did so on the assumption that unjust enrichment is a unitary principle comprised exclusively of instances of subtractive enrichment under the autonomous action in unjust enrichment. And on that skewed view, an unjust enrichment had not occurred because the plaintiff had not held the disputed property prior to the defendant's acquisition and therefore could not establish a "corresponding deprivation."

McLachlin J.'s reasoning raises two points. First, cases like *Soulos* v. *Korkontzilas*, in which the breach of a fiduciary duty results in some gain to the defendant, but no loss to the plaintiff, generally are treated as paradigmatic of the concept of restitution for wrongs under the generic principle of unjust enrichment.[130] Second, it is interesting to speculate as to whether or not McLachlin J. would have recognized that fact if she had employed the international formulation, rather than the Canadian formulation, of the second element of the principle of unjust enrichment.[131] Although the client in *Soulos* likely[132] suffered no "corresponding deprivation," the agent's acquisition did come "at the plaintiff's expense" in so far as it was the direct result of a wrong committed against the client.

b. Separating Autonomous Unjust Enrichment and Restitution for Wrongs

In isolation, the Supreme Court of Canada's occasional failure to connect restitution for wrongs to the generic principle of unjust enrichment is unfortunate, but not alarming.[133] The same can not be said with respect to those decisions in which the

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129 *Supra* note 3.

130 See *e.g.* A.M. Tettenborn, *The Law of Restitution in England and Ireland*, 2d ed. (London: Cavendish, 1996) at 31.

131 Of course, adoption of the international formulation is no guarantee of accuracy. In Australia, where the binary principle of unjust enrichment has been recognized (*supra* note 125), the High Court recently echoed McLachlin J.'s view that the imposition of a gain-based remedy in response to a breach of fiduciary duty does not fall under the heading of "unjust enrichment": *Warman International Ltd.* v. *Dwyer* (1995), 182 C.L.R. 544 at 557 (H.C.A.). See also M. McInnes, "The Structure and Challenges of Unjust Enrichment" in M. McInnes, ed., *Restitution: Developments in Unjust Enrichment* (Sydney: LBC Information Services, 1996) 17 at 34-36.

132 Conceivably, the client suffered a loss by means of an "interceptive subtraction" (below at text accompanying note 143) in so far as the agent acquired a property that, but for the events giving rise to his unjust enrichment, would have accrued to the client: cf. *Soulos* v. *Korkontzilas*, *supra* note 3, Sopinka J.

133 In contrast, a complete failure to recognize the possibility of restitution for wrongs, regardless of its categorization, may lead to injustice: *Rosenfeldt* v. *Olson* (1986), 25 D.L.R. (4th) 472 (B.C.C.A.).

Court has mixed the analyses[134] respectively applicable to the concept of restitution for wrongs and the autonomous action in unjust enrichment.[135]

LAC Minerals Ltd. v. *International Corona Resources Ltd.*[136] is illustrative. The plaintiff company possessed information indicating that a certain property, held by a third party, contained gold. It shared that knowledge with the defendant company in the hope of entering into a partnership for the exploitation of the deposits. The proposed venture fell through, however, and the defendant, using the information acquired from the plaintiff, purchased the land for itself. La Forest J., writing for a majority of the Court, held that the defendant's conduct constituted a breach of confidence and imposed a constructive trust over the property as a means of compelling disgorgement of the wrongful gain. While that result may be acceptable, La Forest J.'s reasoning is deeply troubling.

The decision should have involved a relatively simple application of the concept of restitution for wrongs. The Court merely needed to recognize that breach of confidence is an independent cause of action[137] that supports gain-based remedies,[138] including the restitutionary constructive trust.[139] That possibility is revealed by the following diagram.

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134 To a large extent, such dangers arise from the fact that, as Dickson C.J. noted in *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*, the same set of events may support both an autonomous action in unjust enrichment and a restitution-yielding wrong: (1989), 57 D.L.R. (4th) 321 at 349-50 (S.C.C.). Of course, that phenomenon, in itself, is unremarkable. Canadian courts, for example, comfortably deal with the concurrency of actions in tort and contract: *Central Trust Co.* v. *Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.). In the context of the generic principle of unjust enrichment, however, the judicial exercise is rendered considerably more difficult by the relative novelty of the unifying rationale. Judges often know less of either branch of the generic principle of unjust enrichment than of tort or contract.

135 That phenomenon is relatively unknown in Anglo-Australian law, perhaps because the phrase "at the plaintiff's expense" more clearly contemplates both the autonomous action in unjust enrichment and the concept of restitution for wrongs as distinct ideas. In England, debate concerning the relationship between the two branches of the generic principle of unjust enrichment tends to pertain to the proper classification of cases, rather than to the analytical elements applicable under each classification: cf. J. Beatson, "The Nature of Waiver of Tort" in *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991) c. 8; S. Hedley, "Restitution: Contract's Twin?" in F. Rose, ed., *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Oxford: Hart Publishing, 1997) 247 at 264-66.

136 (1989), 61 D.L.R. (4th) 14 (S.C.C.). While perhaps less dramatic, other Supreme Court of Canada decisions similarly confuse the concept of restitution for wrongs with the autonomous action in unjust enrichment: see *e.g. Soulos* v. *Korkontzilas*, *supra* note 3, Sopinka J.; and *Brissette Estate* v. *Westbury Life Insurance Ltd.* (1993), 96 D.L.R. (4th) 609 (S.C.C.), Sopinka. See also *Ontex Resources Ltd.* v. *Metalore Resources Ltd.* (1993), 103 D.L.R. (4th) 158 (Ont. C.A.); and McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada," *supra* note 88.

137 *Prince Albert* v. *Strange* (1848) 2 De G. & Sm. 652; and *Coco* v. *A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41 (Ch.).

138 See *e.g. Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)* (1988), [1990] 1 A.C. 109 (H.L.).

139 *Pre-Cam Exploration & Development Ltd.* v. *McTavish* (1966), 57 D.L.R. (2d) 557 (S.C.C.); and R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies*, 3d ed. (Sydney: Butterworths, 1992) at 889.

Enrichment → Plaintiff's Expense #1 (By Subtraction) → Unjust Factor → Restitution
→ Plaintiff's Expense #2 (By Wrong)
⇕
Cause of Action Other than Unjust Enrichment
(Example: Breach of Confidence)
⇕
Restitution (Disgorgement)

The analytical key lies in the fact that the second element of the generic principle (as more clearly expressed in its international formulation) contains an important junction. If the plaintiff had sought relief under the autonomous action in unjust enrichment, its case would have proceeded in a straight line, beginning with enrichment, passing through the first (subtractive) sense of "expense" and concluding with an unjust factor. In that case, its remedy would have been true restitution. However, as the plaintiff set out to obtain disgorgement of the defendant's wrong, its case should have begun with enrichment,[140] but, by taking the detour created by the second (wrongs) sense of "expense," followed the path leading not to the autonomous action in unjust enrichment, but rather to the action in breach of confidence. And, of course, under that action there should have been no need to prove either a subtractive expense or an unjust factor; those concepts did not fall along the chosen route.

Unfortunately, while recognizing that breach of confidence supports personal, gain-based remedies (such as an account of profits[141]), La Forest J. incorrectly stated that proprietary, restitutionary relief could respond only to the autonomous action in unjust enrichment.[142] As a result, he felt compelled to compound the two branches of the

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140 As a matter of pleading and practice, and as suggested by the bi-directional arrows contained in the diagram, the case more realistically would have proceeded in the opposite order. As the claimant sought the remedy of disgorgement, it would have begun with proof of the defendant's liability under a cause of action in breach of confidence before passing through the wrongs sense of "expense" as a means of showing that the defendant received an ill-gotten gain that he ought to have given up.

141 *LAC Minerals* v. *International Corona Resources*, *supra* note 136 at 45-46. However, because he believed that all "restitutionary" remedies are premised upon proof of the autonomous action in unjust enrichment, La Forest J. held that the account of profits, which often redresses a breach of confidence by requiring the wrongdoer to disgorge tainted earnings, is not such a remedy. "[W]hile it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense": at 46. As that statement reveals, however, the remedy of account of profits falls precisely within the branch of the generic principle of unjust enrichment comprised of the concept of restitution for wrongs: Burrows, *The Law of Restitution*, *supra* note 32 at 384; *My Kinda Town Ltd.* v. *Soll* (1981), [1982] F.S.R. 147 at 156, Slade J. ("The purpose of ordering an account of profits ... is to prevent an unjust enrichment of the defendant").

142 La Forest J. adopted Dickson J.'s statement in *Pettkus* v. *Becker* (*supra* note 1 at 273) that "[t]he principle of unjust enrichment lies at the heart of the constructive trust" and further explained that an award of a constructive trust involves a two-step process. "First, the Court determines whether [an autonomous] claim [in] unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is an appropriate remedy to redress that unjust enrichment": *supra* note 136 at 48. However, as the Court recently has made clear, the remedial constructive trust is not invariably tied to the autonomous action in unjust enrichment: *Soulos* v. *Korkontzilas*, *supra* note 3; McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada," *supra* note 88.

generic principle of unjust enrichment. Consequently, although the plaintiff had established the elements of the cause of action in breach of confidence, and therefore should have been entitled to relief under the concept of restitution for wrongs even if it had not suffered any loss, La Forest J. required it to prove an economic detriment corresponding to the defendant's economic gain. A straightforward subtractive analysis, however, was not possible on the facts; the defendant had not taken the disputed property from the plaintiff, but rather had purchased it from a third party. La Forest J. nevertheless found in the plaintiff's favour on the basis of a questionable application of the doctrine of "interceptive subtraction."[143] Under that doctrine, the plaintiff could satisfy its onus by proving that it would have acquired the property from the third party, but for the fact that the defendant had, by reason of the events constituting its unjust enrichment, pre-emptively purchased the land. The problem with that analysis, however, is that while the scope of interceptive subtraction is somewhat unsettled, La Forest J. relied upon authorities suggesting that the doctrine applies only if, were it not for the defendant's acquisition of a benefit, the plaintiff *certainly* would have obtained the enrichment.[144] But at trial, the judge found merely that "but for the actions of [the defendant], [the plaintiff] would *probably* have acquired the ... property."[145] There is, of course, a difference between a certainty and a probability.

Having held that the defendant received an enrichment by (interceptive) subtraction, rather than an enrichment by wrong, La Forest J. proceeded to the final stage of the analysis under the autonomous action in unjust enrichment. At that point, however, he reverted back to the plaintiff's claim in breach of confidence and treated that cause of action as an unjust factor, rather than as a self-sustained basis of relief.[146] Such a characterization is difficult to accept. Breach of confidence and autonomous unjust enrichment are wholly independent causes of action. The requisite elements of proof in each instance derive from the inner logic of the claim and, more immediately, from the case law. And prior to *LAC Minerals*, it was clear that while the action in breach of confidence could be used to secure the restitutionary remedy of disgorgement of a wrongful gain, it played no part in reversing subtractive acquisitions under the autonomous action in unjust enrichment.[147] Consequently, by employing breach of

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143 Jones, *Goff & Jones*, *supra* note 33 at 36-38.

144 *Supra* note 136 at 45. Thus, as Birks explains in a passage cited by La Forest J., "[t]he certainty that the plaintiff would have obtained the wealth in question does genuinely indicate that he became poorer by the sum in which the defendant was enriched": Birks, *An Introduction to the Law of Restitution*, *supra* note 8 at 134. La Forest J. also cited his own, ambiguous comments in *Air Canada* v. *British Columbia*: *supra* note 49 at 193-94.

145 (1989), 25 D.L.R. (4th) 504 at 546 (Ont. H.C.J.) [emphasis added]. See also 542-43 ("On a balance of probabilities I find that, but for the actions of [the defendant], [the plaintiff] would have acquired the ... property").

146 *Supra* note 136 at 45.

147 Granted, if approached at a very high level of abstraction, a cause of action like breach of confidence might be classified as an "unjust factor" for the purposes of the generic principle of unjust enrichment. On that view, the term "unjust factor" would expand beyond the specific reasons that historically supported an autonomous action in unjust enrichment (see text accompanying note 45) and refer, very broadly, to any reason why a defendant can be compelled to give back or give up an enrichment. The benefit of that approach is that it would allow both the autonomous action in unjust enrichment and the concept of restitution for wrongs to conform

confidence as an unjust factor, La Forest J. ignored precedent and disregarded the fundamental division inherent in the generic principle of unjust enrichment. Logically extended, such reasoning could entirely subsume the concept of restitution for wrongs under the autonomous action in unjust enrichment. If that occurred, the traditionally recognized possibility of compelling disgorgement of a wrongdoer's gain, despite the absence of any loss to his victim, might be endangered by the fact that the autonomous action in unjust enrichment requires proof of a corresponding economic deprivation.

C. ENRICHMENT TO THE DEFENDANT

Whether relief is sought under the concept of restitution for wrongs or under the autonomous action in unjust enrichment, the plaintiff obviously must show that the defendant received an enrichment. In the absence of such proof, there simply is nothing to which the principle of unjust enrichment can apply.

As compared with the other two elements of the guiding principle, enrichment is relatively straightforward. Nevertheless, contentious issues occasionally do arise, primarily because of the need to respect the traditionally cherished value of freedom of choice. As Bowen L.J. stated in 1886, "liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will."[148] And while it may be true that "[c]ommon law man has lost the rougher edges of his individualism,"[149] it also is true that the recipient of a purported benefit remains *prima facie* entitled to invoke the notion of "subjective devaluation."[150] In so doing, he may resist liability by arguing that, while he received an objectively valuable benefit, he personally did not choose to place value on that thing and therefore should not be considered enriched or susceptible to liability.[151] The plaintiff's primary task in establishing enrichment, therefore, consists of overcoming subjective devaluation.

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to all three components of the generic principle. As seen in *LAC Minerals*, however, the great danger of that technique is that it engenders confusion regarding the constituent elements of the individual causes of action. For that reason, it is best avoided. Cf. A. Burrows & E. McKendrick, *Cases and Materials on the Law of Restitution* (Oxford: Oxford University Press, 1997) at 570.

148 *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234 at 248 (C.A.).

149 Birks, *An Introduction to the Law of Restitution*, *supra* note 8 at 121.

150 While they commonly employ the underlying idea, courts seldom have used the term "subjective devaluation": see *e.g. Gidney* v. *Shank*, [1995] 5 W.W.R. 385 at 400 (Man. Q.B.); *Olchowy* v. *McKay* (1995), [1996] 1 W.W.R. 36 at 46 (Sask. Q.B.); *Club 7 Ltd.* v. *E.P.K. Enterprises*, [1993] N.J. No. 363 at §229; and *Ministry of Defence* v. *Ashman*, [1993] 2 E.G.L.R. 102 at 105 (C.A.).

151 For example, while most people may subscribe to the perception of the marketplace that a shoeshine has a value of, say, $5, a particular person may be indifferent to the condition of his shoes or he may, despite conceding that he likes his shoes to be shined, insist that he would prefer do the job himself, rather than pay someone else to perform the task.

Very broadly speaking, it often is said that a plea of subjective devaluation may be defeated if the defendant either: (i) received an "incontrovertible benefit," or (ii) "freely accepted" a benefit.[152]

1. INCONTROVERTIBLE BENEFIT

Canada has taken a leading role in the development of the doctrine of incontrovertible benefit. While the reasoning underlying that doctrine clearly has been applied by English and Australian courts,[153] Canadian judges most often have expressly invoked the operative phrase.[154] Moreover, the leading case in the area undoubtedly belongs to the Supreme Court of Canada. In *Peel (Regional Municipality)* v. *Canada*,[155] McLachlin J. described an incontrovertible benefit as "an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture."[156] In other words, it is a benefit that is immune to subjective devaluation. Such an enrichment may take one of three forms. First, it may consist of a receipt of money.[157] Money cannot be subjectively devalued because it is the very

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152 Incontrovertible benefit and free acceptance should not be exclusive tests of enrichment; logically, a plea of subjective devaluation can be defeated on other grounds. That point was overlooked in *Soulos* v. *Korkontzilas*, *supra* note 3. As explained above, a real estate agent breached his fiduciary obligations by purchasing a property in which his client was interested. The client sought a constructive trust over the land by means of the concept of restitution for wrongs. In dissent, Sopinka J. (treating the claim as being based on the autonomous action in unjust enrichment) held that relief should be denied because the defendant, despite his acquisition, had not been enriched: at 239, 241-42. (While imposing a constructive trust, McLachlin J. seemed to agree that there had been no enrichment: at 224.) That view was based on the fact that the defendant purchased the land at market price and subsequently experienced an economic loss when the property declined in value. However, given the form of relief sought and the fact that the plaintiff was willing to reimburse the defendant for both his purchase price and his market losses, a legal enrichment arguably existed. Because the plaintiff was seeking the property, rather than its value, recourse to the notion of subjective devaluation should have been precluded. Indeed, the value of the land (whether determined objectively or subjectively) should have been irrelevant.

153 There is relatively little *express* recognition of the test of incontrovertible benefit in Anglo-Australian law: *BP Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 799 (Q.B.); *Proctor & Gamble Philippine Manufacturing Corp.* v. *Peter Creme Gmbh*, [1988] 3 All E.R. 843 at 855 (Q.B.); *Strang Patrick Stevedoring Pty. Ltd.* v. *Owners of the MV "Sletter"* (1992), 38 F.C.R. 501 at 522, 529; and *Cadorange Pty. Ltd.* v. *Tanga Holdings Pty. Ltd.* (1990), 20 N.S.W.L.R. 26 at 35 (Eq. Div.).

154 See *e.g. Park Lane Ranch Ltd.* v. *Fleetwood Village Holdings (Phase II)* (1980), 17 R.P.R. 35 at 44 (B.C.S.C.); *Republic Resources Ltd.* v. *Ballem* (1981), [1982] 1 W.W.R. 692 at 705 (Alta. Q.B.); *Magical Waters Fountains Ltd.* v. *Sarnia (City)* (1990), 74 O.R. (2d) 682 at 691 (Gen. Div.); *Toronto-Dominion Bank* v. *Bank of Montreal* (1995), 22 O.R. (3d) 362 at 375 (Gen. Div.); *Gidney* v. *Shank*, *supra* note 150 at 397 (Man Q.B.), rev'd. on other grounds [1996] 2 W.W.R. 383 (C.A.); *Olchowy* v. *McKay*, *supra* note 150 at 46; and *Halifax (City)* v. *Nova Scotia (Attorney General)* (1997), 163 N.S.R. (2d) 360 at 369 (S.C.).

155 *Supra* note 7.

156 *Ibid.* at 159.

157 Although McLachlin J. did not expressly refer to the receipt of money as a form of incontrovertible benefit, she adopted a passage that did so: *supra* note 7 at 159, quoting J.R.M. Gautreau, "When Are Enrichments Unjust?" (1988-89) 10 Advocates' Q. 258 at 270-71. That proposition universally is accepted by restitution scholars.

means by which the law recognizes and expresses value;[158] a $5 bill necessarily is worth $5 regardless of who holds it. Second, an incontrovertible benefit may consist of a demonstrable financial gain. For example, if the plaintiff mistakenly repairs the defendant's car and the defendant subsequently sells the vehicle in its improved state, thereby reaping a monetary benefit from the claimant's services, he can not subjectively devalue the repairs. Effectively, he is positioned as if he had received money from the plaintiff.[159] And, returning to the first point, money invariably is enriching. Third, an incontrovertible benefit may consist of the saving of a necessary expense.[160] Again, the analysis returns to the invariably enriching nature of money. As McLachlin J. recognized, a benefit may be either positive or negative.[161] Just as the defendant must be enriched if he receives $5, so, too, he must be enriched if, because of the plaintiff's actions, he is spared the necessity of meeting a $5 expense. In either event, his monetary situation is identical.[162]

Although the essence of incontrovertible benefit can be sketched easily enough, some problems remain. First, because of differing opinions regarding the extent to which freedom of choice should be protected, there is considerable academic debate pertaining to the doctrine's precise scope of applicability.[163] For example, with respect to the second form of incontrovertible benefit, should it suffice that the defendant received a non-monetary benefit from which he easily could realize a financial gain or should he be precluded from subjective devaluation only if he actually has realized such a gain? Likewise, with respect to the third form, must the defendant have been subject to an absolute necessity or should it suffice that, practically speaking, he had little choice but to meet the expense? Although the traditional cases suggest some answers, modern courts have yet to address authoritatively such matters.

The second problem regarding incontrovertible benefit pertains to its proper role. As McLachlin J. clearly recognized in *Peel*, that test applies only with respect to the element of enrichment under the principle of unjust enrichment. Nevertheless, a number of decisions, both before and after *Peel*, have suggested that restitutionary relief is available upon mere proof of an incontrovertible benefit, as if that doctrine is a self-

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158 *BP Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)*, *supra* note 153 at 799, Goff J. ("Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient inevitably is benefited").

159 *Greenwood* v. *Bennett* (1972), [1973] Q.B. 195 (C.A.), Lord Denning M.R.; cf. *Promotivate International* v. *Toronto Star Newspapers* (1985), 23 D.L.R. (4th) 196 (Ont. H.C.J.); and *Olchowy* v. *McKay*, *supra* note 150.

160 See *e.g. County of Carleton* v. *City of Ottawa*, *supra* note 23.

161 *Supra* note 7 at 156.

162 Cf. *Ministry of Defence* v. *Ashman*, *supra* note 150 (suggesting partial subjective devaluation of necessary expense).

163 For an overview, see M. McInnes, "Incontrovertible Benefits in the Supreme Court of Canada" (1994) 23 Can. Bus. L.J. 122.

contained cause of action.[164] Once again, the Canadian courts occasionally exhibit a worrying lack of analytical rigour.

2. FREE ACCEPTANCE

Just as free acceptance may serve as an unjust factor,[165] so, too, it may establish the existence of an enrichment. Thus, a defendant may be considered enriched if, despite knowledge that payment was expected and despite a reasonable opportunity to reject the benefit, he received services[166] from the plaintiff. Logically, of course, free acceptance can not invariably establish subjective enrichment. While passive acceptance may reflect a desire to expend resources in the acquisition of a benefit, it also may be the product of utter indifference; a person may refrain from refusing a proffered service simply because he can not be bothered to say anything at all. That difficulty is overcome, however, by the fact that free acceptance serves as a test of enrichment, not by purporting to establish subjective enrichment, but rather by precluding subjective devaluation of an objectively valuable enrichment. Thus, as a matter of fairness, if the defendant was not prepared to pay for a benefit, he should have informed the plaintiff of that fact before she conferred it and thereby saved her the disappointment of later being refused compensation. Because he failed to do so, the law will not allow him to claim that he does not subscribe to the market value of the service.

The status of free acceptance as a test of enrichment varies from jurisdiction to jurisdiction. In England, the courts have yet to endorse expressly the idea and, after early enthusiasm,[167] academic opinion is turning.[168] There is a growing perception that free acceptance, which permits recognition of an enrichment in the absence of any positive act by the defendant indicating a desire to pay for the plaintiff's services, insufficiently protects the traditional value of freedom of choice. Burrows, for example, supports the more conservative "bargained-for" test, which recognizes an enrichment in the absence of an incontrovertible benefit only if the defendant gave the outward

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164 See *e.g. Gill* v. *Grant* (1988), 30 E.T.R. 255 at 272 (B.C.S.C.); *Wettstein* v. *Wettstein*, [1992] B.C.J. No. 1026 (S.C.); *Alyea* v. *South Waterloo Edgar Insurance Brokers Ltd.* (1993), 50 C.C.E.L. 266 at 274 (Ont. Ct. (Gen. Div.)); *Lavigne* v. *Dak Enterprises Ltd.*, [1996] B.C.J. No. 196 at § 30 (S.C.). The same mistake has been made by Australian judges: *Monks* v. *Poynice Pty. Ltd.* (1987), 8 N.S.W.L.R. 662 at 664 (Eq. Div.); *McKeown* v. *Cavalier Yachts Pty. Ltd.* (1988), 13 N.S.W.L.R. 303 at 313 (Eq. Div.); and *J. Gadsden Pty. Ltd.* v. *Strider 1 Ltd. (The "AES Express")* (1990), 20 N.S.W.L.R. 57 at 65 (Adm. Div.).

165 Section III(A)(2).

166 Although the test of free acceptance theoretically may apply to goods, the relevant cases almost all pertain to services.

167 Goff & Jones, *The Law of Restitution*, *supra* note 36 at 30; and Birks, *An Introduction to the Law of Restitution*, *supra* note 8 at 114-16.

168 See *e.g.* Burrows, "Free Acceptance and the Law of Restitution," *supra* note 76; J. Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment" in *The Use and Abuse of Unjust Enrichment*, *supra* note 135, c. 2; Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment," *supra* note 77; cf. Birks, "In Defence of Free Acceptance," *supra* note 48 at 127-41.

impression of both a desire to receive a benefit and a willingness to pay for it.[169] On that view, liability could never be based on mere passivity.

Free acceptance has received more favourable treatment in Australia, where it has been endorsed by the High Court[170] and generally supported by commentators.[171] As a sign of the relative liberality of Australian law, the courts expressly recognize an enrichment not only where the defendant actually accepted the plaintiff's services, but also where he "constructively" is deemed to have done so.[172] Constructive acceptance may occur, for example, when the defendant receives partial services pursuant to an invalid contract. While he may never have given any indication that he would be willing to pay for anything less than full performance, and while he may never have been able to reject part performance, he may be deemed enriched to the extent that the plaintiff fulfilled her putative obligations. That fact is significant in so far as it rejects the more extreme criticisms of free acceptance that generally premise the existence of legally relevant enrichment upon proof that the defendant received (substantially) all of what he requested.[173]

As in other areas of unjust enrichment, the Canadian position is the most relaxed and, analytically, the least satisfying. Granted, in some instances, the concept of free acceptance has been applied without great difficulty. *Deglman* v. *Guaranty Trust Co.*[174] is illustrative. As previously discussed,[175] the parties entered into an unenforceable contract pursuant to which household services were to be provided in exchange for a bequest. The nephew honoured his promise, but the aunt died without having properly amended her will. In the circumstances, the aunt's estate was bound by the fact that the deceased could not have subjectively devalued the objective value of the nephew's services. Having freely accepted those services in the full knowledge that payment was expected, she lost the ability to argue that liability improperly would interfere with her freedom of choice.

In contrast to *Deglman*, however, several recent decisions have invoked the test of free acceptance in theory, only to ignore it in practice. Once again, the cohabitational property disputes provide the clearest examples. Returning to the leading case of

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169 Burrows, *The Law of Restitution*, *supra* note 32 at 14-16. In a variation on the same theme, Burrows also supports the "reprehensible seeking-out" test as a means of recognizing an enrichment in circumstances in which the recipient sought out a service with the intention of wrongfully refusing payment. By way of example, he suggests a situation in which an injured thief threatens to shoot a physician unless he is given free medical assistance.

170 *Pavey & Matthews Pty. Ltd.* v. *Paul*, *supra* note 1 at 227-28, Mason and Wilson JJ., 257, 262-63, Deane J. See also *Brenner* v. *First Artists' Management Pty. Ltd.*, *supra* note 76.

171 See *e.g.* Mason & Carter, *supra* note 32 at 49-52, 301-304; D. Byrne, "Benefits — For Services Rendered" in M. McInnes, ed., *supra* note 131, 87; cf. M. Garner, "Benefits — For Services Rendered: Commentary" in M. McInnes, ed., *ibid.* at 109; M. McInnes, "Free Acceptance in the Australian Law of Restitution" (1996) 24 Aust. Bus. L.J. 238.

172 *Foran* v. *Wight* (1989), 168 C.L.R. 385 at 438, Deane J.; *Pavey & Matthews Pty. Ltd.* v. *Paul*, *supra* note 1 at 257.

173 Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment," *supra* note 77.

174 *Supra* note 1.

175 See text accompanying note 21.

Pettkus v. *Becker*,[176] it will be recalled that while Rosa Becker contributed labour toward the acquisition and operation of an apiary, title to that property was taken in Lothar Pettkus' name alone. It also will be recalled that, throughout the parties' nineteen year relationship, Mr. Pettkus clearly evinced a general intention to take the benefit of Ms Becker's efforts without payment. The only occasions upon which he acknowledged an obligation to provide her with compensation arose when, shortly before their relationship permanently broke down, she left him for a three month separation. As she was leaving, he told her to take $3000, a car and forty bee hives and to "get lost." And upon her return, he equivocally agreed to her demand for payment of $500 per year. As Mr. Pettkus later explained in evidence,

> I knew the whole business is in my name and she had nothing so I figures it's only fair to give her a little bit of money and I figured the five hundred dollars, pay for all the expenses and she would have five hundred dollars every year so long as she stayed with me and if there's a good crop and if there's no crop well of course I can't pay.[177]

Could it be said, upon dissolution of the parties' relationship, that the defendant had been enriched in a manner that would support restitutionary relief? Dickson J. relied upon the test of free acceptance, answered in the affirmative and awarded the plaintiff a half interest in the disputed property. With respect, however, while that reply may seem intuitively fair, it also seems analytically incorrect.[178] Under the test of free acceptance, Mr. Pettkus should have been precluded from subjectively devaluing the objective value of Ms Becker's contributions only to the extent that he had accepted those benefits despite (constructive[179]) knowledge that she expected compensation. And, as recognized in other contexts, a recipient's conduct may reveal that his acceptance was premised upon the assumption that services were offered at a particular cost. If so, notwithstanding his free acceptance, he should be entitled to subjectively devalue the services from their objective value down to that presumed price.[180] It is only at that price that he exercised his freedom of choice to accept despite knowledge that payment was expected; if he had known that a greater price would be charged, he might have emphatically rejected the benefit.

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176 *Supra* note 1.

177 *Ibid.* at 272.

178 While free acceptance may not apply in *Pettkus* v. *Becker*, an enrichment can be established on the basis of the test of incontrovertible benefit. On the reported facts, it appears that Ms. Becker: (i) contributed money, an invariable enrichment, to the parties' joint effort, (ii) contributed labour that allowed Mr. Pettkus to realize a financial gain from the sale of honey, and (iii) contributed labour that saved Mr. Pettkus the necessary expense of hiring outside help. Although he did not expressly invoke the appropriate terminology, Dickson J. essentially relied upon the test of incontrovertible benefit to find an enrichment in *Sorochan* v. *Sorochan*, *supra* note 56 at 6.

179 As previously discussed (above at note 83), there are difficulties associated with applying the notion of constructive knowledge under the test of free acceptance. Those difficulties apply whether free acceptance is used to determine the existence of an unjust factor or a enrichment.

180 See *e.g.* M. McInnes, "Contractual Services, Restitution and the Avoidance of Bad Bargains" (1995) 23 Aust. Bus. L.J. 218; and N. Rafferty, "Contracts Discharged Through Breach: Restitution for Services Rendered by the Innocent Party" (1999) 37 Alta. L. Rev. 1 at 51.

Turning to the facts of the case, the overwhelming features of the first seventeen years of the parties' relationship were the defendant's unrelenting greed and the plaintiff's apparent acquiescence to that appalling behaviour. At least with respect to the evidence arising from that period, then, there is little basis upon which to find that Mr Pettkus knew (or should have known) that Ms Becker expected to receive a half interest in the apiary. Moreover, while the events surrounding the parties' temporary separation, two years prior to their final parting, may reveal some acknowledgement of liability, they also place severe restrictions upon the application of the test of free acceptance. Taken at face value, the evidence indicates merely that: (i) Mr Pettkus believed Ms Becker's past services to be worth $3000, a car and forty bee hives, and (ii) he believed her future services to be worth $500 per year "if there's a good crop." Accordingly, it would seem that Mr Pettkus' free acceptance should have been limited to the terms of those admissions. And while that interpretation admittedly is cramped, it also is true that Dickson J. failed to present grounds for adopting a more generous view.[181]

IV. CONCLUSION

The twofold aim of this article was to describe and assess the uniquely Canadian principle of unjust enrichment. To a significant extent, those two goals can not be separated; the features that distinguish the Canadian principle from its Anglo-Australian counterparts also are the features that stand out for critique. Unfortunately, on the whole, the final assessment must be somewhat negative. True, Canadian restitution law does some things very well. For example, its insistence upon a "corresponding deprivation" averts the Anglo-Australian error of quantifying relief under the autonomous action in unjust enrichment solely on the basis of the defendant's gain and without regard to the plaintiff's loss. Generally, however, the Supreme Court of Canada's approach to the principle of unjust enrichment is marked by a lack of analytical rigour; in many instances, the Court has distorted precedent and principle in order to achieve desired ends. In that respect, the influence of the cohabitational property cases can not be understated. Not only has the Court's jurisprudence in that area established a host of questionable rules, it also has created an environment in which unjust enrichment often appears to be perceived simply as a malleable means of securing situational fairness. For that reason, Canadian law would do well to reflect on the more restrained approach adopted in Anglo-Australian law.

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[181] Dickson J. did say that there was "no evidence to indicate that [Mr Pettkus] ever informed [Ms Becker] that all her work ... was being performed on a gratuitous basis": *supra* note 1 at 274). However, that statement is inconsistent with the general tenor of the evidence and with the Court's finding that the parties did not share the type of common intention that would support a resulting trust: see text accompanying note 85. Once again, the lesson is not that non-titled partners should be denied relief upon the dissolution of cohabitational relationships; some mechanism obviously is needed to achieve fairness in such circumstances. Rather, the point is that the principle of unjust enrichment, if properly applied, often can not accommodate such claims.