Goff & Jones: The Law of Unjust Enrichment, 8th ed., by C. Mitchell, P. Mitchell and S. Watterson (London, Sweet & Maxwell, 2011, cxxxv and 901, £355)

It is no exaggeration to say that the law of unjust enrichment would not exist, certainly not as we know it, if it was not for *Goff & Jones*. Although courts had long awarded restitution in a variety of situations,[1] and although the *Restatement of the Law of Restitution*[2] was published 30 years earlier, the first edition of *The Law of Restitution*[3] in 1966 established the subject within the Commonwealth. For the first time, all of the relevant materials were collected together for easy consultation. Even more importantly, the grounds of liability, historically dispersed under a catalogue of obfuscating labels, were rationalized within a simple, three-part principle: defendant's enrichment, plaintiff's expense, and reason to reverse. The cause of action, suddenly more manageable, proliferated, and under *Goff & Jones'* guidance, the subject entered a period of unprecedented growth and evolution. By the 1990s, for example, unjust enrichment easily rivalled tort and contract for space in the *Law Quarterly Review* and the *Cambridge Law Journal*. And where none had appeared before,[4] Canada saw the publication of three texts within a 10-year period beginning in 1982.[5]

As would be expected given its remarkable success, the book changed relatively little as it passed through seven editions between 1966 and 2007. The details obviously were updated to reflect academic and judicial developments, but the essential structure and orientation remained stable. It was that constancy that allowed

1. *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (Eng. K.B.); *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785 (S.C.C.).
2. American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul, Minnesota, American Law Institute, 1937). Although the American model of unjust enrichment subsequently fell into something close to desuetude, Professor Andrew Kull's recent production of the *Restatement 3d* (following a failed attempt at a *Restatement 2d* in the 1980s) has rekindled interest in the subject: American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (St. Paul, Minnesota, American Law Institute, 2011).
3. R. Goff and G. Jones, *The Law of Restitution* (London, Sweet & Maxwell, 1966).
4. But see now M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto, LexisNexis, 2014).
5. G.H.L. Fridman and J.G. McLeod, *Restitution* (Toronto, Carswell, 1982); G.E. Klippert, *Unjust Enrichment* (Toronto, Butterworths, 1983); P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Ontario, Canada law Book, 1991).

judges and practitioners to consult *Goff & Jones* in the confident knowledge that it would provide an accurate picture of the rules of recovery. All of that remained true even after Lord Goff's elevation to the House of Lords in 1986 precluded his participation following the third edition.

Against that backdrop, the 8th edition marks a turning point. The title has changed. Whereas the book previously was known as *Goff & Jones: The Law of Restitution*, it now is called *Goff & Jones: The Law of Unjust Enrichment*. (The significance of that change is discussed below.) So too, the latest edition was produced by a new set of hands. Professor Gareth Jones, having stepped down as the Downing Professor of Law at Cambridge University several years ago, has handed the project over to Professor Charles Mitchell and Professor Paul Mitchell of University College London, and Dr. Stephen Watterson of Trinity Hall, Cambridge.

It would be a mistake, however, to regard the new edition as a new work. A great deal remains the same. That is true in two respects. First, and most importantly, *Goff & Jones* is still *Goff & Jones* — an indispensable statement of English law. Accordingly, the Supreme Court of the United Kingdom, like the House of Lords before it, continues to treat it as an authoritative guide to the rules of restitution.[6] Second, a great deal of the text has been carried over from the 7th edition. In some instances, that is obvious. The law of duress, for example, appears virtually unchanged in Chapter 10. In other instances, the material has been repackaged but not substantially revised. The discussion of necessitous intervention, previously split over two chapters, now appears, in much the same form, in a single chapter. Moving in the other direction, the defences of estoppel and ministerial receipt, traditionally folded into a large chapter on the change of position defence, now appear, largely unaltered, in their own chapters. And so on.

The full extent to which the new edition carries on the lessons of the past will become apparent to those who, having relied upon *Goff & Jones* in the past, spend time with its latest edition. Perhaps inevitably, however, it is the differences that most quickly catch the eye.

6. *Pitt v. Holt*, [2013] UKSC 26 (U.K. S.C.), at para. 108 ("The fullest academic treatment of th[e] topic [of mistake] is" *Goff & Jones*, 8th ed.); *Benedetti v. Sawiris*, [2013] UKSC 50 (U.K. S.C.), at paras. 13-18, 22-27, 186 and 185 (U.K. S.C.); *ENE 1 Kos Ltd. v. Petroleo Brasileiro SA Petrobras (No. 2)*, [2012] 2 A.C. 164 (U.K. S.C.), at para. 23; *Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners*, [2012] UKSC 19 (U.K. S.C.), at para. 168.

Those differences start with the change in title. Granted, in one sense, shifting to *The Law of Unjust Enrichment* from *The Law of Restitution* might seem to entail a distinction without a difference insofar as both titles refer to the same area of law. Unjust enrichment is a cause of action that triggers a remedy of restitution. Whether one reads the sequence forwards or backwards, the result essentially is the same. Mitchell, Mitchell and Watterson nevertheless are right to focus on the action rather than the remedy. By referring to the subject as "unjust enrichment", rather than "restitution", they emphasize the independence of the cause of action. Just as we have *Anson on Contract* and *Fleming on Torts*, so too we need *Goff & Jones on Unjust Enrichment*. To refer to *The Law of Restitution* is to subtly perpetuate the perception that the subject is merely a remedial supplement and hence unworthy of equal status alongside the other primary heads of civil obligation.

The choice of title is even more significant in another respect. The first edition of *Goff & Jones* followed the *Restatement of Restitution* in employing an ambiguous conception of "restitution." Narrowly defined, "restitution" is the response that reverses an unwarranted transfer between the parties by compelling the defendant to restore a benefit received from the plaintiff. The trigger in that instance is the three-part cause of action in unjust enrichment. In the paradigm case, the plaintiff carelessly commits a mistake and consequently pays money to the defendant. Although the defendant has done nothing wrong, the enrichment is "unjust" and hence reversible. In its broader sense, in contrast, "restitution" extends to the response that strips a wrongful gain that the defendant acquired (usually from a third party) as a result of breaching a civil obligation that was owed to the plaintiff. The trigger in that instance is *not* the three-part action in unjust enrichment, but rather some species of private wrongdoing that allows the victim to elect, at the remedial stage, between the usual response of compensation of a wrongful loss and the extraordinary remedy of "restitution" of the defendant's wrongful gain. The list of wrongs that support gain-based relief is subject to some debate, but it clearly includes, *inter alia*, the proprietary torts, breach of fiduciary duty, and, most recently, an "exceptional" breach of contract.

When "restitution" is unpacked in that way, it becomes clear that the two conceptions actually involve very different phenomena. Canadian courts have begun to come around to that fact.[7] Succinctly stated, the narrow definition entails a true *giving back*. The remedy, invariably triggered by the action in unjust enrichment, is confined to the benefit that passed between the plaintiff and the defendant. The goal merely is to restore both parties to the *status quo ante*: the defendant cannot give back more than was gained and the plaintiff cannot get back more than was given.[8] The broader definition, in contrast, involves not a giving back, but rather a *giving up*. The plaintiff typically is able, by proving a relevant wrong, to obtain a benefit that it did not previously possess and that it would not have acquired in the normal course of events. The defendant does brisk business conducting tours through a spectacular set of caves that sits beneath adjacent properties that he and the plaintiff respectively own. Though the defendant receives the money from the tourists, and though the plaintiff could not have engaged in the business himself because the defendant's property contains the only point of access and egress, the plaintiff can demand a proportionate share of the profits on the basis of the defendant's subterranean trespass.[9] A director of public prosecution, in breach of fiduciary duty, strikes a deal with criminals: they pay millions in bribes — he turns a blind eye. Though the state cannot possibly "recover" money that it never held, the wayward fiduciary must give up the ill-gotten gain.[10] A traitorous double-agent flees the country and, in breach of a

7. *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 (Alta. Q.B.) at para. 207, affirmed 2013 ABCA 111 (Alta. C.A.) (plaintiff sought profits defendant earned through breach of contract — "While [the plaintiff] characterizes these claims as claims in restitution, they are more precisely disgorgement claims, and will be analyzed as such"); *Inuit of Nunavut v. Canada (Attorney General)*, 2012 NUCJ 11 (Nun. C.J.), at paras. 308 and 512 (the "term restitutionary damages" ought to be avoided "to prevent the confusion that the phrase may cause with restitution as a cause of action quite distinct from breach of contract. The remedy is better referred to as 'disgorgement' . . . Disgorgement requires that the defendant give up a benefit that it has wrongfully acquired. It differs from restitution in that restitution is restricted to the recovery of a benefit obtained by the defendant from the claimant, while disgorgement applies more broadly to the delivery up of a benefit obtained by the defendant from any source whatsoever").

8. *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.), at pp. 193-194 ("the law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth . . . it is restored to him").

9. *Edwards v. Lee's Administrator*, 96 S.W. 2d 1028 (1936, Ky. C.A.), rehearing denied October 30, 1936.

10. *Attorney General of Hong Kong v. Reid*, [1994] 1 A.C. 324 (P.C. H.K.).

contractual undertaking, sells his memoirs for enormous profit. Despite lacking any material connection to that money, the Crown is entitled to compel disgorgement of the wrongful gain.[11]

Notwithstanding the traditional practice of discussing such decisions in terms of "restitution" and "unjust enrichment", those cases really have nothing to do with the remedy that narrowly reverses unwarranted transfers following the successful invocation of the three-part cause of action. They consequently ought to be discussed, clearly and separately, in terms of disgorgement for wrongdoing. The new edition of *Goff & Jones* reflects that proposition. Mitchell, Mitchell and Watterson re-titled the work as *The Law of Unjust Enrichment* to emphasize the scope of inquiry.[12] The book is concerned with unjust enrichment and restitution properly speaking. The chapters that comprised "Section Three: Where the Defendant has Acquired a Benefit Through his own Wrongful Act"[13] in earlier editions have been omitted with the promise that "this material should appear in updated form in a second volume, to be published at a later date."[14]

A similar explanation underlies another prominent revision. While a great deal of substance has been carried over from previous editions, much of that material has been substantially re-structured. It is understandable that *Goff & Jones*, in 1966, largely adopted a contextual approach. Given that bar and bench were not yet terribly comfortable with the idea of an independent action in unjust enrichment, it made sense to present the subject primarily in terms of practical categories of claim, rather than underlying principles. Accordingly, following the introductory chapters and a section dealing with the doctrine of mistake, the bulk of the book was organized around the situations that most often give rise to unjust enrichments. The biggest part of the book was devoted to "Ineffective Transactions", a generic label that encompassed not only benefits conferred pursuant to failed contracts, but also payments made to public authorities as a result of invalid

11. *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.); *cf. Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 (S.C.C.).
12. Professor Birks came to the same view shortly before his untimely death. Whereas he previously had discussed both reversible transfers and wrongful gains in *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985), his final work was narrowly confined to *Unjust Enrichment*, 2d ed. (Oxford, Clarendon Press, 2004).
13. See *e.g.*, G. Jones, *Goff & Jones: The Law of Restitution*, 7th ed. (London, Sweet & Maxwell, 2007), at p. xi.
14. *Goff & Jones*, 8th ed., at p. v.

demands. Significantly, individual chapters were devoted not to specific reasons for restitution (*e.g.*, free acceptance, failure of consideration, *ultra vires* demand), but rather to occasions in which those unjust factors may operate (*e.g.*, "contracts discharged through breach or frustration", "anticipated contracts which fail to materialise"). Another set of chapters was collected under the banner "Where the Defendant has Acquired from a Third Party a Benefit for Which he must Account to the Claimant."[15] Once again, the individual chapters turned not on particular unjust factors, but rather on context (*i.e.*, "Attornment", "Cases Where the Defendant Without Right Intervenes Between the Claimant and Third Party", "Claims under a Will or Intestacy or under an *Inter Vivos* Trust", "Perfection of Imperfect Gifts in Favour of Intended Donees").

That approach continued to make sense as long as the profession conceived of the subject contextually. In that respect, however, the book eventually became a victim of its own success. Because of the lessons learned under *Goff & Jones*, unjust enrichment now comes to mind not as discrete pockets of recovery, but rather as an autonomous head of liability that sits alongside tort and contract. The focus properly falls not upon the surrounding circumstances, but rather upon the constituent elements of proof: enrichment, deprivation, and injustice. For the most part, the 8th edition has been re-structured accordingly. The bulk of the book consists of five parts, dealing with "Enrichment", "At the Claimant's Expense", "Grounds for Restitution", "Defences", and "Remedies." The third part is the key. Much more clearly than in the past, the discussion is organized in terms of the actual *unjust factors — i.e.*, the specific reasons on which an English court may be prepared to reverse a transfer between the parties. Individual chapters are devoted to mistake, duress, failure of basis, free acceptance, *ultra vires* demand, illegality, and so on.

For the preceding reasons, *Goff & Jones*' 8th edition constitutes a welcome update for one of the true classics of modern legal scholarship. Having re-oriented the text in accordance with the evolving conception of unjust enrichment, Mitchell, Mitchell and Watterson have ensured the continued vitality of the work for the purposes of English law. But what of the Canadian audience? When *Goff & Jones* first appeared some 50 years ago, the differences between Canadian law and English law were slight,

15. See *e.g.*, G. Jones, *supra*, footnote 13, at p. x.

and within a relatively short time, the text had become as influential here as it was there. *Goff & Jones* has now been cited on hundreds of occasions by Canadian courts, including more than a dozen decisions at the highest level.[16]

In 2004, however, the Supreme Court of Canada dramatically reformulated the concept of injustice.[17] Following *Garland v. Consumers' Gas Co.*,[18] the ground for restitution no longer consists of the unjust factors — *i.e.*, the positive reasons for recovery, around which *Goff & Jones*' 8th edition is organized. Canadian courts instead ask whether there is an absence of any *juristic reason* — such as contract, donative intent, disposition of law, or enforceable obligation — for the impugned transfer. In a sense, those two models of injustice operate from opposite perspectives. Assuming that the plaintiff has conferred a benefit upon the defendant, the first says "no restitution unless . . .", whereas the latter says "restitution unless . . . ." The difference cannot be understated. It therefore might be thought that *Goff & Jones* no longer has a role to play in Canadian law.

That would be a mistake, for several reasons. If nothing else, *Goff & Jones* will always constitute an authoritative source for the purposes of history and comparison. Its importance, however, is more substantive. Though they now employ very different models of injustice, English and Canadian courts otherwise continue to draw upon the same principle of unjust enrichment. Accordingly, just as the Supreme Court of the United Kingdom may look to Canada for guidance on the issue of enrichment,[19] so too, the Supreme Court of Canada may consult *Goff & Jones* on the nature of restitutionary defences, such as change of position or ministerial receipt.[20]

Finally, even on the issue of injustice, *Goff & Jones* remains relevant, albeit indirectly. English law demands the presence of unjust factors; Canadian law turns on the absence of juristic reasons. The two models, however, do not operate in complete isolation from one another.

16. See *e.g.*, *Nepean Hydro-Electric Commission v. Ontario Hydro* (1982), 132 D.L.R. (3d) 193 (S.C.C.); *Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4th) 140 (S.C.C.); *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257 (S.C.C.); *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.).
17. *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).
18. *Garland v. Consumers' Gas Co.*, *supra*.
19. *Benedetti v. Sawiris*, *supra*, footnote 6, discussing *Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4th) 140 (S.C.C.), at p. 362.
20. *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2009), 304 D.L.R. (4th) 292 (S.C.C.), at pp. 317 and 320-321.

Juristic reasons occasionally have a role to play in English law. Even if the claimant can prove that an enrichment was conferred upon the defendant as a result of some unjust factor, restitution ultimately may be denied if the defendant can point to some good reason as to why the benefit can be retained without payment. In effect, that conception of juristic reason constitutes an additional layer of analysis, a cap on otherwise valid claims. Suppose, for example, that the plaintiff partially performs under an entire contract. The agreement states that the price of $5,000 is payable upon completion, but the plaintiff runs out of resources and abandons the project short of substantial completion. Even if the defendant was enriched, and even if the claimant can prove an unjust factor (*e.g.*, failure of basis), the claim will fail because contract trumps unjust enrichment.[21] Restitution is not available with respect to a transfer that is governed by an enforceable agreement. Although that narrow proposition is reasonably well established, *Goff & Jones* now controversially contains a pair of chapters devoted to juristic reasons: contract, statutes, judgments, and court orders. Those parts of the book clearly are relevant in Canada.

While the explanation is less straightforward, Canadian readers also have reason to continue to consult those chapters in *Goff & Jones* that discuss the unjust factors. Granted, the unjust factors "have now been overtaken"[22] by *Garland*'s test of juristic reasons, and there can be no turning back from that decision. Nevertheless, many of the various principles and doctrines that Canadian courts historically employed as unjust factors remain indispensable, not as immediate triggers to recovery, but rather as grounds upon which juristic reasons may be negated. Take a simple example. A woman gives $500 to her nephew in celebration of his upcoming birthday. When the actual day arrives, she forgets what she has done and, mistakenly believing that a gift is in order, gives him another $500. Upon subsequently realizing the error, the aunt demands restitution of the second payment. She argues that even though she appeared to act with a donative intent, she did not truly do so. If the court accepts that allegation, it will allow recovery. Canadian law formally operates at that level. In order to sustain the claim, however, the aunt must explain *why* the apparent gift failed. And to do that, she must draw upon the doctrine of

21. *Sumpter v. Hedges*, [1898] 1 Q.B. 673 (C.A.), discussed in *Goff & Jones*, 8th ed., at § 3-30.
22. *Kerr v. Baranow* (2011), 328 D.L.R. (4th) 577 (S.C.C.), at p. 621.

mistake,[23] not as an unjust factor, but rather as a means of demonstrating the absence of juristic reason. The same pattern of analysis applies in almost every case.[24] A contract may be defeated by reference to the traditional doctrine of duress; a purported tax may be negated by proof of an *ultra vires* demand; and so on. And since the cases underlying the traditional unjust factors remain indirectly relevant, *Goff & Jones* does as well.

Mitchell McInnes*

23. A mistake most clearly exists if the plaintiff positively believes to be true something that is untrue, as when funds are deposited into a bank account that is thought to belong to a third party, but actually belongs to the defendant. Nevertheless, a restitutionary mistake also may arise from forgetfulness: *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24 (Exch. Ct.); *Brownlie v. Campbell* (1880), 5 App. Cas. 925 (H.L.); *Ferrum Inc. v. Three Dees Management Ltd.* (1992), 7 O.R. (3d) 660 (Ont. Gen. Div.). In either event, the error entitles the plaintiff to resile from the apparent purpose of the act by proving that, if the truth had been in mind, the transfer would not have occurred.

24. The only cases in which it is not necessary to have recourse to the doctrines that traditionally served as unjust factors are those involving *non-purposive transfers* — *i.e.*, cases in which the plaintiff did not formulate even an apparent intention to confer a benefit upon the defendant. That is true, for example, in the event of theft or finding.

* Professor, Faculty of Law, University of Alberta.