

Chief Justice Dickson and the Law of Restitution

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I. INTRODUCTION

THOUGH CHIEF JUSTICE DICKSON authored only a handful of opinions relating to the law on restitution in his lengthy career as a member of the Supreme Court of Canada, it is not too much to claim that those opinions¹ have effected a major reshaping of the law of restitution of the common law provinces. It will be argued here that in so doing, Chief Justice Dickson has illuminated and reinvigorated a branch of the law of obligations which had been neglected and little understood in Canada and elsewhere during the 19th and early 20th centuries. This may well be his most important and enduring contribution to our private law. In order to defend claims such as these, it will be useful to set the historical stage by providing a brief account of the central ideas of the modern law of restitution and of the state of the Canadian law of restitution immediately prior to the appointment of Chief Justice Dickson to the Supreme Court of Canada in 1973.

A brief sketch of the modern history of the law of restitution must begin with a reference to the publication of the American Law Institute's *Restatement of the Law of Restitution*² in 1937. Subtitled "Quasi-Contract and Constructive Trusts," the *Restatement* offered a

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¹ Attention will be focused here on the five opinions identified in notes 13-15, *infra*. There is an additional opinion, that in *Guerin v. R.* [1984] 2 S.C.R. 335, which touches upon a restitutionary topic: fiduciary obligation. The principal contribution of that opinion, however, relates to the law of aboriginal rights. Accordingly, it is considered at length elsewhere in this symposium and will not be considered further here. As well, attention is not given in this article to important restitution decisions of the Court — such as *Rural Municipality of Storthoaks v. Mobil Oil*, [1976] 2 S.C.R. 347 — in which the Chief Justice participated as a member of the panel but did not write a separate opinion.

² American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul: American Law Institute Publishers, 1937).

new analytical framework around which were to be organized the detailed rules of the old common law of *quasi-contract* and a group of equitable doctrines including, but by no means limited to, the equitable rules relating to the constructive trust. The new analytical framework was to be supplied by the principle against unjust enrichment, a principle which was articulated in the first article of the *Restatement* in the following terms:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

According to the theory underlying the *Restatement*, *quasi-contract* and constructive trust have more in common than their disparate origins would suggest. Their commonality rests on the proposition that both appear to represent applications of a broad underlying principle against unjust enrichment. At one level, then, the *Restatement of Restitution* can be seen simply as an exercise in the reorganization of legal knowledge. That is to say, the authors of the *Restatement* were attempting to provide for the law of restitution the useful service that had been provided by earlier generations of scholars in contract and tort by moving the organization and classification of the materials constituting those subjects away from their foundations in the forms of medieval procedural devices and reassembling them around a coherent and intelligible analytical structure. As with its sister restatements in contract and tort, the *Restatement of Restitution* was not an exercise in radical reform of the content of the law. As its title suggests, its principal objective was to effect a restatement of the detailed and existing rules of the law of *quasi-contract* and constructive trust.

At another level, however, it was apparent that the *Restatement* project contained within it the seeds of significant reform. The authors of the *Restatement* explicitly acknowledged their aspiration that the very act of bringing these two subjects together and giving them a coherent analytical structure would facilitate their further growth and development.³ *Quasi-contract* had languished in obscurity in the textbooks as an appendix or afterthought to the general law of contracts. Constructive trusts had been treated, in the English jurisprudence at least, as if it was essentially another type of substantive trust. This association of *quasi-contract* and constructive trust with their formidable private law cousins not only led to a lack

³ W.A. Seavey & A.W. Scott, "Restitution" (1938) 54 L.Q. Rev. 29 at 29.

of serious attention by the scholarly community, the association became, in each case, a positive source of confusion. Thus, *quasi*-contracts were thought to be real contracts, albeit implied, and therefore were, in some respects at least, subject to doctrines pertaining to the enforceability of genuine contracts.⁴ In the American view, *quasi*-contracts were simply obligations imposed by law in order to prevent an unjust enrichment and did not rest on an implied contractual undertaking. Constructive trust, on the other hand, was traditionally viewed as being akin to the express trust and thus available only in "trust-like" situations, most obviously in the context of fiduciary relationships. The American view of constructive trust was that it was a remedial device rather than a substantive trust institution. Moreover, it was considered to be a device imposed for the purpose of preventing an unjust enrichment. To be sure, it could be imposed in the context of fiduciary relations but it would be available in other contexts as well. Thus, it was thought that the basic plan of the *Restatement* — bringing these two subjects together within the covers of one volume, freeing them from their confusing associations with contract and trust and recognizing their commonality — would provide a context within which these subjects could more effectively benefit from the traditional common law methods of doctrinal improvement and refinement than they had in the past. Recognition of the unifying importance of the unjust enrichment principle would serve, not merely as an instrument of reclassification or reorganization, but as an important stimulus and rationale for reform of the existing rules.

⁴ The classic illustration of this phenomenon is the decision of the House of Lords in *Sinclair v. Brougham*, [1914] A.C. 398. The plaintiffs were held unable to recover in *quasi*-contract monies deposited in an *ultra vires* banking business carried on by the defendant building society. This result was justified, in part, on the basis that, "[t]he law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid": *supra* at 452 *per* Lord Sumner. On the implied contract theory, more generally, see R. Goff & G. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) at 5-12.

Interestingly, in what would appear to be the only reported restitution decision rendered by Chief Justice Dickson during his tenure in the Manitoba courts, *Machray's Department Store Ltd. v. Zionist Labour Organization*, (1965) 53 D.L.R. (2d) 657 (Man. Q.B.), Dickson J. effectively ignored the difficulties created by the *Sinclair* case and set aside an *ultra vires* agreement on terms requiring that both parties be restored to their original position. This decision is one of a substantial number of Canadian decisions which (wisely, in my view) narrowly distinguish or ignore the *Sinclair* case. See, generally, P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book Inc., 1990) c. 14.

With a few notable exceptions, the *Restatement* model and, more particularly, the unjust enrichment analysis were not warmly embraced by the English judiciary.⁵ In Canada, a rather different picture emerged.⁶ In 1954, in the leading decision of the Supreme Court of Canada, *Deglman v. Guaranty Trust Co. of Canada*,⁷ the Supreme Court explicitly adopted the unjust enrichment model in granting recovery in *quantum meruit* for the value of services rendered under an oral agreement which was unenforceable by reason of its lack of formality. The defendant had argued that *quantum meruit* relief required the implication of a contract and that such implication was impossible where, as here, the parties had entered into an explicit and unenforceable agreement. The Supreme Court, relying explicitly on the *Restatement*, held that liability in such cases rests on the unjust enrichment principle rather than on a theory of implied contractual obligation. Subsequently, the unjust enrichment notion was taken up with some enthusiasm by Canadian lower courts.⁸ The Supreme Court itself returned to this theme about a decade later. In its 1965 decision in *County of Carleton v. City of Ottawa*,⁹ the Court considered whether to allow the plaintiff a restitutionary claim for the value of payments it had mistakenly made to a medical care facility. The plaintiff had mistakenly thought it was under a statutory obligation to bear the costs of services provided to a particular patient. In fact, the defendant municipality bore that obligation. Accordingly, the payments had the unintended effect of discharging a statutory obligation of the defendant municipality. No similar claim for the value of a mistaken discharge of another's obligation would have been allowable in English law. Nonetheless, the

⁵ For recent evidence of this lack of enthusiasm, see *Orakpo v. Manson Investments*, [1978] A.C. 95 (H.L.) at 104 *per* Lord Diplock ("...there is no general doctrine of unjust enrichment recognized in English law...."). Some prominent jurists took a different view. See, generally, Goff & Jones, *supra*, note 4 at 10-16. Lord Wright, for example, was an admirer of the *Restatement*. See Lord Wright, *Legal Essays and Addresses* (Cambridge: Cambridge University Press, 1939). The famous passage from Lord Wright's opinion in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 at 63-64, adopting the American view in a frustration case, has been quoted very frequently in Canadian cases.

⁶ See, generally, Maddaugh & McCamus, *supra*, note 4, c. 2.

⁷ [1954] S.C.R. 725.

⁸ The early experience is reviewed in W.H. Angus, "Restitution in Canada Since the Deglman Case" (1964) 42 Can. Bar Rev. 529.

⁹ [1965] S.C.R. 663.

Supreme Court granted relief relying, in part, on the unjust enrichment analysis. During this same period, the law of "Restitution" gained increasing attention in Canadian legal periodicals and began to appear in the curricula of the law schools.¹⁰ Canadian interest in the subject was no doubt further stimulated by the appearance, in 1966, of a magisterial treatise on the English law of restitution by Robert Goff and Gareth Jones.¹¹ Indeed, given the holdings of the Supreme Court in the *Deglman* and *County of Carleton* cases, it may be that this splendid work found a more receptive audience in Canada than in England where the unjust enrichment analysis continued to be very much a minority taste.

At the time of Dickson J.A.'s elevation to the Supreme Court in 1973 — twenty years after the decision in *Deglman* — there was thus strong, if not overwhelming, evidence of Canadian acceptance of the American unjust enrichment analysis. Although there was a growing body of case law adopting this approach in the lower courts, there were nonetheless only two decisions of the Supreme Court on point, one per decade. Further, those two decisions, important as they might be, both dealt with matters of *quasi-contract*. There had been no clear pronouncement of the Court in favour of the unjust enrichment analysis on the equity side of the ledger. Further, there was little concrete evidence of the extent to which the Court viewed the unjust enrichment principle as an instrument of reform. The result in *Deglman* was not controversial. To be sure, the change effected in *County of Carleton* was a matter of some significance but, in the traditional common law manner, the significance of that change was masked by reasoning which purported to demonstrate that the holding was not inconsistent with earlier English authority.¹² In short, for those who believed that adoption of the unjust enrichment analysis would facilitate a much needed modernization of Canadian restitu-

¹⁰ Some credit at least for these developments is due to Bradley Crawford, a former student of Robert Goff's at the L.S.E., whose pioneering efforts as a teacher and a scholar of restitution at the University of Toronto (and, one might add, as a head-note writer for the D.L.R.'s) generated much interest in the subject. See, e.g., B.E. Crawford, *Restitution: Cases and Notes* (Faculty of Law, University of Toronto, 1971) [unpublished].

¹¹ R. Goff & G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966). A second edition appeared in 1978 and a third in 1986.

¹² See, e.g., *Mavor v. Pine* (1825), 3 Bing. 285; *Gray v. Hill* (1820) Ry. & M. 420. For earlier Canadian authority to the same effect, see *Giles v. McEwan* (1896), 11 Man. L.R. 150; *Re Meston*, [1925] 4 D.L.R. 887 (Sask. C.A.).

tionary law, the evidence in the case law at that time was encouraging but hardly dispositive.

If, almost twenty years later, one can conclude with some confidence that such a change has occurred, the explanation for this development rests in significant measure on the contribution to this subject made by Chief Justice Dickson during his tenure on the Supreme Court. The principal evidence in support of this proposition is to be found in Chief Justice Dickson's opinions in, firstly, a series of cases dealing with the distribution of property upon the dissolution of a marriage or similar relationship;¹³ secondly, a dissenting opinion in which the Chief Justice sought to overrule the doctrine denying the recovery of moneys paid under a mistake of law;¹⁴ and thirdly, the majority opinion which he delivered in the recent decision of the Court in *Hunter Engineering Co. v. Syncrude Canada*¹⁵ which offers compelling evidence of the Chief Justice's view of the expansive role to be played by the unjust enrichment principle in Canadian restitutionary law. To each of these topics, we may now turn.

II. THE MATRIMONIAL PROPERTY CASES

IT IS WELL KNOWN that in his majority opinion in *Pettkus v. Becker*,¹⁶ Chief Justice Dickson developed an innovative solution for a set of problems arising in the context of matrimonial property disputes. The principal difficulty inherent in the prior law is well illustrated by the decision of the Court in *Murdoch v. Murdoch*¹⁷ in 1973. In that case, and indeed in many of the other Canadian authorities on this point, a recurring factual pattern is to be found. The parties to the litigation are a husband and wife, typically a farming couple, who have worked together in the traditional manner of such couples to develop what might be referred to as a family business. Often, however, title to the principal asset of importance, the farm, would be taken in the name of the husband alone. Upon dissolution of the relationship, though the husband might be subject to continuing support obligations of one kind or another, the traditional view taken by the legal system was

¹³ *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

¹⁴ *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347.

¹⁵ [1989] 1 S.C.R. 426.

¹⁶ [1980] 2 S.C.R. 67.

¹⁷ [1975] 1 S.C.R. 423.

that the husband remained the exclusive owner of the asset held in his name. If the wife had made a cash contribution to the purchase price of the property, the traditional doctrine of resulting trust would confer a *pro rata* equitable interest in the asset upon the wife, provided that the husband could not establish that the contribution was intended as a gift.¹⁸ Considerable difficulty would be encountered, however, in attempting to apply the resulting trust analysis to situations where the contribution of the spouse without title might be said to be indirect. Thus, where the contribution took the form of paying for other household or family expenses or, as in *Murdoch*, of providing services necessary to the operation of a business on the property, the absence of a clear link between the plaintiff's contribution and the acquisition of the asset in question rendered the application of resulting trust analysis highly problematic. Although occasional attempts were made by English judges to extend trust doctrine into situations where the plaintiff wife's contribution might be said to be indirect,¹⁹ the House of Lords reaffirmed, in *Pettitt v. Pettitt*²⁰ and *Gissing v. Gissing*,²¹ the traditional view that the resulting trust analysis was available to the wife in cases of indirect contribution only where both parties intended that the wife would acquire an interest in the property in question. Explicit understandings of this kind are, of course, likely to be rare. Though it was no doubt true that judges minded to effect a just distribution of property in such circumstances would be inclined to "find" such understandings,²² the formal doctrine propounded by the House of Lords offered no comfort to such bold judicial spirits. In *Murdoch v. Murdoch*,²³ the Supreme Court adhered to the traditional rule. Relying on *Pettitt* and *Gissing*, the Court denied the plaintiff wife an interest in the farm on which she had laboured with her husband for many years by reason of the absence of such an understanding. The Supreme Court was,

¹⁸ See, generally, B. Hovius & T.G. Youdan, *The Law of Family Property* (Toronto: Carswell, 1991) c. 5 & 6.

¹⁹ See, e.g., *Hazell v. Hazell*, [1972] 1 W.L.R. 301 (C.A.). For an account of more recent English experience, see Hovius & Youdan, *ibid.*, c. 8.

²⁰ [1970] A.C. 777 (H.L.).

²¹ [1971] A.C. 886 (H.L.).

²² A point made by Professor Waters in an influential article: see D. Waters, "Matrimonial Property Disputes: Resulting and Constructive Trusts: Restitution" (1975) 53 Can. Bar Rev. 366.

²³ *Supra*, note 17.

however, divided in *Murdoch*. A dissenting opinion was filed by Laskin J. Though it is true that the majority in *Murdoch* offered an orthodox interpretation of the applicable doctrine, it is doubtless the case that the dissent of Laskin J. better reflected evolving social attitudes and expectations with respect to the resolution of disputes of this kind. In his dissent, Laskin J. made the intriguing and ingenious suggestion that the wife might be entitled, in such a case, to be awarded an interest in the property by means of a constructive trust imposed on the husband in order to prevent his unjust enrichment.

Five years after rendering its decision in *Murdoch*, the Supreme Court returned to these questions in *Rathwell v. Rathwell*.²⁴ On this occasion, Dickson J. pursued the line of analysis intimated by Laskin J. in *Murdoch*. In a passage which is typical of his style of opinion-writing, the nature of the problem is described in a candid and accessible manner:

In broad terms matrimonial property disputes are much alike, differing only in detail. Matrimonial property, i.e. property acquired during matrimony (I avoid the term "family assets" with its doctrinal connotations) is ordinarily the subject-matter of the conflict. One or other, or both, of the spouses may have contributed financially to the purchase. One or other may have contributed freely given labour. The contribution may have been direct, or indirect in the sense of permitting the acquisition of an asset which would otherwise not have been acquired. Such an indirect contribution may have been in money, or it may have been in other forms as, for example, through caring for the home and family. The property is acquired during a period when there is marital accord. When this gives way to discord, problems arise in respect of property division. There is seldom prior express agreement. There is rarely implied agreement or common intention, apart from the general intention of building a life together. It is not in the nature of things for young married people to contemplate the break-up of their marriage and the division, in that event, of assets acquired by common effort during wedlock.²⁵

Dickson J. went on to observe that although the body of judicial doctrine that had developed to resolve such disputes appeared to be in an "uncertain and unstable state," there was, nonetheless, "a certain inevitability about this in family law matters. The economic and human variables in a society are bound to be diffuse."²⁶ It is evident, however, that Dickson J. had come to the conclusion that the level of instability obtaining in the present context was unattractive. Indeed, in characteristically colourful prose he described the debate

²⁴ [1978] 2 S.C.R. 436.

²⁵ *Ibid.*, at 447-48.

²⁶ *Ibid.* at 448.

being waged on these matters in the law reports and in the law reviews in the following terms:

This appeal affords the Court an opportunity of again considering the juridical basis for the resolution of matrimonial property disputes. The settlement of such disputes has been bedevilled by conflicting doctrine and a continuing struggle between the "justice and equity" school, with *Rimmer v. Rimmer*, the leading case and Lord Denning the dominant exponent, and the "intent" school, reflected in several of the speeches delivered in the House of Lords in *Pettitt v. Pettitt* and *Gissing v. Gissing*, and in the judgment of this Court in *Murdoch v. Murdoch*. The charge raised against the former school is that of dispensing "palm-tree" justice; against the latter school, that of meaningless ritual in searching for a phantom intent.²⁷

Thus, there was a need for renewed stability in this area but, in Dickson J.'s view, not a stability which would be purchased by the creation of rigid rules which would impair the courts' ability to fashion a just result in the particular case.

The need for certainty in matrimonial property disputes is unquestionable, but it is a certainty of legal principle hedging in a judicial discretion capable of redressing injustice and relieving oppression.²⁸

In addition to the need to find an appropriate balance between certainty and flexibility, Dickson J. addressed explicitly the need to take into account changing social attitudes:

Many factors, legal and non-legal, have emerged to modify the position of earlier days. Among these factors are a more enlightened attitude toward the status of women, altered life-styles, dynamic socio-economic changes. Increasingly, the work of a woman in the management of the home and rearing of the children, as wife and mother, is recognized as an economic contribution to the family unit.²⁹

For critics of the Court's decision in *Murdoch*³⁰ such an open acknowledgement of the reality of these social forces and their relevance to the issues in dispute must have seemed both refreshing and reassuring.

Having defined the problems created for judicial craftsmanship by matrimonial disputes in these rather challenging terms, Dickson J. then turned to consider possible solutions. His attention was first

²⁷ *Ibid.* at 442-43.

²⁸ *Ibid.* at 448.

²⁹ *Ibid.* at 443.

³⁰ *Supra*, note 17.

turned to the resulting trust analysis which, predictably, was found to be inadequate to the task at hand. To the extent that resulting trust requires "agreement or common intention" by both parties, such a state of mind may be absent. In such circumstances, Dickson J. stated, it is necessary to turn to the doctrine of constructive trust. Dickson J. began his analysis of the constructive trust device with a ringing endorsement of the American unjust enrichment theory of constructive trust:

The constructive trust amounts to a third head of obligation, quite distinct from contract and tort, in which the court subjects "a person holding title to property...to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it";....The constructive trust is an obligation of great elasticity and generality.³¹

In this passage, Dickson J. adopted the American tripartite division of the law of obligations into tort, contract and restitution.³² As well, he adopted the American theory that constructive trust is a remedial device available in cases of unjust enrichment and not, as it is in the prevailing English view, a substantive trust institution in some sense.

Dickson J. then turned to consider the possible application of constructive trust analysis to the matrimonial property question. For readers familiar with the American restitutionary doctrine, this was an exercise of enormous interest for there was, at that time, no body of American doctrine applying the constructive trust analysis to such situations.³³ Dickson J. identified the causal relationship between the plaintiff's efforts and the defendant's acquisition of the asset in dispute as the critical linchpin of his analysis. He explained as follows:

Where a common intention is clearly lacking and cannot be presumed, but a spouse does contribute to family life, the court has the difficult task of deciding whether there is any causal connection between the contribution and the disputed asset. It has to assess whether the contribution was such as enabled the spouse with title to acquire the asset in dispute. That will be a question of fact to be found in the circumstances of the particular case. If the answer is affirmative, then the spouse with title becomes accountable as a constructive trustee. The court will assess the contributions made by

³¹ *Supra*, note 24 at 454.

³² A similar view had been expressed by Lord Wright in the oft-quoted passage from his judgement in the *Fibrosa* case referred to *supra*, note 5.

³³ A short time before the Court decided *Rathwell*, however, a similar view was taken by a California court in *Marvin v. Marvin*, 134 Cal. 815, 557 P. 2d 106 (Cal. Sup. Ct. 1976). See also "Property Rights Upon Termination of Unmarried Cohabitation: *Marvin v. Marvin*" (1977) 90 Harv. L. Rev. 1708.

each spouse and make a fair, equitable distribution having regard to the respective contributions. The relief is part of the equitable jurisdiction of the court and does not depend on evidence of intention.³⁴

Not one to shy away from difficult issues, Dickson J. then proceeded to formulate an explanation of the underlying rationale of the unjust enrichment principle and, more than this, provided a reformulation of the general principle itself in his own terms.

The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.³⁵

For those who might take the view that the recognition of equitable interests in land created by the provision of personal services on a, presumably, accumulating basis might pose problems for conveyancers, Dickson J. offered little solace.

The emergence of the constructive trust in matrimonial property disputes reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life. The manner in which title is registered may, or may not, be of significance in determining beneficial ownership.³⁶

Few readers were surprised, one suspects, to find that Dickson J. went on to hold that on the facts of this case, the constructive trust analysis was available to the plaintiff. In Dickson J.'s view, the defendant should be taken to hold as constructive trustee for his wife an undivided half-interest in the farm which was, in some sense, a product of their joint effort and teamwork.

The *Rathwell* opinion was surely a bold and impressive exercise in judicial craftsmanship and statesmanship. At the doctrinal level, it proposed nothing less than a major sea-change in the theoretical underpinnings of constructive trust. At the level of social policy, it proposed a reversal of the position quite recently taken by the same Court in the *Murdoch* case on an issue of very considerable public

³⁴ *Supra*, note 24 at 454-55.

³⁵ *Ibid.* at 455.

³⁶ *Ibid.* at 456.

interest. It is understandable that more conservative judicial spirits would have preferred to await legislative treatment of what might be viewed as a politically sensitive and rather complex subject. Perhaps it is not surprising, therefore, that in *Rathwell* Dickson J. carried a plurality but not a majority of the Court on these questions. The plaintiff had in fact made a cash contribution to the acquisition of the disputed asset. Accordingly, a clear majority of the Court took the position that the resulting trust analysis provided a satisfactory basis for the granting of relief in this case. At this juncture, then, Canadian admirers of the unjust enrichment analysis were left on the edge of their proverbial seats. For reasons understandable, if somewhat alarming, the fate of the unjust enrichment analysis of the remedial constructive trust appeared to have become linked with a boldly innovative and potentially very controversial view adopted by Dickson J. with respect to the resolution of matrimonial property disputes. No doubt there is some exhilaration in finding one's pet legal theory at centre stage in an important debate concerning a social issue of some prominence. There is, on the other hand, some risk involved.

A definitive treatment of the point was, however, not long in forthcoming. The Court returned to these questions in 1980 in *Pettkus v. Becker*³⁷ and on this occasion, Dickson J. carried a clear majority of the Court. In his reasons for judgment, Dickson J. covered the same jurisprudential terrain explored in *Rathwell* in more or less the same terms. The principle against unjust enrichment was again restated in terms of "benefit," "detriment" and the absence of a "juristic reason" for the enrichment.³⁸ The plaintiff was awarded relief in the form of a constructive trust imposed on an undivided half-interest in a series of properties acquired in the defendant's name during a lengthy period of cohabitation and joint entrepreneurial activity relating to those properties. On the theoretical point, the majority opinion was very clear in its adoption of the unjust enrichment model of the remedial constructive trust. Interestingly, though, in *Pettkus* Dickson J. linked this view of constructive trust with the somewhat similar view of the *quasi*-contractual action in money had and received taken by Lord Mansfield more than two centuries before in *Moses v. Macferlan*.³⁹

³⁷ [1980] 2 S.C.R. 834.

³⁸ *Ibid.* at 848.

³⁹ (1760), 2 Burr. 1005, 97 E.R. 581 (K.B.).

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan*, put the matter in these words: "...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." It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. . . . 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. The constructive trust has proven to be a useful tool in the judicial armoury.⁴⁰

The dissenting opinion of Martland J. confirms that this linkage of common law *quasi*-contract and equitable constructive trust under the unjust enrichment banner was indeed a point of controversy within the Court. It was Martland J.'s view that while the unjust enrichment principle might provide a satisfactory analysis of the *quasi*-contract cases, it would introduce an element of undesirable uncertainty into the analysis of cases of constructive trust.⁴¹ It is possible, of course, that it was the somewhat novel application of the constructive trust concept being proposed by the majority that provoked Martland J.'s rejection of the unjust enrichment analysis of the constructive trust. It may well be that if the *Pettkus* minority had been asked to consider the utility of the unjust enrichment analysis in the context of a more orthodox application of constructive trust doctrine, opposition of this kind to its utility might have dissipated. In any event, the majority view in *Pettkus* both confirmed and provided a striking illustration of the role to be played by the unjust enrichment principle in the context of constructive trust cases.

Once it is accepted that unjust enrichment provides an attractive analytical framework for both *quasi*-contract and constructive trust, a number of intriguing issues surface for consideration. One might consider, for example, whether recognition of the commonality of these two subjects might lead to a merging of their remedial schemes in the sense that equitable remedies might now become available for what were initially common law causes of action and *vice versa*. If the various restitutionary causes of action of both common law and equitable origin rest on the same underlying principle, could one not argue that once a claim for unjust enrichment is established, whatever its historical pedigree, a court could then select the most appropriate remedy from the entire battery of common law and equitable unjust

⁴⁰ *Supra*, note 37 at 847-48.

⁴¹ *Ibid.* at 856-59.

enrichment remedies and make it available to the plaintiff? A traditionalist would be inclined to deny such a possibility. Equitable remedies are, by their very nature, available only for breaches of duties imposed by equity. On the other hand, it is difficult to discern a principled basis for precluding altogether cross-fertilization of this kind. To place this issue in the context of the matrimonial property cases, one might consider whether the cause of action recognized in *Pettkus v. Becker*, presumably equitable by nature, might give rise to some remedy other than the constructive trust. In *Deglman v. Guaranty Trust*,⁴² it will be recalled, a nephew who provided services to his aunt on the faith of an oral and therefore unenforceable promise that she would leave property to him in her will, was allowed to recover in a common law claim for *quantum meruit* for the value of services rendered when, in due course, it became apparent that the aunt had not performed her promise. Could such a remedy be awarded in the context of the kinds of claims allowed in the *Pettkus* line of authority?

This intriguing issue was addressed by Dickson C.J.C. in the later decision in *Sorochan v. Sorochan*.⁴³ Here, again, the familiar fact pattern was repeated. The plaintiff farm wife sought to impose a constructive trust on the farm property, title to which was held exclusively by her husband. The judgement appealed from held that since the husband had owned the property prior to the commencement of cohabitation, the *Pettkus* principle was inapplicable. That principle was said to rest on the making of a contribution to the *acquisition* of the asset in dispute. The Supreme Court had no difficulty in holding that since the plaintiff's services, rendered over a period of some forty-two years and often without the assistance of her husband, had enabled the farm to be "maintained and preserved as valuable farmland"⁴⁴ and that such a contribution was sufficient to engage the doctrine of constructive trust.⁴⁵ More importantly for present purposes, Dickson C.J.C., for the Court, indicated that in such a case, once a court has determined that an unjust enrichment has occurred, it must then turn to a second question relating to the selection of the most appropriate remedy. For the Chief Justice, it was clear that in a matrimonial property dispute the plaintiff would not be limited to

⁴² *Supra*, note 7.

⁴³ [1986] 2 S.C.R. 38.

⁴⁴ *Ibid.* at 45.

⁴⁵ *Ibid.* at 50-51.

constructive trust relief. "Other remedies, such as monetary damages, may also be available to rectify situations of unjust enrichment."⁴⁶ Having thus opened up a new realm of remedial possibilities, Dickson C.J.C. went on to consider whether, on the facts of the *Sorochan* case, the more appropriate remedy would be the proprietary remedy of constructive trust rather than a claim for monetary relief. A number of factors were identified by the Chief Justice as a basis for reaching the conclusion that proprietary relief was indeed the more appropriate remedy.⁴⁷ First, a clear link had been established between the services performed by the wife and the maintenance of the value of the particular asset. Second, Dickson C.J.C. viewed it to be material that Mrs. Sorochan had a reasonable expectation of obtaining an interest in the land. Finally, the longevity of the relationship of the parties was said to constitute "a further compelling factor in favour of granting proprietary relief."⁴⁸ Although one might have reservations about one or another of these criteria,⁴⁹ it should be emphasized that the significant contribution offered by the *Sorochan* opinion is simply that the remedial possibilities in such cases are opened up and the legitimacy of a reasoned analysis of the basis for awarding different kinds of restitutionary remedies is established.⁵⁰

⁴⁶ *Ibid.* at 47.

⁴⁷ *Ibid.* at 51-53.

⁴⁸ *Ibid.* at 53.

⁴⁹ See, e.g., J.D. McCamus, "The Role of Proprietary Relief in the Modern Law of Restitution" in F. McArdle, ed., *The Cambridge Lectures (1987)* (Montreal: Les Editions Yvon Blais, 1989) 141 at 155-57. As a general matter, the factors identified by the Chief Justice do not appear to be capable of explaining or justifying the granting of proprietary relief in contexts other than matrimonial property cases. Within the matrimonial property context, the introduction of the "reasonable expectation" test appears to run the risk of reintroducing, in another form, the type of intention test that was so disparaged by Dickson J. in *Rathwell*. See generally Hovius & Youdan, *supra*, note 18 at 123-24; Maddaugh & McCamus, *supra*, note 4 at 664-68.

⁵⁰ This general topic is further explored by LaForest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 675-73. For discussion of La Forest J.'s views, see J.D. McCamus, "Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle" (1991) 2 Sup. Ct. L. Rev. (2d) 505. For discussion of the particular question of the availability of proprietary relief in the context of breach of fiduciary duty, see T.G. Youdan, "The Fiduciary Principle: The Applicability of Proprietary Remedies" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 93; J.D. McCamus, "Remedies for Breach of Fiduciary Duty" in *1990 Special Lectures of the Law Society of Upper Canada* (Toronto: Richard De Boo, 1991) 57.

In this important trio of opinions, then, a number of important contributions to the law of restitution are manifest. First, there can be no doubt but that these cases have the cumulative effect of recognizing the existence of a new cause of action relating to the division of assets upon dissolution of a marriage. While the precise elements of this cause of action will undoubtedly be the subject of further judicial and scholarly analysis,⁵¹ a comparison of these cases with the earlier decision of the Court in *Murdoch v. Murdoch*⁵² plainly establishes this point. Secondly, by recognizing the remedial nature of the constructive trust device and linking it to the application of the unjust enrichment principle, the Chief Justice embraced the equitable half of the American *Restatement* project. Those who, like myself, believe that the unjust enrichment analysis is helpful in illuminating these otherwise rather dark corners of our private law of obligations will view this as a most significant development. Further, by divorcing the question of remedial choice from the exercise of recognizing the existence of an unjust enrichment cause of action in particular circumstances, the Chief Justice has legitimated a new and fruitful line of enquiry. Indeed, it is possible that he has provided the means by which, at long last, a fusion or merger of the doctrines of common law and equity in this area may be achieved. Finally, these opinions articulate, in memorable fashion, an elegant statement of the unjust enrichment principle and its underlying rationale. As we shall see, it is possible that the Dickson reformulation of the general principle may yet serve as a generalized statement of the restitutionary cause of action.

III. MISTAKEN PAYMENTS AND THE MISTAKE OF LAW RULE

ONE OF THE CENTRAL TOPICS of the old law of *quasi*-contracts is the recovery of moneys paid under a mistake. As is well known, the traditional rule was that moneys paid under mistake of fact are normally recoverable.⁵³ At the same time, however, it is generally understood that where payments are made under a mistake of law, they cannot be recovered. This latter and much criticized proposition stems from a statement of Lord Ellenborough C.J. in *Bilbie v. Lumley*

⁵¹ See, e.g., Hovius & Youdan, *supra*, note 18, c. 7; Maddaugh & McCamus, *supra*, note 4, c. 27D.

⁵² *Supra*, note 17.

⁵³ See, generally, Maddaugh & McCamus, *supra*, note 4, c. 10.

*et al.*⁵⁴ in 1802. The Supreme Court was provided with an opportunity to reconsider the mistake of law rule in 1982 in *Hydro Electric Commission of Nepean v. Ontario Hydro*.⁵⁵ In that case, the plaintiff municipal utility sought to recover payments made to Ontario Hydro under a scheme whereby Ontario Hydro had charged newer utilities a surcharge for the electricity supplied to them. The surcharge was intended by Hydro to represent a contribution to the capital structure of the Hydro system. Older municipal utilities, which had contributed to the cost of building the Hydro system over a longer period of time, received a so-called "return on equity" in the form of a reduction of what they would otherwise have been obliged to pay Hydro for the power supplied to them. The surcharge imposed on the newer utilities, referred to as a "cost of return," was thus in effect passed on as a rate reduction to the older utilities. When the plaintiff utility formed the opinion, which was ultimately held to be valid by the Supreme Court, that Ontario Hydro possessed no statutory power to impose a surcharge of this kind, the plaintiff brought an action to recover the moneys paid over the previous eight years. From a moral perspective, this might appear to be a rather compelling claim. As Dickson J. said in his dissenting judgment:

To the layman, the issue would be a clear one. Nepean should succeed. Good conscience and plain honesty would require Hydro to repay. To the lawyer trying to follow confused and contradictory authority the matter is not that simple.⁵⁶

The problem, of course, is that the money in this instance has been paid under mistake of law and, indeed, it was on this basis that the majority⁵⁷ of the Court in *Nepean* denied relief. In a persuasively written dissenting opinion, however, Dickson J. indicated that the mistake of law rule should be overturned and that money paid under a mistake should be recoverable, as a general proposition, whether the mistake was one of law or fact.

Drawing on the extensive law review and textual literature dealing with this subject, almost all of which is hostile to the mistake of law rule, Dickson J. mounted a withering attack on *Bilbie v. Lumley et al.* itself and on the general rule said to be based upon it. As others have

⁵⁴ (1802), 2 East 469, 102 E.R. 448. And see Madaugh & McCamus, *supra*, note 4, c. 11.

⁵⁵ [1982] 1 S.C.R. 347.

⁵⁶ *Ibid.* at 349.

⁵⁷ Estey J., with Martland and Lamer JJ. concurring.

noted, Lord Ellenborough's statement in that case represented a misguided importation of the *ignorantia juris* maxim from the criminal law context into that of the civil law. The statement was uttered in ignorance of the existence of "a line of precedents running back two hundred years."⁵⁸ The doctrine is, itself, a "monstrous mistake of law made by Lord Ellenborough."⁵⁹ Moreover, Lord Ellenborough himself allowed recovery some years later in a mistake of law case and opined that when "it is established, as it clearly is, that a mistake in point of fact may also destroy it, it seems difficult upon principle to say that a mistake in point of law, clearly evidenced by what occurs at the time of cancelling should not have the same operation."⁶⁰ Dickson J. went on to observe that the distinction in the treatment of mistakes of fact and those of law lacks a policy foundation. Although the rule is sometimes justified on the basis that it is conducive to certainty, it was Dickson J.'s view that "[c]ertainty in commerce and in public transactions would seem to be better served by the non-recognition of a rule which sows confusion and which has so little to recommend it."⁶¹ The confusion results, as he noted, not only from the inherent difficulty in distinguishing mistakes of fact from mistakes of law but, also, from the development of a long list of exceptions to the general rule, many of which lack clear definition. Thus, Dickson J. was particularly critical of the exception related to mistakes of "private rights" and the distinction between "general law" and "private rights" upon which it rests.⁶²

A fine illustration of the difficulty inherent in applying many of the exceptions to the general rule to a particular fact situation can be found in the attempted application of one of these exceptions in the *Nepean* case itself. The courts below had come to the conclusion that although the payments had been made under a mistake of law, Ontario Hydro, as the party having principal responsibility for the administration of its enabling legislation, was not *in pari delicto* with the plaintiff and ought therefore to restore the moneys paid. This exception would appear to have been invented in an earlier decision

⁵⁸ *Supra*, note 54 at 358 per Dickson J.

⁵⁹ *Ibid.* at 369, quoting E.W. Patterson, "Improvements in the Law of Restitution" (1954-55) 40 Cornell L.Q. 667 at 676.

⁶⁰ *Ibid.* at 358, quoting from Lord Ellenborough's judgment in *Perrott and Others v. Perrott* (1811), 14 East 423 at 440, 104 E.R. 665 at 671.

⁶¹ *Ibid.* at 363.

⁶² *Ibid.* at 365-66.

of the Supreme Court⁶³ and, if one accepts that the invention of this exception was legitimate, the exception would indeed appear to apply to this fact situation. In the majority opinion of the Court in *Nepean*, however, it was held that the *in pari delicto* exception was not available to the plaintiff in the present case.

Dickson J. then turned to consider the proper basis or explanation for the denial of relief in some of the mistake of law cases. Apparently much influenced on this point by the leading English text on the law of restitution⁶⁴ and by similar sentiments expressed in the *Restatement of Restitution*,⁶⁵ Dickson J. suggested that the real reason why relief is denied in cases like *Bilbie v. Lumley et al.* is because the money has been paid "in settlement of an honest claim."⁶⁶ Payment made in these circumstances is irrecoverable, even if later events indicate that the payor was foolish to have acceded to the request for payment. But, of course, this reason for denying relief might also apply in cases where payments are made on the basis of a factual error. Accordingly, the method of reform which appealed to Dickson J. was that adopted by Article 44 of the *Restatement of Restitution*⁶⁷ — simple abolition of distinction between mistakes of fact and mistakes of law. This was, he said, a better approach to reform than "increasing the number of exceptions engrafted on the rule and which have already, to a great extent, emasculated the rule."⁶⁸

As a set piece of common law reasoning, the foregoing analysis set forth by Dickson J. in *Nepean* would stand on its own merits. An ill-conceived rule spawns a host of confusing exceptions. The general rule is misconceived in the sense that it bears no direct relationship to the real reason for denying relief in the cases to which it properly applies. The rule is restated by recasting the general rule in the form of the underlying rationale. Thus reformulated, the old version of the rule

⁶³ Although there are a number of well established "not *in pari delicto*" exceptions to the general rule, the suggestion that public authorities are *per se* subject to this exception with respect to the interpretation and application of their enabling legislation appears to have been the invention of the Supreme Court in *Eadie v. The Corporation of the Township of Brantford*, [1967] S.C.R. 573.

⁶⁴ Dickson J. referred to the discussion to be found in R. Goff & G. Jones, *The Law of Restitution*, 2d ed. (London: Sweet & Maxwell, 1978) 91.

⁶⁵ *Supra*, note 2 at 181-86.

⁶⁶ [1982] 1 S.C.R. 347 at 364, *per* Dickson J.

⁶⁷ *Supra*, note 2 at 181.

⁶⁸ [1982] 1 S.C.R. 347 at 369-70.

and its many exceptions can be discarded. By such means, however rarely they might be deployed, the common law evolves and renews itself. To make an argument such as this, then, it is not self-evident that one needs to rely on the unjust enrichment principle. It is therefore of interest in the present context that Dickson J. apparently viewed the unjust enrichment principle as an important element in his analysis. In setting forth his diagnosis of the basic problem with the mistake of law rule, Dickson J. observed that its popularity "was no doubt due in part to its coincidence with the beginning of a "period of rigidity in contract law" as Professor Waddams has called it, which also saw the suppression of the law of restitution. . ."⁶⁹ Failure to think clearly about the mistake of law problem, he appears to suggest, is part and parcel of a general failure of the courts during the 19th century to develop coherent rules relating to restitutionary issues.

In an era in which increasing attention is being paid to the analysis of restitutionary problems, the mistake of law doctrine thus becomes vulnerable to change. Accordingly, after discussing a number of the exceptions which have developed to that rule, Dickson J. commented as follows:

Finally, the most significant judicial development in the area of mistake of law is not an exception or qualification to the rule but rather the resurgence in English and Canadian jurisprudence of the doctrine of restitution or unjust (or unjustified) enrichment. . . Once a doctrine of restitution or unjust enrichment is recognized, the distinction as to mistake of law and mistake of fact becomes simply meaningless.⁷⁰

Further, in expressing the view that the payments made under mistake of law should be treated in a similar fashion to those paid under mistake of fact, Dickson J. made the following observation:

Goff and Jones suggest the general test, which I would adopt, that the money should be returned if, on general principles of equity, it would be unjust to allow the recipient of the benefit to retain it. In short, the question of mistake of law should be seen as just one more category in the general law of unjust enrichment. If the defendant has been unjustly enriched at the expense of the plaintiff, then he should be forced to disgorge the benefit.⁷¹

⁶⁹ *Ibid.* at 359, quoting S.M. Waddams, *The Law of Contracts* (Aurora: Canada Law Book, 1977) 213.

⁷⁰ *Ibid.* at 367-68.

⁷¹ [1982] 1 S.C.R. 347 at 364.

For Dickson J., then, it appears that the modern Canadian embrace of the unjust enrichment analysis is an important part of the explanation for the fact that the time is ripe for a reconsideration of so well-entrenched a rule as that which denies recovery of moneys paid under mistake of law. If the unjust enrichment analysis provides a context within which to effect such a reconsideration, however, we ought not conclude from the opinion of Dickson J. in *Nepean* that mere incantation of the principle constitutes the sum and substance of that reconsideration. On the contrary, invocation of the principle is accompanied here with a powerful critique of the old general rule. Its deficiencies are catalogued at length. The true basis for denying relief in cases where it has been applied with good reason is identified and embedded in the newly restated version of the rule. This kind of doctrinal shift is not unknown, of course, in other areas of private law. It would appear, however, that the Chief Justice shares the view expressed by the authors of the *Restatement*⁷² and by many others that modification and evolution of this kind may be expected to occur more frequently in an area such as this which has been so ignored and misunderstood in the English jurisprudence.

Although Dickson J. did not carry a majority on these issues in the *Nepean* case, it is not clear that his views were rejected by the majority on their merits. Estey J., who wrote for the majority, evidently felt that Dickson J. was dealing with matters which had not been properly raised by the appellant. He stated:

The thrust of the appellant's submission was centred on the question as to whether the parties to the mistake of law were *in pari delicto*. Unjust enrichment is mentioned in its factum only with reference to the argument that the appellant and the respondent were not *in pari delicto*. In the course of argument the appellant, in response to a question from the Court, stated that it was not urging and not founding its appeal on the abolition of the distinction in law between mistake of fact and mistake of law. Indeed, the rule was accepted....Accordingly my considerations have been confined to the operation of the doctrine of mistake of law as argued."⁷³

In denying relief, then, the majority did rest its decision on the general rule against recovery of monies paid under mistake of law. In doing so, however, the majority did not explicitly reject the analysis offered by Dickson J. in dissent.

It may well be that the *Nepean* majority felt that the application of the traditional rule could be justified in the particular case of

⁷² *Supra*, note 2.

⁷³ *Ibid.* at 412.

payments made to public authorities. There is a hint to this effect in the majority opinion. Having noted that the parties had not raised the question of abolishing the mistake of law rule, Estey J. went on to observe as follows:

This course may well have been taken by both counsel because of the nature of the statutes (concerned with the generation and distribution of electricity to the inhabitants throughout the province, at cost) and the nature of the contending bodies. Each party is a public body 'owned' by the people of the province in the one case and by the Township in the other (the latter, of course, participate in each organization). Neither has the authority to 'accumulate' surplus assets or resources. The concept of unjust enrichment is not easily associated with these relationships.⁷⁴

Certainly, the practical problems that might be associated with the unwinding of a prolonged and substantial exercise in revenue collection and redistribution appeared to trouble the courts below. Craig J., at trial,⁷⁵ had come to the conclusion that in a case of this kind, money would normally be recoverable on the basis that the plaintiff was not *in pari delicto* with the defendant, but that recovery should not be allowed for three reasons in the present case. First, Craig J. reasoned that Ontario Hydro had not in fact received a benefit.⁷⁶ It had passed on payments or credits received to the older municipalities through the device of the "return on equity." Second, it was Craig J.'s view that Ontario Hydro could only recover the amount required to satisfy any judgement granted in favour of the plaintiff by increasing its charges against all municipalities and utilities. Thus, those who had been overcharged already would be required to pay a further surcharge. In short, it would be impossible to restore the *status quo ante*.⁷⁷ The third reason offered by Craig J. for denying relief was that the plaintiff utility "had ample opportunity to investigate its legal rights and take legal advice in the first year or two of the system — rather than waiting eight years."⁷⁸ Although this did not constitute grounds for application of the doctrines of either estoppel or acquiescence, Craig J. felt that this was an "equity" that weighed in the balance against recovery.

⁷⁴ *Ibid.* at 412-13.

⁷⁵ (1978), 92 D.L.R. (3d) 481 (Ont. H.C.), *aff'd* (1980), 107 D.L.R. (3d) 257 (Ont. C.A.).

⁷⁶ (1978), 92 D.L.R. (3d) 481 at 505.

⁷⁷ *Ibid.* at 505-06.

⁷⁸ *Ibid.* at 506.

Dickson J. was unpersuaded by considerations of this kind. The first one was considered by him to be, in effect, a change of position defence.⁷⁹ It was Dickson J.'s view that the mere expenditure of the funds by Hydro did not establish the kind of detrimental change of position necessary to engage that defence.⁸⁰ With respect to the second point, Dickson J. suggested that a close examination of the possible sources of funds needed to discharge its liability to the plaintiff amounted to the creation of a "means test."⁸¹ Moreover, the analysis of the possible means by which Ontario Hydro could recoup its loss was, in his view, rather speculative. With respect to the third point, Dickson J. reasoned that Craig J. was, in effect, inappropriately relying on a defence of "voluntary payment." That is to say, it being Dickson J.'s view that the real reason for denying relief in cases previously characterized as mistake of law cases was that the plaintiff had voluntarily made a payment in settlement of an honest claim, Craig J. appeared to be suggesting that this principle might apply to the present facts. Ontario Hydro had demanded the money. Nepean could have investigated its position carefully, but did not do so. Dickson J. rejected any suggestion of "voluntary payment," however, on the basis that the principle should have no application "where there is something in the recipient's conduct 'which shows that he is the one primarily responsible for the mistake'. . ."⁸² In Dickson J.'s view, "Ontario Hydro was responsible for the proper application and interpretation of its Act; Ontario Hydro had primary responsibility of knowing what charges could be imposed upon municipalities and their utilities, and Ontario Hydro had misled Nepean into thinking that the charges were properly authorized."⁸³ In short, if forced to choose between the right to recover unlawfully extracted levies on the one hand and a sensitivity to the practical problems faced by public authorities required to return them, on the other, Dickson J. had a clear preference for the former.

These two questions — abolition of the mistake of law rule and recognition of a special defence for public authorities — surfaced

⁷⁹ The defence of "change of position" in mistaken payments cases was clearly recognized by the Supreme Court in *Rural Municipality of Storthoaks v. Mobil Oil*, [1976] 2 S.C.R. 147. For discussion of the defence, see Maddaugh & McCamus, *supra*, note 4 at 231-36.

⁸⁰ [1982], 1 S.C.R. 347 at 373.

⁸¹ *Ibid.* at 377.

⁸² *Ibid.* at 380, quoting Goff & Jones, 2d ed., *supra*, note 64 at 31.

⁸³ *Ibid.* at 379.

before the Court again in *Air Canada v. British Columbia*⁸⁴ in 1989. Although Dickson C.J.C. did not participate in the decision of the Court, his views with respect to the first question were of considerable influence. Indeed, a clear majority⁸⁵ of the Court were of the view that the distinction between mistakes of fact and mistakes of law should be considered to be abolished and felt that it was only necessary to refer to Dickson J.'s analysis of this point in the *Nepean* case in order to support this proposition. With respect to the second point, however, the majority took a position which would appear to be antithetical to the views expressed by Dickson J. in *Nepean*.

In *Air Canada*, the plaintiff airline sought to recover taxes collected by the defendant province under an *ultra vires* statute. The majority held that although the mistake of law doctrine ought to be considered abolished, a special defence was nonetheless available to public authorities in the context of payments made under an *ultra vires* statute. It would appear that the kinds of concerns that troubled Craig J. in *Nepean* weighed heavily with the majority. These problems, it was apparently thought, are particularly intense in the context of *ultra vires* legislation and accordingly, a special defence in such cases was considered appropriate. Wilson J. entered a vigorous dissent in the *Air Canada* case which is more consistent with the views expressed by Dickson J. in *Nepean*. In her view, there is no sound policy reason for requiring "the individual taxpayer, as opposed to taxpayers as a whole, [to] bear the burden of government's mistake."⁸⁶ The law-abiding taxpayer who mistakenly assumes the validity of the statute and makes the apparently required payment should be allowed recovery. Any difficulties encountered by the defendant in making restitution should not, as Dickson J. had suggested in *Nepean*, prejudice the plaintiff's claim.

⁸⁴ [1989] 1 S.C.R. 1161.

⁸⁵ LaForest, Lamer, L'Heureux-Dubé and Wilson JJ. Beetz and McIntyre JJ. declined to comment on the point.

⁸⁶ [1989] 1 S.C.R. 1161 at 1215. Perhaps I should add that I find the views of Wilson J. on this point completely persuasive, notwithstanding my own earlier suggestion that problems of the kind troubling the *Air Canada* majority might best be accommodated by the recognition of a special defence in cases where recovery would lead to "fiscal chaos." See J.D. McCamus, "Restitutionary Recovery of Moneys Paid Under a Mistake of Law; *Ignorantia Juris* in the Supreme Courts of Canada" (1983) 17 U.B.C. L. Rev. 233. Consistently with the view expressed by Wilson J. in *Air Canada*, I would now suggest that such problems are best left for resolution under the applicable limitations rules.

The precise nature of the majority holding in *Air Canada* on the scope of the immunity being granted to public authorities is obscured by the fact that in that case the defendant province had subsequently enacted *intra vires* legislation of retroactive effect which would effectively recapture the very moneys in dispute. Though it is unnecessary to explore this point further for present purposes, it may well be that the proper reading of *Air Canada* is that moneys paid to a public authority under an *ultra vires* statute which is corrected by *intra vires* and retroactive legislation are irrecoverable.⁸⁷ What is important for present purposes, of course, is to note that in *Air Canada* a majority of the Court adopted the analysis set forth by Dickson J. in *Nepean* on the general question of the abolition of the mistake of law rule. There seems little doubt that this aspect of the decision in *Air Canada* will be "generally welcomed, as a landmark in the development of a coherent law of restitution in Canada, and as a model for other jurisdictions."⁸⁸

IV. UNJUST ENRICHMENT: GENERAL PRINCIPLE OR GENERIC CAUSE OF ACTION?

IT WILL BE EVIDENT FROM THE FOREGOING DISCUSSION that the Chief Justice, and the Court more generally, have recognized that the unjust enrichment principle offers a useful general statement of the underlying rationale of much of the old law of *quasi-contract* and constructive trust. As such, the principle can usefully serve as an organizational framework for these two bodies of doctrine and, more importantly, can provide an analytical framework facilitating the reconsideration of outdated and anomalous doctrines. But can the unjust enrichment principle serve as the expression of a new generic cause of action in restitution cases? More particularly, can the formulation of the general principle set out by Dickson J. in *Pettkus v. Becker*⁸⁹ serve as the expression of such a generic cause of action? In other words, does the Dickson opinion in *Pettkus v. Becker* perform for the law of restitution the role played in the law of negligence by Lord Atkin's

⁸⁷ See, generally, Maddaugh & McCamus, *supra*, note 4 at 273-75; S. Arrowsmith, "Restitution and Mistake of Law in Canada" (1990) 106 L.Q.R. 28.

⁸⁸ S. Arrowsmith, *ibid.* at 29.

⁸⁹ *Supra*, note 37.

famous opinion in *Donoghue v. Stevenson*⁹⁰? Such questions do not yield easily to analysis and it may well be that some period of time must pass before confident answers can be formulated. Nonetheless, there is at least some evidence in the opinions of the Court rendered in 1989 in *Hunter Engineering Co. v. Syncrude Canada Ltd.*⁹¹ in support of the proposition that in any case where the facts appear to engage the elements of Dickson J.'s formulation of the unjust enrichment principle, a claim in unjust enrichment will lie.

The rather complex facts of the *Syncrude* case can be simplified for present purposes. Syncrude Canada Ltd. ("Syncrude") had ordered gear boxes for use in its Alberta oil sands operation on three separate occasions. The gear boxes were defective and the principal issues in this litigation related to the suppliers' liability as a result of the defects and the applicability and enforceability of various exculpatory clauses. With respect to the third supply contract, however, a restitutionary problem arose. Syncrude had previously dealt with an American supplier, Hunter Engineering Company Inc. ("Hunter U.S."). On the occasion of the third contract, however, Syncrude dealt with former employees of Hunter U.S. who now represented Hunter Engineering (Canada) Limited ("Hunter Canada"), a company which they falsely claimed to be a Canadian subsidiary of Hunter U.S. In fact, in conducting the business of Hunter Canada, the employees were acting in what Hunter U.S. viewed as a breach of fiduciary obligation. On the faith of this false representation, Syncrude entered into a contract for the supply of eleven gear boxes with Hunter Canada. As was the case with the previous suppliers, Hunter Canada sub-contracted the manufacturing of the gear boxes to a company which may be referred to as ACO. In due course, Hunter U.S. discovered this fraud and commenced a passing-off action against Hunter Canada. After discussions with Hunter U.S. and ACO, Syncrude determined that it would attempt to ensure the supply of the eleven gear boxes and, at the same time, avoid prejudging the outcome of the lawsuit brought against Hunter Canada by Hunter U.S. It attempted to accomplish these two objectives by entering into two agreements directly with ACO. In the first of these, ACO agreed to supply the eleven gear boxes directly to Syncrude at the price it would have been paid by Hunter Canada. In the second, Syncrude established a trust fund consisting of the moneys it would have been

⁹⁰ [1932] A.C. 562 (H.L.). For a suggestion that it does indeed do so, see G.B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) c. 2.

⁹¹ [1989] 1 S.C.R. 426.

obliged to pay Hunter Canada under the original supply contract. The purchase price to be paid to ACO was to be paid out of that fund. Further, the balance would be allocated, in effect, to the winner of the lawsuit between Hunter Canada and Hunter U.S. provided — and this proved to be a point of difficulty — that the payment was contingent on the recipient of the funds being willing to assume the obligations of Hunter Canada under the original contract of supply. Those obligations were greater than those normally assumed by Hunter U.S. in agreements of this kind. In the event, Hunter U.S. prevailed in its lawsuit against Hunter Canada and brought a claim in unjust enrichment against Syncrude for the trust moneys remaining after payment had been made to ACO. Hunter U.S. refused to assume the obligations of Hunter Canada under the original contract and, for this reason, Syncrude refused to make the requested payment.

The claim in unjust enrichment brought by Hunter U.S. enjoyed success in the British Columbia Court of Appeal.⁹² Anderson J.A. suggested that the correct mode of analysis was simply to apply the various elements of the unjust enrichment formula set out by Dickson J. in *Pettkus v. Becker* to the facts at hand. Thus, as the facts established “1. An enrichment of the defendant; 2. A corresponding deprivation of the plaintiff; 3. The absence of a juristic reason for the enrichment,”⁹³ Hunter U.S. should be entitled to recover the fund, provided that it would be willing to assume the warranty obligations under the Hunter Canada agreement. Otherwise, Syncrude would enjoy a windfall benefit at the expense of Hunter U.S. Though this decision was overruled by a divided Supreme Court, the important point for present purposes is that neither Dickson C.J.C. who wrote for the majority, nor Wilson J. in dissent, disagreed with the approach taken by Anderson J.A. in applying the *Pettkus* unjust enrichment formula to the facts at hand as if it stated the elements of a cause of action.

For Dickson C.J.C., however, the elements of unjust enrichment were not established on these facts. As Hunter U.S. was unwilling to assume the warranty obligations undertaken by Hunter Canada, Syncrude would not receive an important service for which it had bargained. In such circumstances, Syncrude could not be said to be unjustly enriched. Further, Hunter U.S. could not, in Dickson C.J.C.’s view, have a better claim against Syncrude with respect to the

⁹² (1985), 68 B.C.L.R. 367 (C.A.).

⁹³ *Ibid.* at 382.

proceeds of the original contract than could Hunter Canada itself. Hunter Canada had no such entitlement because the original agreement had been, in effect, rescinded by Syncrude on the basis of Hunter Canada's fraudulent misrepresentation. In such circumstances, none of the elements of the unjust enrichment were made out.

Wilson J., on the other hand, took a rather different view of the extent to which Syncrude had received what it had bargained for. It was her opinion that "Hunter U.S. would be liable under both the Hunter Canada warranty and the implied statutory warranty,"⁹⁴ and accordingly that Syncrude would be in the position of having received precisely what it had originally bargained for and, at the same time, would retain the windfall of the profit that Hunter Canada would have made under the agreement, a windfall which it would be obtaining at the expense of Hunter U.S. No purpose would be served in the present context by exploring at greater length the important difference of opinion between Dickson C.J.C. and Wilson J. on the question of whether Hunter U.S. would in fact assume warranty liability of a kind equivalent to that assumed by Hunter Canada under the original contract. Nor is it necessary to explore here the important difference of opinion between them on the question of whether a third party (Hunter U.S.) could have a better claim to monies payable by one party (Syncrude) to another (Hunter Canada) under an agreement between them than could the party to whom they were payable (Hunter Canada) under the original agreement.⁹⁵ Again, what is of particular interest in the present context is that both Dickson C.J.C. and Wilson J. appear to assume that a plausible claim in unjust enrichment is properly pleaded and argued simply on the basis of the *Pettkus* unjust enrichment formula. Thus, for Dickson C.J.C., the claim did not fail because of its lack of a toe-hold in earlier restitutionary case law. Rather, a careful analysis of the relationships of the parties, one to another, suggested that the *Pettkus* formula was not met on these facts. In the *Syncrude* opinions, then, the Supreme Court seems to have moved a considerable distance in the direction of recognizing the unjust enrichment principle not merely as a statement

⁹⁴ [1989] 1 S.C.R. 426 at 521.

⁹⁵ These issues are explored elsewhere at some length by the present writer. See J.D. McCamus, *supra*, note 50.

of principle or underlying rationale but, rather, as the expression of a "rule" or generic cause of action.⁹⁶

V. CONCLUSION

THE OPINIONS RENDERED by Chief Justice Dickson on matters relating to the law of restitution thus offer a rich harvest. Indeed, it is difficult to estimate, at this point in time, what their full impact might ultimately be. At the present time, however, a number of concrete achievements can be identified. First, in *Pettkus v. Becker*, the Chief Justice authoritatively brought the equitable half of the restitutionary family within the framework of the unjust enrichment analysis. The beneficial organizational and developmental consequences that are thought by many to flow from the adoption of the unjust enrichment analysis were briefly portrayed at the beginning of this article. It has now been clearly confirmed that the advantages of the unjust enrichment analysis extend to relevant equitable doctrines in addition to those of *quasi-contract*. Second, two important modifications to the existing doctrine — the recognition of the *Pettkus* matrimonial property cause of action and the abolition of the mistake of law rule — are plainly Chief Justice Dickson's handiwork. Both of these developments effect important changes in the legal treatment of significant public policy issues. Third, in *Sorochan*, the Chief Justice stated that, in a restitution case, the question of the type of relief — whether personal or proprietary — to be awarded should be divorced from the threshold question of determining whether an unjust enrichment has occurred. This is a development of very considerable importance. An opportunity has been created to reconsider the alignment of the restitutionary remedies with the various individual causes of action and to deal with remedial questions in a more flexible manner. Indeed, it has been suggested here that an opportunity has been provided to effect a merger of the remedial doctrines of common law and equity in this important area of private law. Finally, the analytical approach taken in the *Syncrude* case, when coupled with the unjust enrichment analysis set forth in the *Pettkus* decision, strongly suggests that we have moved in Canada to a situation in which "the law will afford a remedy for unjust enrichment in the

⁹⁶ This general question is considered at greater length in Maddaugh & McCamus, *supra*, note 4 at 21-27 and in McCamus, *supra*, note 50.

absence of valid judicial policy militating against it."⁹⁷ One suspects that Chief Justice Dickson would find himself in general agreement with the following observations of Professor John P. Dawson, a distinguished American restitution scholar:

My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt. We have not yet absorbed all the contributions they have made or foreseen those still in the making.⁹⁸

Certainly, the capacity of the unjust enrichment analysis to play the role envisaged by Professor Dawson in Canadian law has been much enhanced by Chief Justice Dickson's restitution opinions. If the law of restitution has become the most interesting and challenging aspect of Canadian private law, as I believe it has, this development is, in large measure, the result of the enormous contribution made to this field by Chief Justice Dickson.

⁹⁷ *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at 245 per LaForest J.A. (N.B.C.A.).

⁹⁸ J.P. Dawson, *Unjust Enrichment* (Boston: Little, Brown, 1951) at 117.