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**MR. GARLAND GOES TO OTTAWA:
COMMENTS ON RESTITUTION IN CANADA
THROUGH THE LENS OF *GARLAND V.*
*CONSUMERS' GAS***

*Jeff Berryman**

Consumers' Gas is a wholly owned subsidiary of Enbridge Consumer Gas, a Canadian energy conglomerate that has interests throughout the world.¹ It is one of the largest suppliers and retailers of residential gas in Ontario with annual revenues over \$1,767 million and 1.5 million customers.² Gordon Garland is a customer of Consumers' Gas. Unfortunately, like many consumers, he is sometimes tardy paying his monthly gas bill. Consumers' Gas had a policy of charging late payment penalties (LPP) of 5% of the unpaid monthly bill if not received within 16 days of rendering its bill. Between 1983 and 1994, Mr. Garland paid \$75 in late payment penalties. At some point, Mr. Garland realized that where a late payment penalty was imposed, but the actual bill and late penalty was paid within 38 days, the effective interest rate on the late payment was above 60% per annum. Under Canada's *Criminal Code*, it is an offense to "receive a payment or partial payment or interest at a criminal rate."³ A "criminal rate" is defined as an effective annual rate that exceeds 60% per annum.⁴ On outward appearances, it would appear that Consumers' Gas was guilty of an offense, and that such LLP payments were illegal. Mr. Garland, as

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1. See Enbridge Consumers Gas: Company Info, at http://www.cgc.enbridge.com/G/hub_company_info.html (last visited Aug. 27, 2002).

2. See *id.*

3. Criminal Code, R.S.C., ch. C-46, § 347(1)(b) (1985) (Can.).

4. "Criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial principles that exceeds sixty percent of the credit advanced under an agreement or arrangement. See *id.* § 347(2).

representative, commenced a class action seeking to recover all late payment penalties. The amount totaled \$85 million, which with interest now stands at approximately \$110 million.

At first blush, on the facts above, it is easy to paint Mr. Garland as a crusading consumer, fighting the good fight for all consumers against a multi-national industrial giant. Mr. Garland has not enjoined the assault on multi-nationals in the streets of Seattle or the ramparts of old Quebec City; rather, he has engaged the battle in the Ontario Superior Court of Justice. Surely, if justice means anything it should require the return of illegal payments.

In another part of Ontario, Jeff Berryman is also a customer of Consumers' Gas. Unlike Mr. Garland, he is obsessive about paying his bills and has never incurred a late payment penalty his entire life. Up until recently, the Ontario Energy Board (OEB) has regulated all aspects of the gas retailing business in Ontario.⁵ Under its statutory authority, it has set rates for the gas retail industry including the maintenance of "just and reasonable rates . . . for the transmission, distribution and storage of gas."⁶ Pursuant to this authority, the OEB had approved all of Consumers' Gas's rates including the LPP. The amounts received by Consumers' Gas for LPP have been factored in to determine the overall revenue requirements for Consumers' Gas and what must be assessed to give a fair return on shareholder equity. If Mr. Garland wins, it is most likely that either Mr. Berryman and other customers, or the shareholders of Consumers' Gas will indirectly pay the award.

Mr. Garland's case is currently before Ontario courts.⁷ It has already been to the Supreme Court of Canada once and to the Ontario Court of Appeal twice. The Supreme Court has now granted the plaintiff leave to appeal this decision. Mr. Garland's case is complex and the issues it raises straddle a number of substantive and procedural areas in our civil law. However, its root is a restitution issue, and its resolution says much about the state of unjust enrichment in Canada.

5. See Ontario Energy Board Act, R.S.O., ch. O-13, § 19(1) (1990) (Can.), amended by ch. 15, § 2 (1998) (Can.).

6. *Id.*

7. See *Garland v. Consumers' Gas Co.*, (2001), 57 O.R. (3d) 127 (Can.).

Mr. Garland's first success at the Supreme Court of Canada was in having the provisions of the *Criminal Code* apply to the LPP.⁸ However, it is important to consider exactly what was decided in that case. Section 347 of the *Criminal Code* creates two offenses.⁹ One offense is committed when a person enters into an "agreement or arrangement to receive interest at a criminal rate."¹⁰ In this case, there was no agreement relating to the extension of credit.¹¹ In fact, Consumers' Gas wanted to actively deter customers from paying their bills late, and thereby taking "credit." The other offense is to "receive a payment or partial payment of interest at a criminal rate," and it is this offense of which Consumers' Gas was guilty.¹² However, note how this arises: The LPP is a lump sum payment that constitutes a criminal rate when it remains unpaid for 37 days after being imposed.¹³ However, after that date, the rate drops below the criminal rate.¹⁴ Thus, it is the defaulting payer who in fact controls whether the conduct is actually criminal. Although the defendant argued this very point, the Supreme Court rejected this argument on the basis that the payer's obligation to pay accrued immediately once the LPP charge was imposed and that the ability to delay payment could not be considered a "voluntary" act.¹⁵ The plaintiff's evidence,

8. See *Garland v. Consumers' Gas Co.*, (1998), 165 D.L.R. (4th) 385 (Can.).

9. See *Criminal Code*, R.S.C., ch. C-46, § 347 (1985) (Can.).

10. *Id.* § 347(1)(a).

11. In dissent, Bastarache J. would not have found the LPP scheme within the purview of section 347 on the basis that the scheme, although being a penalty, was not pursuant to an "arrangement or agreement" and thus fell outside the definition section of what constituted "interest" as defined by the section. See *Garland*, 165 D.L.R. (4th) at 415 (Bastarache, J., dissenting).

12. See *Garland*, 165 D.L.R. (4th) 385.

13. The *Criminal Code* definition for interest states that it should be calculated on an annual basis using generally accepted actuarial practices and principles. On that basis, the effective rate for being one day late may be anywhere from 520 to 5.4 billion percent. See Christopher C. Nicholls, *Protecting Goliath from David: Criminal Rate of Interest and Finance Transactions after Garland and Degelder*, 15 BANKING & FIN. L.J. 249, 275 (2000).

14. See *id.* at 275-78.

15. In *Nelson v. C.T.C. Mortgage Corp.*, (1984), 16 D.L.R. (4th) 139 (Can.), *aff'd*, [1986] 1 S.C.R. 749 (Can.), the court dealt with the reverse of the situation in *Garland*. The debtor had exercised a pre-payment option on a mortgage, thereby shortening the actual term of the loan and resulting in the effective interest rate rising above the *Criminal Code*. The interest rate of the

which was not challenged at this stage of summary proceedings, indicated that 81% of customers had paid the LPP within 10 days, well within the thirty-eight-day period. However, assuming a restitution action exists, an immediate problem is whether a restitution action would differentiate between these two classes of payers. The 81% who pay within the thirty-eight-day period may legitimately argue that there is an impoverishment that is unjust. On the other hand, the 19% who pay after the thirty-eight-day period may incur an impoverishment, but it cannot be said to be unjust in that its imposition would not appear to offend section 347. Yet, the moral quality and culpability of Consumers' Gas is identical in both cases—namely to impose a late payment penalty upon the payers, who delay the payment of their bills on time.

Armed with his first court victory, Mr. Garland sought to apply it to his own circumstances and that of the class he represented. The parties agreed to have a number of issues determined in summary proceedings. Mr. Garland argued that he was entitled to bring a restitution claim for a refund of his LPP. Consumers' Gas argued a number of specific defenses based on provisions of the *Ontario Energy Board Act*. Primarily, that because the LPP had been approved by the OEB, this constituted a "good and sufficient" defense and that the plaintiff's action amounted to a collateral attack on the legislative powers delegated to the Board.¹⁶ Winkler J., the trial judge, accepted both of these arguments.¹⁷ Analysis of these arguments is beyond the scope of this Article, but essentially, Winkler J. found that the provision in the *Ontario Energy Board Act* which conferred immunity against civil suit brought against a

loan over its contracted period was not criminal. This did not violate section 347 because the act of the debtor was truly voluntary in exercising the option, and the transaction could not become illegal through a voluntary act of the debtor. *See also* Degelder Constr. Co. v. Dancorp Dev. Ltd., (1998), 165 D.L.R. (4th) 417 (Can.) (mortgage rate found to give rise to interest at criminal rate when calculated over term initially agreed, though not when calculated over period during which credit was actually outstanding).

16. Ontario Energy Board Act, R.S.O., ch. 332, § 18 (1980) (Can.) amended by ch. 15, § 25 (1998) (Can.), provides that "[a]n order of the Board is a good and sufficient defence to any . . . proceeding brought or taken against any person in so far as the act or omission that is the subject of . . . [the] proceeding is in accordance with the order."

17. *See* Garland v. Consumers' Gas Co., (1995), 122 D.L.R. (4th) 377 (Can.).

regulated industry for actions ordered by the Board, was constitutional. The imposition of the LPP under the *Ontario Energy Board Act* was within the “pith and substance” of provincial jurisdiction and had only an incidental effect on the federal government’s exclusive jurisdictional competence over criminal law. With respect to the collateral attack, Winkler J. found that the *Ontario Energy Board Act* contained a full administrative process which allowed public participation to determine the rate structure for gas retailing to the public. Mr. Garland had not participated in this process and sought to use this civil action to re-hear matters within the OEB’s exclusive competence. Consumers’ Gas had no option but to adhere to the rulings of the Board and should not be put into the position of having to defend the Board’s rulings.¹⁸

Although unnecessary for his judgment based on the above findings, Winkler J. addressed the plaintiff’s ability to seek restitution. Winkler J. applied what has become the classic statement of the unjust enrichment principle in Canada, taken from *Peter v. Beblow*,¹⁹ that there must be “(1) an enrichment [of the defendant], (2) a corresponding deprivation [of the plaintiff], and (3) the absence of a juristic reason for the [defendant’s] enrichment.”²⁰ The plaintiff demonstrated both (1) and (2), but not (3). A juristic reason, defined as “some underlying justification, grounded in a legal or equitable

18. The defendant also made two subsidiary arguments: One, that there is recognized in Canada a “regulated industries” defense to a *Criminal Code* violation whereby a party acting under the lawful authority of a valid provincial regulatory structure is shielded from criminal sanction. Winkler J. did not believe that this defense extended to the circumstances of this case. The *Criminal Code* did not provide the latitude that other quasi-criminal provisions provided where this defense had been successful. Two, Consumers’ Gas argued that they could claim protection under a particular provision of the *Criminal Code* that had been enacted to give protection to persons who served the Monarch but who turned out to be on the wrong side of a civil war. Winkler J. summarily dismissed this defense.

19. [1993] 1 S.C.R. 980 (Can.). The three-part test is an updated version of the test articulated by Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 844 (Can.) (“[F]or 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.”).

20. *Beblow*, 1 S.C.R. at 987.

base,”²¹ was present in this case because the LPP was specifically authorized by the OEB. The Board’s orders had not been directly challenged by either of the parties and were therefore valid.

Mr. Garland immediately appealed to the Ontario Court of Appeal. Here, he was more successful. The court reversed the trial judge on the issues of collateral attack and whether section 18 of the *Ontario Energy Board Act* provided Consumers’ Gas a “good and sufficient” defense to civil action.²² The collateral attack doctrine would apply only where the administrative board had made a decision directly binding the particular plaintiff, who was seeking to impugn the decision in collateral litigation. In this case, the OEB’s decision was made affecting Consumers’ Gas and not the plaintiff.²³ Additionally, because the plaintiff would not have had any opportunity to gain the relief it sought in these civil proceedings if it was confined to a hearing before the OEB, its action was not a collateral attack. Nor could section 18 be construed as authorizing the Energy Board to mandate criminal conduct and then alternatively, confer protection against civil suit.

The court’s ruling on Consumers’ Gas’s defenses focused attention on the plaintiff’s claim in unjust enrichment.²⁴ On this issue, the court both disagreed with the trial judge and dissented amongst its members. Speaking for the majority, McMurtry C.J.O. accepted the three-part test for unjust enrichment as enunciated in *Peter v. Beblow*, however, he disagreed with Winkler J. on whether Consumers’ Gas had received an enrichment.²⁵ Since all of Consumers’ Gas’s rates were set by the OEB, it could not be said that they had been enriched when they had not retained the LPP as a profit.²⁶ The amount collected from the LPP had been factored into the rates set by the OEB such that its imposition did not amount to any additional income received by Consumers’ Gas.²⁷ Any amounts

21. Winkler J. accepted this definition provided by Blair J. in *Canada (Attorney General) v. Confederation Life Ins. Co.*, (1995), 24 O.R. (3d) 717, 773 (Can.).

22. *See Garland v. Consumers’ Gas Co.*, (2001), 57 O.R. (3d) 127 (Can.).

23. *See id.*

24. *See id.*

25. *See id.* at 147–50.

26. *See id.* at 148–49.

27. *See id.*

received under the LPP had been passed on to all Consumers' Gas customers in reduced gas rates.²⁸

With respect to the third part of the test, the absence of juristic reason, McMurtry C.J.O. concurred with Winkler J. but for different reasons. McMurtry C.J.O. accepted an expansive definition of what constitutes an "unjust" enrichment from McLachlan J. in *Peel v. Canada*.²⁹

First, the injustice lies in one person's retaining something which he or she ought not to retain, requiring that the scales be righted. Second, the required injustice must take into account not only what is fair to the plaintiff; it must also consider what is fair to the defendant. It is not enough that the plaintiff has made a payment or rendered services which it was not obliged to make or render; it must also be shown that the defendant as a consequence is in possession of a benefit, and it is fair and just for the defendant to disgorge that benefit.³⁰

The majority believed that because Consumers' Gas was required by statute to adhere to the rate scheme set by the OEB, and because it was within the Board's ability to set the LPP as part of what was a just and reasonable rate for consumers, it would be unfair to require Consumers' Gas to now repay the LPP.³¹ Additionally, the cost implications of such an order, which would presumably be passed onto all Consumers' Gas's customers, raised distinct and unique public policy considerations as a result of the defendant operating in a completely regulated environment.³²

Although Borins J.A. agreed with the majority on the application of the defenses which Consumers' Gas had raised, he dissented on the conclusions respecting the availability of the plaintiff's unjust enrichment claim.³³ Borins J.A. commenced by adopting much of Professor L. Smith's analysis on the state of unjust enrichment law in Canada and accepted that there were two divergent approaches to defining the concept of "unjust

28. *See id.* at 149.

29. (1992), 98 D.L.R. (4th) 140 (Can.)

30. *Id.* at 165.

31. *See Garland*, 57 O.R. (3d) at 150.

32. *See id.*

33. *See id.* at 154 (Borins, J.A., dissenting).

enrichment.”³⁴ The narrow approach focuses upon reasons to reverse enrichments.³⁵ Under this approach, the burden is upon the plaintiff to establish an “unjust factor,” often drawing from older and well-established restitutionary forms of action.³⁶ The wider approach focuses upon reasons why the defendant should be entitled to keep the benefit.³⁷ The burden under this approach often lies on the defendant to identify these factors, which are more pragmatic and idiosyncratic.³⁸ Borins J.A. did not tip his hat at either approach. He reviewed the rationale and interpretation given to the *Criminal Code* criminal interest rate provision. He noted that this provision was designed as consumer legislation. Contracts that included a criminal interest rate had not been enforced on the grounds of illegality and the criminal interest rate either severed, or was read down to comply. The fact that the LPP has been held by the Supreme Court of Canada to be in violation of the *Criminal Code* could not be ignored. To allow Consumers’ Gas retention of the LPP would be to allow it to profit from a crime and from its own wrongdoing. The trial judge had made an error in believing that the LPP was valid simply because the plaintiff had not directly attacked the OEB’s order. Moreover, Borins J.A. argued that the majority’s decision was unsustainable because by allowing the OEB’s order to constitute a “juristic reason,” they were ignoring the impact of the Supreme Court’s decision. In holding that the order authorized a criminal interest, this constituted a criminal offense and was therefore invalid.³⁹ In addition, to allow the OEB’s order to constitute a valid juristic reason would be to allow a provincial regulatory agency to override federal criminal law in violation of the constitutional paramouncy doctrine. As Borins J.A. stated:

In my view, it would be wrong to say that the rate orders do not provide [Consumers’ Gas] with a defence under s. 18 of the OEBA because they have been rendered inoperative by the doctrine of federal paramouncy, and then to breathe life

34. See Lionel Smith, *The Mystery of “Juristic Reason”*, 12 SUP. CT. L. REV. 211 (2000).

35. See *Garland*, 57 O.R. (3d) at 168–69 (Borins, J.A., dissenting).

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.* at 173.

into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.⁴⁰

On the issue of whether Consumers' Gas had experienced a benefit, Borins J.A. accepted the trial judge's conclusion that the simple receipt of money constituted a benefit. However, the fact that all of Consumers' Gas's rates were determined by the OEB raised the possibility of a change of position defense to any restitution action. Borins J.A. held that this defense was not available to a wrongdoer and that it was simply another attempt to justify retention of the LPP in contravention of the criminal law.⁴¹

I have outlined *Garland v. Consumers' Gas* in some detail because I believe it is illustrative of the developments of Canadian law within the area of unjust enrichment in a number of respects: What is a juristic reason, what constitutes a benefit, and how do these concepts accommodate public policy concerns? The fact that Canada's most senior provincial appellate court can arrive at such divergent views on these issues is symptomatic of the conceptual vicissitude in a number of areas.

The legal consequences that follow a breach of the criminal interest rate provisions of the *Criminal Code* are notoriously difficult to discern. The section itself was enacted to prevent loan sharking, although it would appear it has rarely been used to that effect.⁴² The majority of cases where the section has been invoked concerns otherwise legitimate commercial transactions where a borrower seeks to escape the enforcement of a contract's provisions alleging illegality.⁴³ Judicial approach to this issue has normally resulted in the interest rate component of the contract being severed from the contract in whole or in part.⁴⁴ The decision to sever requires the

40. *Id.* at 176.

41. *See id.* at 176–77.

42. In fact, the section requires the Attorney General's approval before a charge is laid and there have been few reported criminal prosecutions. *See* Criminal Code, R.S.C., ch. C-46, § 347(7) (1985) (Can.).

43. *See* Milani v. Banks, (1997), 32 O.R. (3d) 557 (Can.); William E. Thomson, Assoc. Inc. v. Carpenter, [1989] 69 O.R. (2d) 545 (Can.); *see also* Stephen Antle, *A Practical Guide to Section 347 of the Criminal Code—Criminal Rates of Interest*, 23 CAN. BUS. L.J. 323, 337–39 (1994) (discussing conditions under which courts find severance possible); Mary Ann Waldron, *White Collar Usury: Another Look at the Conventional Wisdom*, 73 CAN. BAR. REV. 1, 16–18 (1994) (discussing test for severability).

44. *See* Antle, *supra* note 43, at 338.

court to analyze several factors.⁴⁵ First, the court must determine whether the policy of the *Criminal Code* provision will be subverted by severance.⁴⁶ Second, the court must determine whether the parties entered the arrangement with an illegal purpose from inception.⁴⁷ Third, the court must determine the relative bargaining positions of the parties.⁴⁸ For example, has the borrower been forced to submit to a usurious lender without independent advice? Finally, the court must consider whether the borrower will be unjustly enriched as a result of not severing the interest term.⁴⁹ In such a case, the whole loan is unenforceable and the borrower need not return the principal advanced.⁵⁰ A more recent development has been the simple “reading down” of the interest rate so that it conforms to the maximum permissible rate, namely 60%.⁵¹ This approach was justified on the basis that the imposition of interest *per se* was not illegal, and the parties to a loan were experienced commercial entities, negotiating at arm’s-length and with legal advisors.⁵² Apart from the obvious difference that *Garland* does not involve a strict loan agreement (although ultimately it does engage an extension of credit) applying the above criteria, it would seem that the LPP term should be severed from the contract to supply gas. Whether the LPP could be “read down” so that at any time where an actual payment resulted in excess of the 60% interest threshold, a refund of only the difference was paid, is problematic. There are obvious problems in how the difference would be calculated. However, there is an attraction to the idea that the OEB approval of what constitutes a “fair and reasonable” LPP policy can be equated to the bargain struck between commercial entities bargaining at arm’s-length. The OEB policy shores up any power imbalance between the parties when entering the contract concerning the supply of gas and the charges imposed. It was the lack of any imbalance that motivated the trial judge to read down the interest rate so that it

45. *See id.* at 337–38.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* at 337–39.

50. *See id.* at 338.

51. *See* Transport N. Am. Express, Inc. v. New Solutions Fin. Corp., (2001), 200 D.L.R. (4th) 560 (Can.).

52. *See id.* at 571–72.

conformed to the *Criminal Code* rather than severing the interest rate clause completely.⁵³

There is an apocryphal story of an English tourist armed with a city map who approaches a local Irishman seeking directions to some church spire visible in the distance. The Englishman asks, "We are here, but how do I get to there?" The Irishman replies, "Well, if I wanted to get to there, I wouldn't start from here."

In *Garland* what is the "here" and the "there"?

A. Here

As a matter of contract law, the consequences of statutory illegality are not always clear-cut. A distinction is first drawn between those contracts entered into with the purpose of committing an illegal act, and contracts that are either expressly or implicitly prohibited by a statute. In the former category, the contract is unenforceable where one or both parties had the intention upon formation of the contract to commit the illegal act.⁵⁴ In the latter category, a further distinction is drawn between a contract that is expressly prohibited and one that is implicitly prohibited.⁵⁵ In both cases, the contract will be illegal and unenforceable, and the parties' intent, whether to deliberately break the law or not, is irrelevant.⁵⁶ Before a contract is deemed illegal because of an implicit prohibition, however, the court must be satisfied that finding the contract illegal will advance the policies of the statutory scheme. With respect to the explicitly prohibited category, this formal classificatory approach may now have given way to a more contextual approach. This approach seeks to balance the consequences that flow from making a contract unenforceable for illegality and the remedy being sought, against the policy and objectives of the statutory scheme.⁵⁷ Under this contextual approach, even an explicit statutory prohibition may not automatically result in

53. *See id.*

54. *See Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775).

55. *See Still v. Minister of Nat'l Revenue*, [1998] 1 F.C. 549, 564 (Can.).

56. *See id.* at 567; *St. John Shipping Corp. v. Joseph Rank, Ltd.*, [1956] 3 All E.R. 683, 687 (Eng.); S. M. WADDAMS, *THE LAW OF CONTRACTS* § 572 (4th ed. 1998); John D. McCamus, *Restitutionary Recovery of Benefits Conferred Under Contracts in Conflict With Statutory Policy—The New Golden Rule*, 25 OSGOODE HALL L.J. 787, 803 (1987).

57. *See McCamus*, *supra* note 56, at 803–05.

a complete denial of relief on the basis of unenforceability to an otherwise innocent party or one who is acting in good faith.⁵⁸

Thus, based on the above, the classification of Consumers' Gas's conduct can have varying consequences. Section 347(1)(a) of the *Criminal Code* suggests that the *act* of contracting itself is the actual offense; thus, the subsequent agreement must be illegal from its inception.⁵⁹ If the case falls within the first category above, then intent is important because the agreement cannot be enforced by either party where they both intended to commit the offense, or by the one who alone has the intent to commit the offense.⁶⁰

Section 347(3) creates an evidentiary presumption to the effect that when a person receives a payment of interest at a criminal rate, then she is deemed to have knowledge of both the nature of the payment and its reception at a criminal rate.⁶¹ Accordingly, the receipt of the LPP in *Garland* creates a presumption that Consumers' Gas had the intent to commit the offense. If the case falls within the second category (i.e., that the LPP constituted a *contract* in violation of an explicit statute), then intent would be irrelevant for the purposes of contract law, and the contract would be illegal and unenforceable *per se* under the classical approach.⁶² However, under a contextual approach we would have to ask how declaring the contract unenforceable would advance the policy of the *Criminal Code* provision. It is this question that has lead courts to a policy of severing the interest component from the credit contract itself.

In *Garland*, the plaintiff initially claimed that Consumers' Gas had violated both section 347(1)(a) and (b).⁶³ In the first case, the

58. I take this to be the effect of the decision in *Still v. Minister of National Revenue*, [1998] 1 F.C. 549 (Can.). In that case, the court held that in spite of an explicit statutory provision in immigration legislation that prohibited the plaintiff from taking employment, her actual contract of employment was seen to be valid for the purposes of determining an entitlement to unemployment benefits under a different statutory regime. In the court's opinion, the policy under the Immigration Act that prohibited employment would not be jeopardized by treating it as valid for the purposes of unemployment benefits.

59. See Criminal Code, R.S.C., ch. C-46, § 347(1)(a) (1985) (Can.) ("enters into an agreement or arrangement to receive interest at a criminal rate").

60. See McCamus, *supra* note 56, at 803.

61. See Criminal Code, R.S.C., ch. C-46, § 347(3).

62. See *St. John Shipping Corp. v. Joseph Rank, Ltd.*, [1956] 3 All E.R. 683, 687 (Eng.).

63. See *Garland v. Consumers' Gas Co.*, (1998), 165 D.L.R. (4th) 385, 390 (Can.).

Supreme Court of Canada did not find an infringement of section 347(1)(a) because there was no explicit agreement to extend credit and the imposition of the LPP did not necessarily result in payment of a criminal rate for all payers.⁶⁴ However, the court did agree with Garland's claim that Consumers' Gas violated section 347(1)(b).⁶⁵ Section 347(1)(b) makes the "receipt" of payment the offense, regardless of whether it is paid pursuant to an agreement with the accused.⁶⁶ Again, the presumption will assist in determining criminal liability.

Section 347(1)(b) does not explicitly deal with entering into any agreement or arrangement.⁶⁷ However, implicit within this provision is a prohibition of agreements and arrangements that incorporate a criminal interest rate pursuant to the definition of what constitutes a "criminal rate" under the *Code*.⁶⁸ Whether such an agreement or arrangement is illegal and unenforceable would have to be based on whether such a conclusion advanced the policy objective of the statutory provision.

So far this Article has dealt primarily with the effects of illegality on the enforceability of the contract. This aspect should be kept distinct from the restitution aspects of the same transaction. In the past, the availability of restitution for benefits bestowed, either as money paid or services rendered, has closely followed the contractual analysis. Once the contract has been found illegal, attempts to recover have been met with the legal principles such as *ex turpi causa non oritur actio* (no right of action arises out of a shameful cause), and in *pari delicto potior est conditio defendentis* (where both parties are equally wrongful the position of the defendant is stronger to deny recovery).⁶⁹ However, there are a number of exceptions: (1) where the parties are not in *pari delicto*; (2) where there is repentance before the contract is executed; and (3)

64. *See id.* at 410.

65. *See id.* at 410–13 (receives payment or partial payment of interest at a criminal rate).

66. *See* Degelder Constr. Co. v. Dancorp Dev. Ltd., (1998), 165 D.L.R. (4th) 417, 431–32 (Can.).

67. *See* Criminal Code, R.S.C., ch. C-46, § 457(1)(b).

68. *See id.*

69. *See* Still v. Minister of Nat'l Revenue, [1998] 1 F.C. 549, 557, 564 (Can.).

where the claim is collateral but can be made independently of the illegality.⁷⁰

John D. McCamus, in an important contribution, has recast the restitution issues into what he calls a “new golden rule.”⁷¹ He asks that we separate the contractual and restitution aspects. Following a determination that a contract is unenforceable, we should then explore whether the policy issues that animated us to deny contract enforcement also warrants the denial of restitution. This calls for a similar contextual approach as suggested above, to be used to determine the contractual effects of illegal conduct on a contract, but also includes issues peculiar to restitution. For example, McCamus suggests that while it may be appropriate to deny a party enforcement of executory obligations or its expectancy, it may not justify retention of a windfall conferred pursuant to an executed obligation prior to the illegality being determined.⁷²

Garland invites a number of restitution responses. From a contractual point of view, the illegality may lead to either the non-enforcement of the supply contract or—and more likely—the severance of the LPP provisions. However, from a restitution perspective, does it also warrant denying a refund of the payments Consumers’ Gas received? An orthodox restitution response would probably conclude that the facts in *Garland* fit within the context of the recognized “not in *pari delicto*” exception and therefore restitution would be allowed.⁷³ In *Garland*, a bargaining imbalance existed between the parties, and the plaintiff had little alternative but to contract with Consumers’ Gas for his heating supplies. Against this is the fact that the OEB had consistently granted the use of the LPP by Consumers’ Gas. Consumers’ Gas may have been unaware of the *Criminal Code* violation at the time of proposing this LPP scheme; however, they continued to impose it even after these proceedings were commenced. Of course, it was always open to Consumers’ Gas to suggest an alternative method of quantifying the LPP and to have that method approved by the OEB. Once approved

70. See *id.* at 567–68.

71. See McCamus, *supra* note 56, at 810 (now incorporated into his book, PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* (1990)).

72. See MADDAUGH & MCCAMUS, *supra* note 71, at 369.

73. See *Garland v. Consumers’ Gas Co.*, (1998), 165 D.L.R. (4th) 385, 395 (Can.).

however, Consumers' Gas would be bound to implement such a scheme.⁷⁴ Under McCamus's "golden rule" approach, less attention may be paid to establishing disparities in fault (the parties may well be in *pari delicto*). Instead, greater attention would be paid to the quality of the unjust enrichment, and how that unjust enrichment necessarily impacts upon the policy concerning the avoidance of usurious contracts.

In *Garland*, the Supreme Court of Canada concluded on its interpretation of section 347 that:

[I]t is clear that there is no violation of s. 347(1)(a) in this case. The arrangement between Consumers' Gas and its customers does not, on its face, require the payment of interest at a criminal rate. The payment of such interest depends on the occurrence of subsequent events.⁷⁵

The focus is on the act of receipt of the payment rather than on whether the contract constitutes an illegality. From a restitution standpoint, a claim should be mountable on the public policy principle that no person should be able to benefit from his or her criminal activity. This principle, of long standing, has been invoked to deny a person, or others who claim through that person, from profiting from heinous crimes such as murder and manslaughter.⁷⁶ For example, it has been invoked to deny a convicted person who seeks to benefit indirectly from selling their story of a heinous crime.⁷⁷ It has also bedeviled insurance law and indemnity

74. There are few cases dealing with the refund of criminal interest. For example, in *Bon Street Dev. Ltd. v. Terracan Capital Corp.*, (1992), 76 B.C.L.R. (2d) 90 (Can.), Low J. adopted the passage from MADDAUGH & MCCAMUS as accurately stating the law of restitution on illegal contracts and the exceptions thereto. See MADDAUGH & MCCAMUS, *supra* note 71, at 349. However, he declined to order the refund of criminal interest on the basis that indeed the parties were in equal fault. See also *Vandekerhove v. Litchfield*, (1993), 103 D.L.R. (4th) 739 (Can.), *rev'd*, (1995), 121 D.L.R. (4th) 571 (Can.) (noting that in *Bon Street*, "the parties were equally at fault in entering into and completing the illegal contract.").

75. *Garland*, 165 D.L.R. (4th) at 410.

76. For a recent discussion of this policy in Canada, see the most recent decisions of the Supreme Court in *Oldfield v. Transamerica Life Insurance Co.*, (2002), 210 D.L.R. (4th) 1 (Can.) and *Goulet v. Transamerica Life Insurance Co.*, (2002), 210 D.L.R. (4th) 22 (Can.).

77. See *Rosenfeldt v. Olson*, (1986), 1 B.C.L.R. (2d) 108 (Can.) (finding the restitution claim unsuccessful in this case).

policies.⁷⁸ However, it has rarely, if ever, been applied to other forms of criminality.

Most restitution scholars accept that preventing a person from benefiting from wrongdoing is one of two essential organizing principles of restitution, and that profits from such wrongdoing should be recoverable.⁷⁹ Difficulty arises, however, in making the appropriate link between the perpetrator's crime and whether it was committed at the expense of the victim. The citizen's duty to avoid criminal or wrongful acts is owed to the State rather than the individual victim. The State also assumes the primary function of punishing aberrant behavior, and allowing a restitution claim to go forward may have the appearance of recreating forfeiture and attainder—common law actions that have been abolished in Canada⁸⁰—or impinge on the proper province of the legislature.⁸¹ However, in other areas where criminal sanctions have proved inadequate, courts have been willing to supplement with civil actions.⁸² Maddaugh and McCamus suggest that restitution is only justified where the party committing the wrongful act “has an express motive of obtaining some benefit from his victim.”⁸³ This need for “intent” is not obvious other than that it allows the connection to be made between the wrongdoer and the victim such that it is “wrongdoing . . . at the expense of . . . the victim.”⁸⁴

Whether or not Consumers' Gas may be required to make restoration to Garland on the basis of their criminal activity focuses upon the following factors:

- (1) Consumers' Gas has not been criminally convicted of an offense although the tone of the Canadian Supreme Court's decision suggests that they are in fact guilty.

78. See *Oldfield*, 210 D.L.R. (4th) at 1; *Goulet*, 210 D.L.R. (4th) at 22.

79. See, e.g., LORD GOFF & GARETH JONES, *THE LAW OF RESTITUTION* ch.38 (5th ed. 1998); MADDAUGH & MCCAMUS, *supra* note 71, ch. 22.

80. Criminal Code, R.S.C., ch. C-46, § 6(1)(b) (1985) (Eng.).

81. See GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 561 (1999). The *Criminal Code* now contains quite detailed provisions on the forfeiture and restoration of property that is the fruits of a crime. See Criminal Code, R.S.C., ch. C-46, §§ 491.1, 738.

82. See JEFF BERRYMAN, *THE LAW OF EQUITABLE REMEDIES* 135 (2000) (granting an injunction for continual flouting of a criminal statute).

83. MADDAUGH & MCCAMUS, *supra* note 71, at 494.

84. G. H.L. FRIDMAN & JAMES G. MCLEOD, *RESTITUTION* 562 (1982). The authors do not share this view and believe that intent is irrelevant.

The evidential presumption contained in section 347(3) clarifies the element of intent for the purposes of the offense.⁸⁵ There is little doubt that Consumers' Gas intended to impose the LPP on Garland.

- (2) It is unlikely that Consumers' Gas will be criminally prosecuted under the section. Such prosecution requires the consent of the Attorney General, and previous history suggests that it is seldom requested by prosecutorial agencies or, when requested, given to them.
- (3) As a class action, it is likely that all the parties who paid the criminal LPP are known, as are the amounts they actually paid.
- (4) The legislative provision is for the benefit of consumers. The duty Consumers' Gas breached is not one they owe to the State at large, but rather to their consumers who have all been readily identified.

Restitution actions based on an illegal contract, or a public policy preventing a person from profiting from a crime, both fall within "benefits acquired through wrongdoing." However, these are not the only potential restitution actions arising from the facts in *Garland*. Arguably, the parties entered into the LPP arrangement based on a mistake of law. Both Mr. Garland and Consumers' Gas honestly and mistakenly believed that the LPP scheme, as authorized by the OEB, complied with the provisions of the *Criminal Code*. Any payment made under the LPP was not made as a compromise or settlement of an honest claim, this being a recognized counter to an action based on mistake of law.⁸⁶ Further, the payment was arguably made under a practical compulsion because the particular circumstances gave Consumers' Gas a monopoly on the supply and distribution of gas to Mr. Garland under the terms the OEB

85. Criminal Code, R.S.C., ch. C-46, § 347(3).

86. In Canada, the distinction between mistake of fact and mistake of law was abolished by the Supreme Court in *Air Canada v. British Columbia*, (1989), 59 D.L.R. (4th) 161, 197-98 (Can.). See also *Air Canada v. Liquor Control Bd. of Ontario*, (1995), 126 D.L.R. (4th) 301, 328 (Can.) (appeal allowed in part although the restitution aspect was upheld by the Supreme Court in *Air Canada v. Liquor Control Board of Ontario*, (1997), 148 D.L.R. (4th) 193, 214-16 (Can.)).

approved. Mr. Garland's choice was to either not use gas, or to avoid incurring any LPP by always paying his bills promptly.

A claim made under a mistake of law as constituting either an "unjust factor" or "juristic reason" is one of autonomous restitution.⁸⁷ An enrichment and a corresponding impoverishment complete the claim. The change of position defense assumes importance in identifying whether there is an actual residual benefit that warrants restoration. The majority in *Garland* approached the case as if unjust enrichment was a cause of action that subsumes all claims in restitution, even those based solely on wrongdoing.⁸⁸ The majority thus elevated the "unjust enrichment" principle, as articulated in the three criteria from *Peter v. Beblow*,⁸⁹ to the substantive claim itself. The receipt of the LPP as a criminal offense is but one factor to be considered under the rubric of "juristic reason." The fact that it was authorized by the OEB is seen as a stronger countervailing factor. By subsuming restitution for wrongs, together with autonomous restitution, the majority ignored the fact that a change of position defense is normally unavailable for wrongdoers, whereas available in a situation of autonomous restitution.⁹⁰

B. *There*

As demonstrated by the split decision in the Ontario Court of Appeal, the "just" resolution in *Garland* is not intuitively obvious. Let us consider what we know.

The defendant violated the *Criminal Code*. However, the legislative intent behind the violated section was to catch loan sharking agreements. Although the action in this case was not loan sharking, the section has a general consumer protection orientation.⁹¹ Critics have scathingly attacked the provision as ill-conceived

87. See GERALD MCMEEL, *THE MODERN LAW OF RESTITUTION* 4 (2000).

88. See *Garland v. Consumers' Gas Co.*, (1998), 165 D.L.R. (4th) 385 (Can.).

89. [1993] 1 S.C.R. 980, 987 (Can.) (the criteria being enrichment, corresponding deprivation, and absence of juristic reason for enrichment).

90. The allure of the unjust enrichment principle as the substantive cause of action for all restitution actions is powerful in Canada and has tempted members of our most senior appellate court. For example, see the discussion on the legal basis for a constructive trust in *Soulos v. Korkontzilas*, (1997), 146 D.L.R. (4th) 214, 215 (Can.).

91. See *Garland*, 165 D.L.R. (4th) at 396.

because it applies to transactions that are the products of parties negotiating at arm's-length in a fair marketplace.⁹² The fact that the Attorney General's consent is required to prosecute has meant few criminal prosecutions. The weight of the cases involve civil suits that raise illegality and the non-enforcement of criminal interest provisions. The illegality in this case depends on a rather technical interpretation given to the *Criminal Code*, although the severity of the infringement can work in an extreme fashion. The LPP scheme had been approved by a provincial regulatory board charged with ensuring the public interest.

The countervailing arguments focus upon the clear illegality of Consumers' Gas's actions and the fact that it is improper for a provincial regulatory body to consent to orders that violate valid federal legislation. A wrongdoer should not profit from illegal acts at the expense of another.⁹³ The illegal LPP assessed by Consumers' Gas has enriched Consumers' Gas's customers in that rates for distribution and purchase of gas have been lowered to reflect the fact that LPP payments are available to meet part of Consumers' Gas's working capital.⁹⁴ (Query whether Consumers' Gas's shareholders have been enriched. That determination would turn on the way the OEB guarantees a return on shareholder capital and how savings through productivity gains and management are reflected in shareholder return. As a regulated industry, these benefits may not automatically inure for the benefit of shareholders, but go to reduce the cost of gas to consumers. In addition, the cost of providing credit to customers who do not pay on time is a real cost to Consumers' Gas. Any LPP may only cover the cost of providing consumers credit and not constitute a saving of expenditure.)

I suggest the resolution of these two competing approaches involves a three-step analysis: First, has the wrongful act been made out? Second, does the alleged wrong require additional sanctioning

92. See Jacob S. Ziegel, Editorial, *Section 347 of the Criminal Code*, 23 CAN. BUS. L.J. 321, 321 (1994); Jacob S. Ziegel, *The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost*, 11 CAN. BUS. L.J. 233, 244 (1986).

93. See *Oldfield v. Transamerica Life Ins. Co.*, (2002), 210 D.L.R. (4th) 1 (Can.); *Goulet v. Transamerica Life Ins. Co.*, (2002), 210 D.L.R. (4th) 22 (Can.).

94. See *Garland*, 165 D.L.R. (4th) at 385.

by conferral of a restitution remedy? Third, has the requisite elements of a restitution claim been established?

1. Has the wrongful act been made out?

Litigation is important for at least four purposes: to provide a just resolution as between the litigants, to provide hortatory guidance to those who legally advise others, to act as ombudsman against those who wield power and influence, and to educate and publicize socially desirable norms of behavior to the community. The importance accorded these purposes varies with the dispute. Generally, issues of autonomous restitution engage the first two more than the latter two, because the goal is more likely to be centered on corrective justice. Restitution for wrongs engages all four, but particularly the latter two. The goal is more likely to reflect distributive justice.

Like Borins J.A. in *Garland*, I believe we cannot ignore the fact that Consumers' Gas's conduct is illegal. The wrongful act has been made out.

2. Does the alleged wrong require additional sanctioning by conferral of a restitution remedy?

Both Consumers' Gas and the OEB have accepted that the LPP regime must be changed to ensure statutory legality. This will have flow-on effects and, indeed, Toronto Hydro (a large municipal authority retailing hydro also regulated by the OEB) was given intervener status in this case because they had a similar LPP scheme. Of course, this decision of the regulator and the regulated only arose because the illegality of the LPP was brought to light. The court admits that Mr. Garland could not have received a restitution remedy from the OEB, although presumably he could have objected at the time the LPP was first suggested.⁹⁵ Mr. Garland was thus successful in having the LPP annulled for the future. This leaves open the need for additional restorative relief to sanction Consumers' Gas. The public policy interests justifying further sanction are the broader issues of ensuring that a wrongdoer does not profit from their wrongs at the expense of others, and the furtherance of the legislative policy behind the *Criminal Code*. A contextual approach to this question

95. See *id.*

may look at the consumer protection aspect of the *Criminal Code* provision, the degree of moral culpability of Consumers' Gas, the sophistication of the parties, the length and systemic nature of the wrong, and the extent of the benefit.

3. Have the requisite elements of a restitution claim been established?

There is clearly an impoverishment of the plaintiff in *Garland* although, as indicated before, it may not be in direct correlation to the money paid to Consumers' Gas. The plaintiff's delay in making payment had a real cost to Consumers' Gas. For those who paid after thirty-eight days elapsed, no effective criminal interest rate was levied. Thus, has there been a benefit?

Most writers in restitution accept that a payment of money, a saving of expenditure, or a "request for performance" (as in expenditures made in anticipation of a contract being formed) constitutes a benefit.⁹⁶ Because money is universally exchangeable, its payment is usually always seen as a benefit. The only reservation in *Garland* is whether Consumers' Gas can plead change of position as a defense in that, while they received the LPP, they never retained any benefit and acted only as a conduit to transfer this benefit to others.

A change of position defense has been accepted in Canada in the case of mistake of fact and mistake of law for some time, although it has never been worked through in any detailed analysis.⁹⁷ At least two conceptual positions have been identified as underlying a change of position defense. The first focuses upon the attainment of a "just and fair" result as between the parties in light of the defendant's changed circumstances.⁹⁸ It admits that the plaintiff has suffered an impoverishment and that the defendant was enriched, but now, the changed circumstances confronting the court would create a further injustice if the defendant was required to restore any benefit to the

96. See *Peel (Regional Municipality) v. Canada*, (1992), 98 D.L.R. (4th) 140, 150–57 (Can.); *GOFF & JONES*, *supra* note 79, at 16; *MADDAUGH & MCCAMUS*, *supra* note 71, at 38; *MCMEEL*, *supra* note 87, at 16; *VIRGO*, *supra* note 81, at 67.

97. See *RBC Dominion Sec., Inc. v. Dawson*, (1994), 111 D.L.R. (4th) 230, 234–40 (Can.); *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*, (1975), 55 D.L.R. (3d) 1, 1 (Can.).

98. See *Rural Municipality of Storthoaks*, 55 D.L.R. (3d) at 13.

plaintiff.⁹⁹ As between the plaintiff and the defendant, there is no valid reason why the defendant should be made to bear the losses. This position appears loosely in the language of the American *Restatement of the Law of Restitution*.¹⁰⁰ The second position focuses upon the nature of the enrichment in that any expenditure by the defendant made as a result of receipt of the enrichment now diminishes the original enrichment.¹⁰¹ This position has generally been recognized by academic writers as involving two distinct steps: (1) a causative link between the receipt of the benefit and the defendant's change of position, and (2) that the defendant's change in position would make it inequitable for him or her to now be required to restore benefits to the plaintiff.¹⁰²

An initial threshold under either approach is whether a change of position defense is available to a wrongdoer. Opinion is divided on this issue. The disagreement appears about the type and extent of the wrongdoer's moral culpability or fault needed to justify denying the defense. Criminal wrongdoing usually involves moral turpitude. Where the action is based on illegality—Consumers' Gas has never been convicted of any offense against the *Criminal Code*—the defendant may argue that they innocently engaged in the alleged criminal activity. While this would be no defense to a criminal charge, it does go to the issue of whether the additional sanction of a restitution remedy is warranted in the first place. We return to the issues surrounding the policy objectives behind the legislation that make the agreement or conduct illegal and what civil response is necessary and justifiable. If the factors that animated our decision to allow a restitution action in the first place are to ensure that a wrongdoer does not profit from their wrong, it would seem anomalous to now allow a defense of change of position. Simply put, if innocence has not protected the defendant from a finding of illegality, or from a finding that restitution is necessary to further the

99. *See id.*

100. The formulation in GOFF & JONES, *supra* note 79, at 822, and following Lord Goff in *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 331 (Eng.), favors this approach.

101. *See* ROSS GRANTHAM & CHARLES RICKETT, ENRICHMENT & RESTITUTION IN NEW ZEALAND 333 (2000); Jonathan Dawe, *The Change of Position Defense in Restitution*, 52 U. TORONTO FAC. L. REV. 275 (1994).

102. *See* GRANTHAM & RICKETT, *supra* note 101, at 341; MCMEEL, *supra* note 87, at 435; VIRGO, *supra* note 81, at 711.

policy objective implicit in the legislation, then it should hardly protect the defendant now by way of a defense.

Even assuming that a change of position defense is available for a wrongdoer based on criminality or illegality, as currently conceived in Canada, it is probably not available in *Garland*. There is some similarity between *Garland* and the case of *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*¹⁰³ In that case, the receipt of royalties from the plaintiff had unjustly enriched the defendant municipality.¹⁰⁴ The municipality had used these payments to fund its general operations and, as a consequence, had set a tax rate on its residents reflecting the revenue stream from the plaintiff.¹⁰⁵ The court denied a change of position to the municipality because the fact of expenditure alone could not justify the defense. Expenditure would have to have been for some extraordinary project that would not have been undertaken but for receipt of the funds, before it could constitute a change of position.¹⁰⁶ By comparison, Consumers' Gas, as a regulated industry, can be likened to a public municipality. It had absorbed the LPP into its revenue stream as part of its regular operations and had not undertaken any particularly extraordinary expenditure with the funds.¹⁰⁷

My arguments favor the dissenting opinion of Borins J.A. How? There is another reason for favoring a restitution response in *Garland*. If Consumers' Gas is required to refund the LPP, then this will have obvious repercussions on its financial accounts. Surely, this will be an issue before the OEB at Consumers' Gas's next request for a rate adjustment. It is right that the problem should be laid at the feet of the body that must claim some responsibility for its incursion.

CONCLUSION

In *Peel (Regional Municipality) v. Canada*,¹⁰⁸ McLachlin J. posited a series of tensions in the development of restitution in

103. (1975), 55 D.L.R. (3d) 1 (Can.).

104. *See id.*

105. *See id.* at 6.

106. *See id.* at 13.

107. Dickson J. in dissent also rejected this same argument in *Hydro Electric Commission of Nepean v. Ontario Hydro*, (1982), 132 D.L.R. (3d) 193, 195–219 (Can.).

108. (1992), 98 D.L.R. (4th) 140 (Can.).

Canada. In particular, she distinguished between two doctrinal approaches: the “traditional category approach” (building upon established categories where restitution had been awarded in the past) and the “principled approach” (building upon the unjust enrichment principle of benefit, impoverishment, and absence of juristic reason).¹⁰⁹ McLachlin J. also called for a third approach:

[O]ne which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery; one which charts a predictable course without falling into the trap of excessive formalism.¹¹⁰

The majority in *Garland* cogently illustrates what happens when McLachlin J.’s approach is not followed. Specifically, the unjust enrichment principle is threatened to be reduced to meaningless cant if we are not careful to carry over or create new organizational structures used to classify claims of restitution.

109. *Id.* at 151–52.

110. *Id.* at 153.