

REVIEW

Goff & Jones: The Law of Restitution *Law of Restitution*

MITCHELL McINNES*

Goff & Jones: The Law of Restitution, by Gareth Jones
London: Sweet & Maxwell, 1993, pp. cxxv, 819.

Law of Restitution, by Andrew Tettenborn
London: Cavendish Publishing, 1993, pp. xix, 175.

WITH ENCOURAGEMENT FROM THE JUDICIARY, the Canadian law of restitution continues to edge closer to equal status with tort and contract.¹ And yet, because too few law faculties offer a course devoted to restitution,² many students

* B.A., LL.B. (Alberta), LL.M., Ph.D. (Cambridge), Lecturer in Law, University of Melbourne, Australia.

¹ The Supreme Court of Canada has long taken a leading role in the development of the law of restitution: see, for example, *Degelman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725; *County of Carleton v. City of Ottawa*, [1965] S.C.R. 663; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.*, [1976] 2 S.C.R. 147; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; and *Peel v. Canada; Peel v. Ontario*, [1992] 3 S.C.R. 762.

² Curiously, the subject often is parcelled into a course entitled "Remedies and Restitution." One never finds a course called "Remedies and Tort," because tort is a body of law primarily concerned with the definition of causes of action. However, the same generally is true of "restitution." That term commonly refers to autonomous claims based on the concept of unjust enrichment, for which exist various types of restitutionary remedies: G. Jones, *Goff & Jones: The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993) at 3; P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, On: Canada Law Book, 1990) at chapters 4-9. The law of restitution is confined exclusively to remedial matters only with respect to situations falling under the heading of "restitution for wrongs." In such situations, a plaintiff pursues restitutionary relief for a cause of action lying in some other area of law. For example, if a defendant reaps a benefit as a result of tortious conduct, a plaintiff may seek disgorgement of that gain, rather than compensation of his own loss: P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (New York: Oxford University Press, 1989) [hereinafter *Introduction*] at chapter 1.

Occasionally, it also is said that the law of restitution adequately can be considered in courses dealing with equity or trusts. However, while restitution certainly contains significant equitable

must await graduate studies abroad for exposure to the topic.³ Indeed, because they so frequently have the opportunity to shape first impressions, Professor Gareth Jones of Cambridge University and Professor Peter Birks of Oxford University enjoy positions of personal influence to which most domestic academics can only aspire. Many of the reasons for that situation undoubtedly stem from the fact that Canadian law schools increasingly are coming to share with their American counterparts the perceived need to emphasize theory over practice, interdisciplinary scholarship over doctrinal analysis, and public law over private law. Consequently, when the time comes for curriculum review, restitution is apt to be passed over in favor of less traditionally oriented courses.⁴

Restitution should be taught in Canadian law schools, and it should be taught in a manner which enables students to put their lessons into practice. While advanced scholarship undeniably is an essential exercise, too often the lecture hall and the law review become the fora for well-meaning, though ultimately unsatisfying, experiments in philosophy or social science.⁵ The enterprise of legal education fails doubly if useful ideas are not effectively communicated: members of the audience are left empty and are dissuaded from further investigation.

As is true of the Supreme Court of Canada's adoption of a broad principle of unjust enrichment,⁶ Birks' efforts⁷ bring much needed theoretical structure to the

components, its most important claims derive from the quasi-contractual actions which originated in law. Similarly, while the institution of the trust plays a important, if controversial, role in Canadian law, it by no means comprises all of the law of restitution.

³ More specifically, it typically is to England that Canadian students must go. Despite a rich history of scholarship (see e.g. A.W. Keener, *A Treatise on the Law of Quasi-Contract* (New York: Baker, Voorhuis & Co., 1893); American Law Institute, *Restatement of the Law of Restitution* (St. Paul: American Law Institute, 1937); J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown & Co., 1951); and G.E. Palmer, *Law of Restitution* (Boston: Little, Brown & Co., 1978)), the American law of restitution currently is not an area of great activity.

⁴ The point is not that curricula should stagnate and resist the changing needs of the legal community; clearly, it is desirable to provide students with exposure to non-traditional subjects and perspectives. Nevertheless, it also is important to bear in mind that because most graduates still wish to pursue careers in practice, they require the basic tools needed to represent clients in private actions.

⁵ Tony Weir's assessment of much recent tort and contract scholarship is apt: "[t]hese books show Professors at Play. The Professors play with a skill which would have struck medieval theologians as admirable, but they may well not amuse, and are most unlikely to instruct, Students at Work." Book Review of E. Weinreb, ed., *Tort Law* and L. Alexander, ed., *Contract Law*, (1992) 51 *Camb. L.J.* 388 at 390.

⁶ See e.g. *Degelman v. Guaranty Trust Co. of Canada*, *supra* note 1; *County of Carleton v. City of Ottawa*, *supra* note 1; *Pettkus v. Becker*, *supra* note 1; and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

⁷ *Introduction*, *supra* note 2.

law of restitution. Moreover, if that body of law is to present intellectual challenges capable of attracting the brightest minds, it occasionally must be explored at relatively high levels of abstraction. Nevertheless, it is impossible to run before one walks. A clear explanation of the various instances in which the law allows or denies recovery therefore is imperative⁸ if students and practitioners are to realize the full potential of the law of restitution.⁹

In 1966, Robert (now Lord) Goff & Gareth Jones' pioneering text, *The Law of Restitution*, appeared as both a catalyst for change and an exegesis of established rules.¹⁰ In bringing together a vast body of seemingly disparate actions under the unifying theme of reversing unjust enrichments, they created order from chaos in a manner that was at once learned and accessible. The fact that our courts already had recognized a general principle of unjust enrichment¹¹ could not diminish the significance of the work. Goff & Jones' effort was immediately hailed as a remark-

⁸ Concentration on the traditional categories of recovery is beneficial for several reasons. First, while the law no longer irrationally fears that recognition of the principle of unjust enrichment will result in intolerable "palm tree justice" (see e.g. *Baylis v. Bishop of London*, [1913] 1 Ch. 127 at 140), it properly remains vigilant to the danger of straying too far too fast: see e.g. *Peel v. Canada*, *supra* note 1 at 784; G. Jones, "The Law of Restitution: The Past and the Future" in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1993) 2 [hereinafter *Essays*]; Birks, *Introduction*, *supra* note 2 at 16–25. That peril can be avoided by employing recognized instances of recovery as signposts of liability and by developing the law incrementally. Similarly, in light of judicial conservatism, a new type of claim is more likely to be accepted if it is presented simply as an analogous extension of an established head of recovery, rather than as a manifestation of a broad principle: see e.g. *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at 241 (N.B.C.A.). Finally, the general principle of unjust enrichment requires refinement before it can be applied in a particular type of situation. Hundreds of years of jurisprudence have revealed important policy considerations that should continue to inform the rules of restitutionary relief in various circumstances; it would be imprudent to cast aside that body of wisdom.

⁹ Andrew Burrow's recent text admirably bridges the gap between theory and practice and serves as the first student textbook in the English law of restitution: *The Law of Restitution* (London: Butterworths, 1993) at viii.

¹⁰ Birks describes the first edition of *The Law of Restitution* as "the most important English event in a wider movement by which Anglo-American law has set about rectifying the error of having overlooked the subject for most of the century in which textbooks have re-shaped the law": *Introduction*, *supra* note 2 at 5.

Earlier, the *Restatement of the Law of Restitution*, *supra* note 3, written by Austin Scott and Warren Seavey (under whom Jones studied while a graduate student at Harvard Law School), served a similar role from the American perspective.

¹¹ *Morrison v. Canadian Surety Co.*, [1954] 4 D.L.R. 736 (Man. C.A.); *Degelman v. Guaranty Trust Co. of Canada*, *supra* note 1.

able achievement,¹² and time has only further entrenched the text's status as a classic.¹³ Consequently, its fourth edition is readily welcomed.

The most readily apparent difference between the new edition of *The Law of Restitution* and its predecessors lies in its authorship. Lord Goff's work in the House of Lords and the Privy Council, as well as his extra-judicial activities, precluded his direct participation. Nevertheless, his influence remains profound. Much of the material and all of the spirit have been carried over from previous editions, and, of course, Lord Goff continues to shape the law of restitution from the bench.¹⁴ In terms of content, the fourth edition of *The Law of Restitution* features a new chapter considering the decision of the House of Lords in *Woolwich Equitable Building Society v. The Inland Revenue Commissioners*,¹⁵ and the chapters examining defences and restitution for wrongs have been substantially reconsidered and rewritten. So, too, the new edition witnesses slight changes in the formulation of fundamental concepts. Thus, the doctrine of free acceptance, initially devised in the first edition of *Goff & Jones* in 1966, has been amended to take account of the voluminous discussion that it has engendered.¹⁶ It is now said that

[a defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services.¹⁷

Fortunately, the features which established the text's reputation over the past quarter century have been retained. Like its predecessors, the new edition compre-

¹² Bradley Crawford considered it "fully equal to ... the very best English or American texts" and offered the sound advice, "[b]uy it and read it": (1967) 45 Can. Bar Rev. 174 at 174-75.

¹³ The twenty-fifth anniversary of the first edition of *The Law of Restitution* was honoured with a collection of papers from leading scholars around the world: Burrows, ed., *Essays*, *supra* note 8.

¹⁴ See e.g. *Woolwich Equitable Building Society v. The Inland Revenue Commissioners*, [1993] A.C. 70; *Lipkin Gorman (A Firm) v. Karpnale Ltd.*, [1991] A.C. 548.

¹⁵ *Ibid.*

¹⁶ See e.g. P. Birks, "In Defence of Free Acceptance" in Burrows, ed., *Essays*, *supra* note 8 at chapter 5; Birks, *Introduction*, *supra* note 2 at 114-16; A. Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 L.Q.R. 576; Burrows, *The Law of Restitution*, *supra* note 9 at 11-14; J. Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P. 71; G. Mead, "Free Acceptance: Some Further Considerations" (1989) 105 L.Q.R. 460; and M. Garner, "The Role of Subjective Devaluation in the Law of Unjust Enrichment" (1990) 10 O.J.L.S. 42.

¹⁷ *Supra* note 2 at 19 (italics indicating revision). Regrettably, the Supreme Court of Canada's recent decision regarding the other contentious form of enrichment — incontrovertible benefit — was rendered too late for inclusion. The reader must await another day for Jones' analysis of *Peel v. Canada*; *Peel v. Ontario*, *supra* note 1. See M. McInnes, "Incontrovertible Benefits in the Supreme Court of Canada" (1994) 23 Can. Bus. L.J. 122.

hensively examines the various instances in which the courts will (or should) recognize a claim in restitution; the resources employed are of remarkable breadth, both temporally and geographically. The subject profitably lends itself to an examination of both the ancient forms of action and contemporary cases. And though published in England, *The Law of Restitution* is a truly cosmopolitan effort; its analyses benefit from insightful references to the law of restitution as formulated in Australia, New Zealand, the United States, Germany, South Africa, and Israel. Canadian readers will be especially interested in Jones' comments on recent decisions of the Supreme Court of Canada regarding mistake of law¹⁸ and breach of confidence.¹⁹

Little would be gained from discussing the contents of the work in greater detail. Suffice to say that whether one is working in Canada or abroad, in academia or in the courts, *The Law of Restitution* remains the first source one should consult when presented with a problem in the law of restitution. Very often, it also is the last source one need consult.

Whereas *Goff & Jones* provides an incomparable blend of descriptive discussion and doctrinal analysis, Andrew Tettenborn's text, *Law of Restitution*, is single-mindedly practical in orientation.²⁰ As its intended audiences are students and practitioners, it eschews theoretical analyses in favor of concise statements of the law as it appears in the courts.

Readers may well notice the lack of any attempt to create an over-arching or general scheme into which all particular instances of restitution can (or should) be fitted. This is quite deliberate. Just as the attempt to construct universal principles of, say contractual and tortious liability have led to results which are vacuous or misleading when confronted with the rules actually in force, so also with the different heads of recovery; apart from the fact that they all exist to reverse some kind of enrichment in the defendant, they are all subject to their own particular rules.²¹

The author sets himself the task of briefly stating the law of restitution, and admirably rises to meet the challenge. In well under two-hundred pages, he explains the crucial rules in the area, and then some.

Tettenborn's volume is less ambitious than Jones' and, in the absence of a concerted effort at comparative analysis,²² will prove to be less helpful to the Canadian reader. However, that is not to say that it will not find readers in this

¹⁸ *Air Canada v. British Columbia*, *supra* note 1.

¹⁹ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra* note 1.

²⁰ A. Tettenborn, *Law of Restitution* (London: Cavendish Publishing, 1993).

²¹ *Ibid.* at backpage.

²² As would be expected in light of its aims, *Law of Restitution* is not devoid of Canadian references, but it does focus primarily on English law.

country. Because the fundamental concepts in the law of restitution now²³ are similar on both sides of the Atlantic, the text often provides a succinct statement of the law here as well as in England.²⁴ Moreover, while expressly adopting a descriptive approach, Tettenborn does not refrain from offering opinions where the law is unsettled or unsatisfactory.²⁵ Finally, and perhaps most significantly, Tettenborn's volume provides a model for introductory texts in this country. Recent Canadian works on the law of restitution are comprehensive²⁶ and as such serve important functions. However, there is a broad spectrum of pedagogical needs; the student often, and the practitioner occasionally, will require a simpler survey of the law than currently is available.²⁷ Hopefully, that need will be met here as it now has been met in England.

In the past thirty years, restitution has grown considerably in stature, largely due to the efforts of the Supreme Court of Canada and a handful of dedicated scholars. Judges and academics must, of course, continue to play instrumental roles. However, restitution will fulfil its potential only when it draws support from the top down *and* from the bottom up. Accordingly, it is necessary that students be taught to recognize and explore the possibilities of private law relief outside of tort and contract. The recent works by Gareth Jones and Andrew Tettenborn, though very different in many respects, both serve the cause admirably. The former remains what it has always been: indispensable. Because of its comprehensiveness and accessibility, *Goff & Jones* sets the standard for text books, not only in restitution, but in law

²³ The House of Lords recently joined the Supreme Court of Canada in recognizing the concept of unjust enrichment as underlying the law of restitution: *Lipkin Gorman (A Firm) v. Karpnale Ltd.*, *supra* note 14; *Degelman v. Guaranty Trust Co. of Canada*, *supra* note 1.

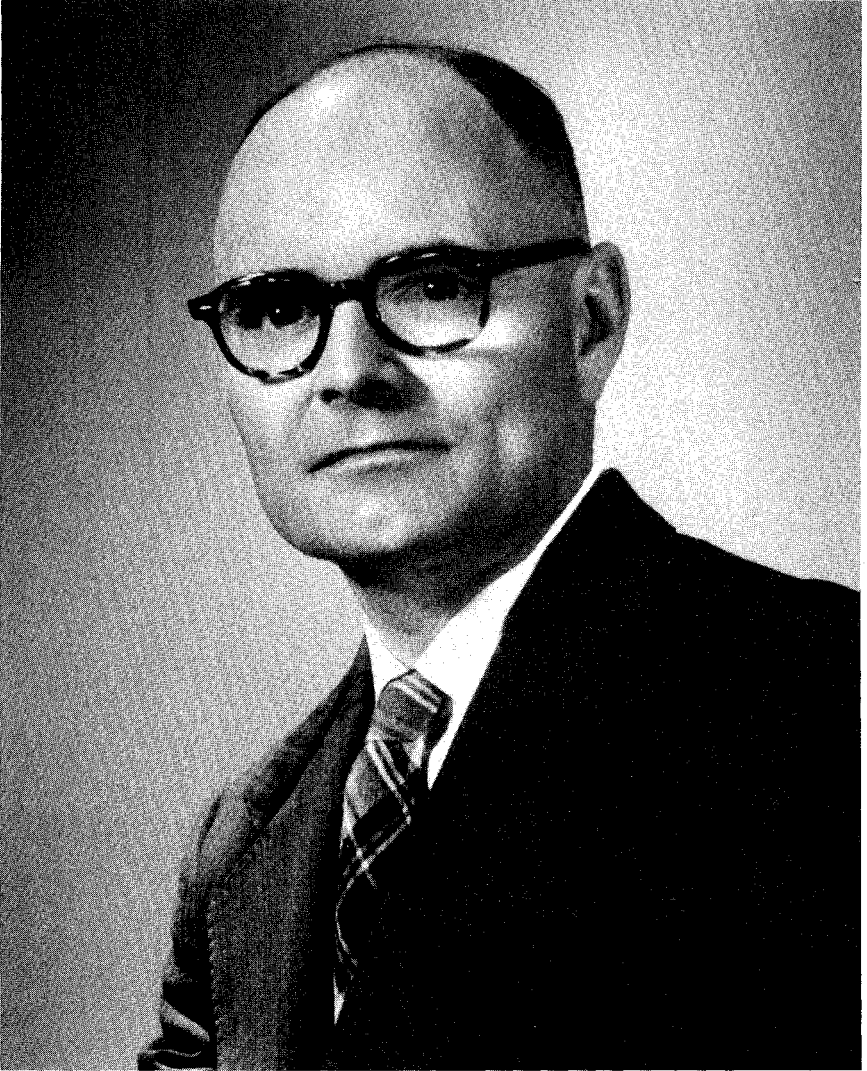
²⁴ Nevertheless, the Canadian reader must be alive to the differences that exist between Canadian and English law, and for that reason, Tettenborn's text may not be appropriate for students in this country.

²⁵ For example, while arguing that recovery should occasionally be allowed on policy grounds for services which were neither requested nor freely accepted, his scepticism (*supra* note 20 at 151) regarding the doctrine of incontrovertible benefit sets him apart from most scholars: see McInnes, "Incontrovertible Benefits in the Supreme Court of Canada", *supra* note 17.

²⁶ Maddaugh & McCamus, *The Law of Restitution*, *supra* note 2; G.H.L. Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992).

²⁷ The need for introductory Canadian texts is not confined to the law of restitution. For example, whereas English tort law is served by both exhaustive tomes (see e.g. R.W.M. Dias, gen. ed., *Clerk & Lindsell on Torts*, 16th ed. (London: Sweet & Maxwell, 1989)) and brief overviews (see e.g. J.G. Fleming, *An Introduction to the Law of Torts*, 2d ed. (Oxford: Clarendon Press, 1985)), in Canada, it tends to be an all or nothing proposition.

generally. Tettenborn's work is far less ambitious, and for that very reason satisfies an important need, at least in English law. It is an excellent entry level text that provides newcomers with a simple, yet thorough, overview of the diverse rules and principles.



Roy St. George Stubbs
(1907–1995)

