

UNJUST FACTORS, ABSENCE OF JURISTIC REASON AND THE DEVELOPMENT OF CANADIAN UNJUST(IFIED?) ENRICHMENT LAW

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I. INTRODUCTION

The common law has traditionally organized its law of unjust enrichment by unjust factors. That unjust factor might, for example, be mistake, and all legal systems permit a party who pays money labouring under a mistake to recover the payment. By contrast, civilian and mixed systems (such as Germany, Scotland, and South Africa) have organized their law of unjustified enrichment by reference to an absence of basis structure. A civilian or mixed system asks what basis or reason there is for the retention of the asset or money. In other words, rather than asking for a positive reason to give up the money—the mistake—it asks for a positive reason to keep it—for example, a valid gift. If there is none then, absent knowledge that there is no valid basis, restitution follows. McInnes has called this the difference between “restitution unless . . .” and “no restitution unless . . .”¹

There is an ongoing debate in both English and Canadian law as to whether the law should be seen as following the unjust factors approach (which, despite the young age of the subject and the controversial nature of

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¹ See Mitchell McInnes, “Garland’s Unitary Test of Unjust Enrichment: A Response to Professor McCamus” (2011) 38:2 Adv Q 165, at 169–71 [McInnes, “Garland’s Unitary Test”].

it, I will describe as the “traditional” approach) or if it should move to the absence of basis approach. In England, the House of Lords (HL) referred to the debate.² Peter Birks, shortly before his death, became convinced, and argued very strongly in his last book, that this shift had to happen.³

Canadian common law now talks in terms of absence of juristic reason. Introduced into Canadian law by *Pettkus v Becker*,⁴ it is uncertain whether the term was taken seriously at first. Nevertheless, after the Supreme Court of Canada (SCC) elucidated it as a two-stage test for liability in *Garland v Consumers' Gas Co.*,⁵ it is now more widely accepted (at least in the eyes of Mitchell McInnes). Once it is proven that the defendant is enriched and that there is a corresponding deprivation of the claimant, the claimant recovers the payment not because there was a positively proven error, but because no basis can be found (e.g., a gift) for the defendant to retain the money. McInnes believes that a limited reconciliation between the two systems is possible and that the old jurisprudence based on unjust factors is still of relevance.⁶ It is not clear that McInnes's interpretation of *Garland* is universally accepted. John McCamus is McInnes's most prominent critic and the debate has run for over a decade.

The first substantive part of the paper (Part II) outlines the two structures of unjust enrichment, and briefly defends the idea that there are just two—at least in relation to what I shall call the “performance claim”. Part II B3 outlines a debate in South Africa between Jacques du Plessis and Helen Scott. Scott has attempted recently to show that the traditional South African view that its law is founded on absence of basis is not

² See e.g. *Deutsche Morgan Grenfell v IRC*, [2006] UKHL 49 at paras 45–49, [2007] 1 AC 558 [*Deutsche Morgan*].

³ Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) ch 5 [Birks, *Unjust Enrichment*].

⁴ [1980] 2 SCR 834 at 848, 117 DLR (3d) [Pettkus]. It had cropped up earlier in an *obiter* comment by the majority in *Rathwell v Rathwell*, [1978] 2 SCR 436, 83 DLR (3d) 289.

⁵ 2004 SCC 25, [2004] 1 SCR 629 [*Garland*].

⁶ McInnes, “Garland's Unitary Test”, *supra* note 1 at 194.

accurate and really makes heavy use of unjust factors.⁷ I show in Part II B2 that, properly understood, the civilian causes of action, known as *condictiones*, are mutually exclusive. This is particularly important in terms of the lack of overlap between the *condictio indebiti* and *condictio causa data causa non secuta*. The second substantive part of the article (Part III) outlines the development of Canadian law. Comparisons with the South African debate may be helpful for Canadian lawyers as there are some parallels to be drawn between the two conversations. Essentially the point of this paper is this: the comparative perspective demonstrates that taking the absence of juristic reason formula too seriously destabilizes Canadian law. This matters. It is not a matter just of theoretical purity. A stable analysis enables clarity of thought and enables us, for example, to ensure that like cases are treated alike. Even if the two systems, fully developed, give much the same answers in many cases, they rely on different principles and different concepts, and analysing case law founded on one set by reference to the other is almost certain to lead to confusion and ultimately wrongly decided cases.

The argument is a complex one and will proceed as follows. The *Garland* formula, as discussed in Part III A1, is somewhat imprecise and needs some glossing if it is to fit within the civilian model proposed by McInnes. I discuss McInnes's analysis, and the counteranalysis of McCamus in Part III A2, where I distinguish between absence of juristic reason as a cause of action and as a general principle. In Parts III B and C, I attempt to gloss *Garland* to fit with McInnes' analysis. One of the lessons from Part II is that to work as a civilian model *Garland* must either be one cause of action, as McInnes suggests, or the two limbs of *Garland* must be mutually exclusive causes of action, like the *condictio* claims in Scotland or South Africa. In Part III D1, I show that the case law cannot be analyzed in this way. The two limbs of *Garland* are not exclusive, and are not intended to be. No plausible gloss on the cases fits a civilian system, or to put it better, the best civilian gloss developed in Parts B and C cannot be made to fit the

⁷ Helen Scott, *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (Oxford: Hart, 2013) [Scott, *Unjust Enrichment*].

cases. The SCC sees a good deal of variety and variation in unjust enrichment; in particular, the inclusion of the family home cases makes the category much more heterogeneous than the *Garland* formula really reflects. This heterogeneity may simply reflect that unjust enrichment is in Canada a repository for difficult cases (like the family home) dealt with elsewhere in other common law systems. Finally, I suggest in Part III D2 that McCamus's view of the formula as reflecting a general principle of "absence of juristic reason" is apt to mislead.

II. TWO DIFFERENT STRUCTURES OF THE LAW OF UNJUST ENRICHMENT

We can divide this section into a number of subsections. Firstly, we outline the structure of a common law and then, secondly, a civilian system of unjustified enrichment. This is important. McInnes suggests that the old and new law in Canada can be integrated; the justification he gives for this is that both systems are founded on a deep respect for the autonomy of the parties and that philosophical unity allows for the two approaches to be reconciled in a way that allows Canadian courts recourse to the old law.⁸ In South Africa, the question is also to what extent unjust factors and absence of basis can coexist and what role those ideas play in the law of unjustified (or unjust) enrichment. The debate, the details of which we come to later, should therefore be instructive to Canadian lawyers.

One final point needs to be made. There are only these two options; the two systems cannot be sensibly mixed or merged into a hybrid. Obviously in an unjust factors system we can have more or fewer recognized unjust factors, or in a civilian absence of basis system the law can be adjusted to suit local conditions. Scots law is not the same as South African; nor is German the same as French; nor is English law the same as Australian or New Zealand law. However, broadly speaking, it is impossible to conceive of any other way to decide on unjust enrichment other than "restitution if" or "restitution unless". We either start from the view that there is a positive reason to grant restitution, and then bar it, or from the view that the absence of a basis justifies restitution and then find limits on

⁸ McInnes, "Garland's Unitary Test", *supra* note 1 at 194–95.

that. Lionel Smith denies this. He argues that Roman law, from which the “civilian” systems are derived, was partly absence of basis—the *condictio sine causa*—but also had claims for mistake (*condictio indebiti*) and failure of consideration (*condictio causa data causa non secuta*).⁹ This is, as we see later, a misunderstanding of the civilian *condictio* claim, which is, at least in contemporary law, usually organized around a concept of “performance”. By this I mean a transfer with a putative purpose, for example, a payment with the purpose of paying a debt (which in fact does not exist). Nonetheless, in cases where the claimant’s action is based on him having repaired the defendant’s car, mistakenly thinking the car is his own, Smith is absolutely right in saying that it requires a civilian court to give primacy to the mistake.¹⁰ There is no performance in the mistaken repair case because the repairer has no intent to benefit the car owner. Smith is also right that in some systems where the claim is for money a different set of rules is used as for other types of enrichment such as services.¹¹ Yet there is disquiet in some quarters about that in civilian jurisdictions. In South Africa, Jacques du Plessis has argued that the same rules should logically apply to both sorts of enrichment.¹² This paper is primarily concerned with “performance claims”.

In Part B3, however, I raise a distinction that emerges from the South African debate between the **reason** for restitution and mere **requirements** for the claim. Absence or failure of a given purpose is a reason for restitution. Mistake might also be. But they cannot both be the ultimate reason for restitution on the same facts, and in those Civil law systems that require affirmative proof of mistake it is not the ultimate reason or rationale behind the claim; the ultimate reason is the absence of the liability to pay.

⁹ Lionel Smith, “Demystifying Juristic Reasons” (2007) 45:2 Can Bus LJ 281 at 286–87 (he says this is how South African, French (including Quebecois), and probably Scots law work in the modern day: *ibid* at 287) [Smith, “Demystifying”].

¹⁰ Smith, “Demystifying” at 288.

¹¹ *Ibid* at 288–89.

¹² Jacques du Plessis, *The South African Law of Unjustified Enrichment* (Cape Town: Juta, 2012) at 102 [Du Plessis, *South African Law*].

A. COMMON LAW SYSTEMS

Common law systems rely on unjust factors. Peter Birks—the father in many ways of the English law of unjust enrichment—proposed a number of probanda in the 1980s, before he reconceptualized unjust enrichment in terms of absence of basis.¹³ Firstly, was the defendant enriched? Secondly, was the defendant enriched “at the expense of the claimant”? Thirdly, was there a cause of action, or unjust factor? In Birks’s original account of the law of restitution, typically this might be mistake or failure of consideration. In a mistake claim after *Barclays Bank Ltd v WJ Simms Sons & Cooke (Southern) Ltd*,¹⁴ however, the claimant must prove merely that the mistake he made caused him to make the payment or the transfer. As in every system, if the claimants were obliged to make the payment or transfer it cannot be recovered.¹⁵ A failure of consideration claim entails proof that the claimant made the payment, transfer, or provided services (usually) on the basis of some contractual or extra-contractual counter-performance or expected future event, which never in fact occurred. If there is a contract, or purported contract, restitution is impossible unless it is found to be void, or terminated for (for example) breach of contract.¹⁶ Typically a mistake and failure of consideration claim can, in English law, run concurrently; we see in the swaps cases, for example, that both a failure of consideration and mistake claim were successful.¹⁷

¹³ Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Oxford University Press, 1989) at 21.

¹⁴ (1979), [1980] QB 667, [1979] 3 All ER 522 (UK).

¹⁵ See Pablo Gallo, “Unjust Enrichment: A Comparative Analysis” (1992) 40:2 Am J Comp L 431 at 442.

¹⁶ This explains why (unless it can be apportioned) the contract needs to be terminated or avoided before an unjust enrichment claim arises. See Tariq A Baloch, *Unjust Enrichment and Contract* (Oxford and Portland, Oregon: Hart, 2009).

¹⁷ See e.g. *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington*, [1996] UKHL 12, [1996] AC 669 (failure of consideration); *Kleinwort Benson Ltd v Lincoln City Council*, [1998] UKHL 38, [1999] 2 AC 349 (mistake).

B. THE CIVILIAN SYSTEMS

1. OBJECTIVE AND SUBJECTIVE APPROACHES

Civilian and mixed systems rely on there being an absence of basis. There are different possible bases or purposes in a civilian system. These are transfers: *causa solvendi*, *donandi*, *obligandi*, and *ob rem*, respectively transfers made to discharge a debt, make a gift, create an obligation, or induce action in another. Where there is therefore no debt to be discharged or valid gift made, German law provides a single claim, referred to as the “performance claim” (or “*Leistungskondiktion*”) under paragraph 812 of the German Civil Code (*BGB*).¹⁸ The “performance” referred to is the purposive transfer, deliberate conferral, or payment of money. The action lies where the reason for the performance, transfer, or payment fails. The standard, but not universally accepted, German method of finding a legal ground (for the transfer) is to look at the intention or purpose of the claimant. This is the subjective method of identifying the putative basis of the transfer and involves the claimant’s pointing to one putative basis—and only one—that fails.¹⁹ In Germany, therefore, we might say that my purpose in making the payment was to discharge a debt. There was no debt. My purpose failed because there was no legal ground (*Rechtsgrund*) and therefore I recover the payment. If I pay to discharge a non-existent debt, that is my only legally relevant purpose. My purpose is not to obtain counter-performance (at least my legally relevant purpose is not). This idea

¹⁸ German Civil Code (*Bürgerliches Gesetzbuch*), trans by Langenscheidt Translation Service, online: Bundesministerium der Justiz <www.gesetze-im-internet.de/englisch_bgb> at §812 I 1 [*BGB*]. The paragraph also contains three other claims hidden in the “in sonstiger Weise” (in another way) phrase: these are the *Eingriffskondiktion*, *Rückgriffskondiktion*, and *Verwendungskondiktion*.

¹⁹ See Helen Scott, “Restitution of Extra-Contractual Transfers: Limits of the Absence of Legal Ground Analysis” (2006) 14:1 RLR 93 at 100 [Scott, “Restitution of Extra-Contractual Transfers”]; Reinhard Zimmermann & Jacques du Plessis, “Basic Features of the German Law of Unjustified Enrichment” (1994) 2:1 RLR 14 at 24; *BGB*, *supra* note 16 at § 812, no 137; Dieter Reuter & Michael Martinek, *Ungerechtfertigte Bereicherung* (Tubingen, Germany: Mohr Siebeck, 1983) 107–10.

of legally relevant purpose is important; although the focus is on the purpose of the claimant, that purpose is in most cases inferred from the surrounding circumstances. In Scots and South African law, there is a further subdivision between different *condictiones* or causes of action. For example, the *condictio indebiti* lies where the inferred purpose is to discharge a debt that does not exist. A different cause of action, the *condictio causa data causa non secuta*, lies where the purpose is extra-contractual.

The objective basis by contrast finds a legal ground or lack of it, irrespective of the parties' intention, inferred or otherwise. It does this by multiplying sets of facts where transfers are justified and saying that if none are present, restitution follows. The claimant never has to prove anything about his purpose, although since invalidity alone justifies restitution it is extremely difficult to explain why his knowledge that the transfer was not due should be a defence. This view also leads to the argument that civilian systems require the impossible proof of a negative.²⁰ Some Scots institutional writers seem to have taken the view that their law followed such a pattern.²¹ More recently Evans-Jones suggests Scots law is more likely to be subjective in character.²² In English law, although the judiciary has not been warm towards the development of an absence of basis approach, there were hints that the HL in *Deutsche Morgan Grenfell v IRC*²³ thought the

²⁰ See Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12:1 SCLR (2d) 211 [Smith, "The Mystery"].

²¹ See e.g. George Mackenzie, *The Institutions of the Law of Scotland*, 5th ed, Book 3, Title 1 (Edinburgh: National Library of Scotland, 1719) I 3.1; Robin Evans-Jones, "Some Reflections on the Condictio Indebiti in a Mixed Legal System" (1994) 111:4 SALJ 759. In South Africa JC van der Walt suggested an objective system as well, see Scott, "Restitution of Extra-Contractual Transfers", *supra* note 19 at 98, translating JC van der Walt, "Die Condictio Indebiti as Verrykingsaksie" (1966) 29 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 220 at 222.

²² Robin Evans-Jones, *Unjustified Enrichment: Enrichment by Deliberate Conferral: Condictio*, vol 1 (Edinburgh: W Green & Son Limited, 2003) para 2.05 [Evans-Jones, *Unjustified Enrichment*].

²³ *Deutsche Morgan*, *supra* note 2.

issue would be objective. Lord Hoffmann remarked for instance that whether there was a valid *causa* was a matter of objective inquiry.²⁴

Adoption of the subjective mode has an important consequence. In English law relief is given in a mistaken payment case because the payor's intention does not cover the case; the payment was only intended to be made if the facts were as the claimant thought they were, not as they actually were. If we by contrast say that the reason why he receives relief is that he paid in accordance with a basis or subjective purpose which it was later discovered was not present or fulfilled, we are saying (almost) exactly the same thing in different words. This means that McInnes is quite right to point to the two systems' being rooted in a respect for the parties' autonomy.²⁵ It also explains why it is not wholly irrational for Scots²⁶ and South African law²⁷ to have a requirement the claimant show a mistake in their *condictio indebiti* actions; the mistake requirements are not bizarre imports from English law, but have a respectable Roman vintage,²⁸ and the error requirement, which must be a mistake as to liability, is tied into the requirement that no debt or other valid obligation to pay exists. The mistake requirement has largely disappeared from German law. Under §812 of the *BGB*, there is no requirement to prove that the claimant has made a mistake. It has not completely disappeared, however, in that, as we have seen, there remains a bar to relief if the claimant knew the money was not owing.²⁹ South Africa also has an excusability requirement; the mistake the

²⁴ *Ibid* at para 28.

²⁵ McInnes, "Garland's Unitary Test", *supra* note 1 at 194–96; see Smith, "Demystifying", *supra* note 9 at 284 (Smith argues the approaches are not too different, but crucially, they *are* different).

²⁶ See e.g. *Morgan Guaranty Trust Co of New York v Lothian Regional Council* (1994), 1995 SC 151, 1995 SLT 299 (Ct Sess Scot).

²⁷ See e.g. *Willis Faber Enthoven v Receiver of Revenue* (1991), [1992] (4) SA 202 (AD), [1992] 4 All SA 62 (SAfr SC).

²⁸ For a discussion on how error was interpreted in Scots and South African law and whether it was influenced by English and Roman law, see Jacques du Plessis, "Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems" (2003) 78:1&2 Tul L Rev 219 at 242–47.

²⁹ See *BGB*, *supra* note 18 at §814.

claimant makes must be one that is excusable. If the claimant's mistake is careless, relief will be denied. This rule is largely indefensible,³⁰ and has been abolished in Scotland. It is difficult to find anyone in South Africa who will defend it.

2. NON-CONCURRENCY OF CLAIM IN THE MIXED SYSTEMS

The *condictiones* are mutually exclusive causes of action. If one lies, no other lies. This is because when the payor makes a payment or transfer he only ever has one purpose in mind. This is a critical distinction with unjust factors. This is easy to see in systems like Germany where there is only one claim (although, even there, traces of older claims are still extant) but also holds good where there are different causes of action—the *condictiones*. The *condictio causa data causa non secuta* (sometimes shortened to *condictio causa data*, or *condictio cd*) is not therefore an equivalent to the failure of consideration unjust factor, despite the similarities, and the *condictio indebiti* is not—despite the similarities—a mistake action.

It is instructive to examine the Scots decision in *Cantiere San Rocco v Clyde Shipbuilding & Engineering Co.*³¹ In that case, a set of marine engines were unable to be delivered to the Austrian shipbuilders (Austria at the time had a coastline where Slovenia and Croatia are today) because of the outbreak of war with Austria in 1914. Lord Shaw said, “It is an admitted fact in the case that that consideration has entirely failed. Therefore, this, as I say, would be a typical case of restitution under the Roman law and one for the application of the maxim *causa data causa non secuta*.”³² There was performance in the form of payment, but no counter-performance in the form of delivery. The parties had agreed to the exchange and so Lord Shaw felt it looked like both failure of consideration and a *condictio causa data*

³⁰ See Du Plessis, *South African Law*, *supra* note 12, at 135–39; Helen Scott, “The Requirement of Excusable Mistake in the Context of the *Condictio Indebiti*: Scottish and South African Law Compared” (2007) 124:4 SALJ 827 at 859.

³¹ (1923), [1923] UKHL 1, [1924] AC 226 (HL (Scot)) [*Cantiere San Rocco* cited to UKHL].

³² *Ibid* at 251.

causa non secuta.³³ Ever since, the law in Scotland has affirmed that the *condictio causa data causa non secuta* can be used in frustration cases. In *Chandler v Webster*,³⁴ the claimant had rented a room to view the coronation procession of Edward VII. Both parties agreed that this was the reason for the hire. The coronation was cancelled due to the king's ill health, but because the contract was initially valid, no restitution was possible. As a valid contract there was consideration, and no failure of consideration could be found.³⁵ In contrast, the HL in *Cantiere San Rocco* avoided the result that no restitution was possible by saying the parties performed in consideration for counter-performance.³⁶ The result in *Chandler* is plainly wrong, as it confuses restitution requirements with those of contractual validity.

In England, the case of *Fibrosa Spolka Ackjyna v Fairbairn Lawson Combe Barbour Ltd*³⁷ also makes clear that consideration refers to performance, and therefore, in cases of termination of contracts for breach (or frustration on the facts of that case)³⁸ restitution is made via the unjust factor of failure of consideration.³⁹ However, as Evans-Jones has pointed out, the logic of the civilian system is that if the contract was valid when formed, the parties pay or perform to discharge a debt or other obligation. They do not pay to obtain counter-performance. The relevant basis is *causa solvendi*, not *ob rem*. This implies that not only is there a valid basis for the payment, but the contract should be unwound within contract.⁴⁰ The rule

³³ See *Cantiere San Rocco*, *supra* note 31 at 256.

³⁴ [1904] 1 KB 493, 1904 WL 12844 (CA) [*Chandler* cited to KB].

³⁵ *Ibid* at 499.

³⁶ *Cantiere San Rocco*, *supra* note 31.

³⁷ (1942), [1943] AC 32 at 48, [1942] 2 All ER 122 (HL (Eng)).

³⁸ Now in England dealt with via the *Law Reform (Frustrated Contracts) Act, 1943* (UK), 6 & 7 Geo VI, c 40.

³⁹ See Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2012) 319–20.

⁴⁰ See Robin Evans-Jones, “Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law” (1998) 114:2 Law Q Rev 228 at 238; Robin Evans-Jones,

that the *condictio causa data causa non secuta* applies in frustration cases is, however, probably too well dug in to be uprooted now. By contrast, Scots law sometimes takes the Evans-Jones view, which can be seen in *Connelly v Simpson*.⁴¹ In this case, the pursuer reclaimed money paid for shares in a company because the defender had in breach of contract put the company into liquidation, thus making the share transfer impossible. The majority agreed that the *condictio causa data causa non secuta* was unavailable in termination for breach cases: the party had paid to discharge an obligation that did in fact exist.⁴² The consequences of termination are dealt with as part of the law of contract. More recently, in the case of *Stork Technical Services (RBG) Ltd v Ross's Executor*, Lord Tyre in obiter dicta confirmed this result.⁴³ Stork agreed to build a production line at SGL's factory.⁴⁴ A dispute arose and an adjudicator appointed under the contract found Stork liable to pay just over £1m.⁴⁵ That adjudication was set aside (or reduced, as it is known in Scots law terminology) and Stork sought to recover its fees for the work.⁴⁶ The case involved reduction or setting aside of a settlement rather than termination of a contract for breach, but as Lord Tyre said,

“Roman Law in Scotland and England and the Development of One Law for Britain” (1999) 115:4 Law Q Rev 605 at 607–14. On termination for breach, see Hector L MacQueen, “Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective” (1997) Acta Juridica 176 at 18. A complication for Evans-Jones is that MacQueen accepts that the appropriate action might be the *condictio ob causam finitam*: where a purpose is temporarily achieved, but then fails. Even if this should be the action in frustration cases, it is not the *condictio cd*. See MacQueen, *supra* note 40 at 190; Evans-Jones, *Unjustified Enrichment*, *supra* note 22 at para 2.07.

⁴¹ (1993), 1994 SLT 1096, [1993] SC 391 (Ct Sess Scot).

⁴² *Ibid* at 1106 (Lord McCluskey); *ibid* at 1108 (Lord Sutherland). In the Canadian context, Lionel Smith has argued that the contract scenario just described simply proves that valid obligations do not always bar unjust enrichment claims: Smith, “Demystifying”, *supra* note 9 at 292.

⁴³ 2015 SLT 160 at paras 34, 35, [2015] CSOH 10A (Ct Sess Scot).

⁴⁴ *Ibid* at para 1.

⁴⁵ *Ibid* at para 2.

⁴⁶ *Ibid* at para 4.

where a party to a contract had made a payment in anticipation of a counterpart performance that never occurred, restitution of the price was available.⁴⁷ That availability did not depend upon the application of the *condictio causa data causa non secuta*.⁴⁸

It is notable that the consequences of termination of contract for breach in German law are also dealt with under contract even when restitutionary.⁴⁹ The position is messier in South African law where the remedy is termed “cancellation for breach”, and Sally Hutton has argued that the *condictio causa data causa non secuta* ought to lie here.⁵⁰ Saul Miller disagrees, however, calling it unequivocally a contractual remedy.⁵¹ Although all these systems allow restitution, the classification of the action may make a difference as to whether the defence of change of position can be allowed. That defence is one that the defendant has relied on to his detriment (usually through spending the money) on the receipt and should not now be forced to repay the money.⁵² In South Africa, for instance, debate rages around whether the fact the defendant has breached his contract should preclude the defence; a debate irrelevant if the claim is in unjust enrichment.⁵³

⁴⁷ *Ibid* at para 34.

⁴⁸ *Ibid*. See also the case note in Martin Hogg, “Restitution Following Termination of Contract: A Contractual or Enrichment Remedy?” (2015) 19:2 Ed L Rev 269.

⁴⁹ See *BGB*, *supra* note 18, §346ff; Reinhard Zimmermann, “Restitution after Termination for Breach of Contract: German Law after the Reform of 2002” in Andrew Burrows & Alan Rodger, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 323 at 326–27.

⁵⁰ Sally J Hutton, “Restitution After Breach of Contract: Rethinking the Conventional Jurisprudence” (1997) *Acta Juridica* 201 at 212–17.

⁵¹ Saul Miller, “Unjustified Enrichment and Failed Contracts” in Reinhard Zimmermann, Daniel Visser & Kenneth Reid, eds, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2005) 437 at 445. Curiously, in South Africa the classification may depend on whether the enrichment is money or “non-returnable” benefits.

⁵² See Elise Bant, *The Change of Position Defence* (Oxford and Portland, Or: Hart, 2009).

⁵³ See Miller, *supra* note 51 at 448–49.

Evans-Jones has defined the Scots *condictio causa data causa non secuta* as lying in cases where outside of contract the pursuer performs for a future purpose which failed to materialise;⁵⁴ certainly there is a clear rule that outside frustration, the *condictio* cannot lie where there is a valid contract.⁵⁵ That future purpose might be the receipt of a specific quid pro quo from the transferee, or it might be the occurrence of a particular future event.⁵⁶ In South African law, there is more confusion about the relation with contract, but Daniel Visser has described the *condictio* as lying not where the performance was made to fulfil a present obligation, but where it was made to bring about a particular future result, such as counter-performance, or a given future event, such as marriage or the conclusion of an anticipated contract.⁵⁷ In English law, failure of consideration lies at common law in any case where counter-performance is not forthcoming. Therefore, where the contract is void, there can be failure of consideration. This is not true of the Civil law. Properly understood, where a party believes there to be a contract, he performs to discharge the obligation—not to receive counter-performance—and so the *condictio indebiti* exists if it is a void obligation, and only the *condictio indebiti*.⁵⁸ The *condictio causa data causa non secuta* only exists if the payor intended to induce counter-performance, despite his knowledge of the lack of obligation and the defendant fails to perform.⁵⁹ Other *condictiones* are likewise mutually exclusive. The *condictio ob turpem vel iniustam causam* in South African law invariably applies

⁵⁴ Robin Evans-Jones, “The Claim to Recover What Was Transferred for a Lawful Purpose Outwith Contract (Condictio Causa Data Causa Non Secuta)” (1997) *Acta Juridica* 139 at 142 [Evans-Jones, “The Claim to Recover”].

⁵⁵ See MacQueen, *supra* note 40 at 185.

⁵⁶ See Evans-Jones, *Unjustified Enrichment*, *supra* note 22 at para 4.01; Evans-Jones, “The Claim to Recover”, *supra* note 54 at 142.

⁵⁷ Daniel Visser, *Unjustified Enrichment* (Cape Town: Juta & Co, Ltd, 2008) at 455 [Visser, *Unjustified Enrichment*].

⁵⁸ *Ibid* at 268. But see the later discussion of *Legator McKenna Inc v Shea* (2008), [2008] ZASCA 144, 2010 (1) SA 35 (S Afr SC) [*Legator McKenna*].

⁵⁹ See Visser, *Unjustified Enrichment*, *supra* note 57 at 459–60.

where the contract is void for illegality.⁶⁰ Finally, the *condictio sine causa specialis* provides a mop up where there is no obligation, or the putative obligation is not owed to the recipient of the transfer.⁶¹

3. THE DU PLESSIS–SCOTT DEBATE IN SOUTH AFRICAN LAW

In 2013, Helen Scott published a book entitled *Unjust Enrichment in South African Law*.⁶² Her argument is that although it is normally thought that South African law is based on a civilian paradigm of the type described above, in fact it is in large measure based on unjust factors.⁶³ She reanalyzes the *condictio indebiti* in terms of different unjust factors, including failure of consideration.⁶⁴ We have already seen that there is an error requirement in the action additional to the requirement that the contract or other putative reason for the payment have been void. For Visser, the additional mistake requirement simply means that although the mixed systems recognize that there needs to be an absence of basis, there can be additional requirements, and he notes that German law has a defence to the action that the claimant knew the payment was undue.⁶⁵ For Scott, the matter is much more fundamental. She argues it is inherent in the mixed nature of South African law that the unjust factors have an important role.⁶⁶ Scott therefore devotes different chapters of her book to analyzing how the unjust factors of mistake, incapacity, and compulsion or duress⁶⁷ are reflected in the *condictio*

⁶⁰ See *ibid* at ch 7; Visser suggests at 418 that it could be accommodated by the *condictio indebiti*, although a distinction between void and illegal contracts is clearly tenable; the position of the *condictiones ob turpem vel iniustam causam* and *sine causa specialis* is peripheral to my argument, however.

⁶¹ It may lie between trustee and payee where the former makes an unauthorized payment, or where a bank pays believing there is a valid order to pay from its customer.

⁶² Scott, *Unjust Enrichment*, *supra* note 7.

⁶³ *Ibid*.

⁶⁴ *Ibid* at 15.

⁶⁵ Visser, *Unjustified Enrichment*, *supra* note 57 at 187–88; *BGB*, *supra* note 18, §814.

⁶⁶ Scott, *Unjust Enrichment*, *supra* note 7, at 188–92.

⁶⁷ See e.g. *Union Government (Minister of Finance) v Gowar*, 1915 AD 426.

indebiti.⁶⁸ In a paper later published in the 2014 Edinburgh Law Review following a symposium hosted by the Edinburgh Centre for Private Law, she reiterated the point and added failure of consideration to the list.⁶⁹ Her argument revolves around the decision of *Legator McKenna Inc.*⁷⁰ In that case, it was held that full counter-performance by the defendant would act as a bar to a *condictio indebiti* claim.⁷¹ In effect, we might say that the plaintiff's purpose in making his own performance is not just to discharge an obligation, but to induce counter-performance. If counter-performance is forthcoming, the plaintiff's purpose is achieved and there lies no cause of action. Essentially, failure of counter-performance is required in the *condictio indebiti*. To the extent that failure of counter-performance triggers the *condictio causa data causa non secuta*, the differences between the *condictiones* start to dissolve and the actions potentially lie concurrently. The *condictio indebiti* becomes a vehicle for a mistake, duress, or failure of consideration claim, and the *condictio causa data* is just another vehicle for a failure of consideration claim.

The symposium also involved a paper by Jacques du Plessis. He argued that in South Africa under the *condictio indebiti*, the mistake must be a mistake as to liability; in English law it can be a mistake as to pretty much anything at all, so long as it causes the payment.⁷² In South Africa, the requirement that it be a mistake as to liability is tied to the requirement that the transferor not in fact owe the money.⁷³ The mistake, du Plessis argues, does not exist if there is liability to pay, and the presence or absence of that

⁶⁸ Scott *supra* note 7 at ch 2–5.

⁶⁹ Helen Scott, “Rationalising the South African Law of Enrichment” (2014) 18:3 Ed L Rev 433 at 441. For a more explicit exposition of this, see Helen Scott, “South Africa” (2009) 17:1 RLR 221 at 226–27; Scott, *Unjust Enrichment*, *supra* note 7 at 441–42.

⁷⁰ *Supra* note 58.

⁷¹ *Legator McKenna*, *supra* note at para 30.

⁷² Jacques du Plessis, “Labels and Meaning: Unjust Factors and Failure of Purpose as Reasons for Reversing Enrichment by Transfer” (2014) 18:3 Ed L Rev 416 at 421–23 [Du Plessis, “Labels and Meaning”].

⁷³ See *ibid* at 421.

liability is therefore the central issue.⁷⁴ In English law, by contrast, the emphasis is on the mistake rather than the absence of liability; the claimant may find the claim barred by a valid obligation, in which Goff and Jones call a “justifying factor”.⁷⁵

Du Plessis, therefore, has the *condictio* claims operate at the level of substantive cause of action and argues that mistake operates at a different level; it is a prerequisite for relief, but not the ultimate reason for it as it is in English law. One might argue that this is odd. After all, if it is a requirement of the cause of action, how can its satisfaction not be a reason for the claimant’s success? In one sense of the word “reason” this is right, but what du Plessis is expressing is that the essence of the cause of action in the *condictio indebiti* is not the mistake or the lack of freely chosen action. Removing the mistake requirement does not change the essence of the action. In Germany, it has been attenuated to a defence of knowledge. Du Plessis explains that the thinking behind the mistake (or duress) requirement is not to show that the payor did not act freely, but to demonstrate that the transfer was not intended as a gift.⁷⁶ Although this has not occurred yet and du Plessis does not go so far as to suggest that it should, this implies that the real logic of the action dictates neither a mistake requirement, nor a defence of knowledge, but rather, to defeat the action, the defendant needs to put up a claim that the transfer was in fact intended as a gift (or that the claimant, as happens under an objective system, needs to prove the absence of a gift). This is a consequence of the fact that what unifies the *condictiones* is that the transfer was in accordance with a putative (but in fact non-existent or invalid) liability or legal basis and, critically, each *condictio* deals with a unique manner in which the putative basis fails.

To make the point, du Plessis describes mistake and duress as “weak” unjust factors, as opposed to the “strong” unjust factors found in English

⁷⁴ Du Plessis, “Labels and Meaning” at 424.

⁷⁵ Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff and Jones: The Law of Unjust Enrichment*, 8th ed (London, UK: Sweet and Maxwell, 2011) ch 2–3.

⁷⁶ See du Plessis, “Labels and Meaning”, *supra* note 72 at 425.

law.⁷⁷ To readers unfamiliar with South African law this might seem like dancing on the head of a pin. What difference can it make whether your unjust factors are strong or weak? Du Plessis, however, describes this as an important distinction, based on the secondary importance of the role played by the mistake, as opposed to the absence of basis. We might state that in a common law system mistake, duress, and undue influence all reflect a concentration on the party's autonomy and might be justified by the need to respect and defend that. From a comparative perspective, the vital point to note is that mistake and duress are not just "relevant at some point" in English law. They feature strongly in a system where, as du Plessis puts it, "problems with volition are a primary basis for classification."⁷⁸ Such problems are not the primary focus of a performance claim in Civil law. Du Plessis goes on to argue that Scott, by raising the prominence of mistake, duress, or failure of consideration, reduces the *condictio* claims from the status of substantive cause of action to a mere form of action: a procedural form of words at best. She also calls mistake an unjust factor across a wide range of differing cases, arguing at one stage that the defence that the claimant knew the transfer was not obligatory reflects a disguised unjust factor of mistake.⁷⁹ The role that defence plays in German law, though, is rather different to mistake in South African law: it is not part of the cause of action in Germany. Lionel Smith therefore commits—du Plessis would claim—the same error as Helen Scott. Smith, as we saw earlier, claims that Scots, South African law, and the French family of systems mix together unjust factors, which he calls reasons for restitution, and absence of basis. Indeed, like Scott, du Plessis also suggests that the defence of knowledge reflects the same thinking as the unjust factor of mistake.⁸⁰

⁷⁷ See *ibid* at 429–30.

⁷⁸ See du Plessis, "Labels and Meaning", *supra* note 72 at 429.

⁷⁹ *Ibid* at 422; Scott, *Unjust Enrichment*, *supra* note 7, at 191.

⁸⁰ See Smith, "Demystifying", *supra* note 9; du Plessis, "Labels and Meaning", *supra* note 72 at 430.

III. CANADIAN UNJUSTIFIED ENRICHMENT LAW

Part II cleared the ground, establishing that in contrast to the common law's unjust factors, the civilian *condictio* claims are mutually exclusive and never lie concurrently because the *condictio indebiti* and the *condictio causa data causa non secuta*, for example, deal with the consequences of the failure of different legal bases or underpinning purposes of the transfer—and there is (or should be) only ever one legally effective purpose. This Part looks to see what that analysis can teach us about the current position of Canadian law. Canadian restitution law came alive in *Degelman v Guaranty Trust Co of Canada*,⁸¹ where the SCC recognized the existence of a principle of unjust enrichment; it then developed through the use of what we have come to call unjust factors.⁸² After *Garland*, McInnes argued that the SCC had indicated a desire and intention to switch to a civilian system.⁸³ John McCamus argued that it had not.⁸⁴ This disagreement matters. Canadian law cannot sensibly decide limitation issues without deciding whether there are one or more (possibly concurrent) causes of action,⁸⁵ and when (why and how) they accrue. This might mean that whether different actions can be combined and run simultaneously might change the result if one is time barred but the other not. There are cases in Canadian courts where the “cause of action in unjust enrichment” is pleaded,⁸⁶ which on its face suggests that there is only one cause of action. At the same time, mistake,

⁸¹ [1954] SCR 725, [1954] 3 DLR 785 [*Degelman* cited to SCR].

⁸² *Ibid* at 728, 734.

⁸³ See e.g. McInnes, “Garland’s Unitary Test”, *supra* note 1 at 197.

⁸⁴ See Peter Maddaugh & John McCamus, *The Law of Restitution in Canada: Looseleaf Edition* (Toronto: Carswell, 2004) para 3:12.

⁸⁵ In *Salna v Awad*, the Alberta Court of Appeal said that the limitation period cannot start to run until all elements of are satisfied: 2011 ABCA 20 at paras 29–30, 42 Alta LR (5th) 158. One question this raises is: when does an absence of something arise?

⁸⁶ See e.g. *Brouillette Building Supplies Ltd v 1662877 Ontario Inc*, 2009 CanLII 3323, 2009 CarswellOnt 96 (ONSC); 321665 *Alberta Ltd v Mobil Oil Ltd*, 2010 ABQB 522, 3 WWR 547. See also M M Litman, “The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust” (1988) 26:3 Alta L Rev 407.

failure of consideration, duress, and undue influence would count as four separate causes of action.

Part A of this section aims to trace the serious emergence of juristic reasons analysis in the SCC, post-*Garland*, and explains the course of the McInnes–McCamus debate. Parts B and C conduct something of a thought experiment to ask how Canadian law might develop a more civilian system of performance claims. Part D examines whether the development of Canadian law has in fact proceeded along those lines and the extent to which McInnes is right in saying that Canada is largely succeeding in switching to a civilian system. While John McCamus might decry attempts to turn Canadian common law into a fully-fledged civilian absence of basis system, he does not deny that a significant number of cases have simply applied the *Garland* analysis to dire results.⁸⁷ In two papers from 2008 and 2011 I argued that it would prove impossible to move English law from an unjust factors approach to an absence of basis approach, without in the first place upsetting contract law concepts, and in the second place upsetting established property and trusts principles.⁸⁸ The relationship between trusts and, in particular, the constructive and resulting trust in Canada and the law of unjust enrichment, is a larger question than can be comfortably asked here. I hope to show in Part D that the SCC’s intention is not what McInnes believes. There is therefore a sore need for a SCC decision to repair the destabilizing impact of *Garland*. This is not to say, however, that John McCamus wins the day. His views too are potentially destabilizing, albeit for a slightly different reason, to which we return later.

⁸⁷ See John D McCamus, “Forty Years of Restitution: A Retrospective” (2011) 50:1 Can Bus LJ 474 at 495–98. For two lower court examples, see *TD Canada Trust v Mosiondz*, 2005 SKQB 540 at paras 19–20, 272 Sask R 100 (suggesting that the law on mistake was only useful as a historical guide); *Annapolis (County) v Kings Transit Authority* 2012, NSSC 401 at para 56, (2012) 323 NSR (2d) 90 (expressly agreeing with McInnes’s analysis) [*Annapolis*].

⁸⁸ Duncan Sheehan, “Unjust Factors or Restitution of Transfers *Sine Causa*”, online: (2008) Oxford U Comparative L Forum 1 <ouclf.iuscomp.org/articles/sheehan.shtml> [Sheehan, “Unjust Factors”]; Duncan Sheehan, “Resulting Trusts, *Sine Causa* and the Structure of Proprietary Restitution” (2011) 11:1 OUCLJ 1 [Sheenan, “Resulting Trusts”].

A. ABSENCE OF JURISTIC REASONS AND UNJUST FACTORS

1. THE INTRODUCTION OF THE TEST: GARLAND AND SUBSEQUENT SUPREME COURT CASES

In *Garland*, customers of the gas company claimed penalty charges back on the basis that they constituted an illegal overcharge under the Canadian *Criminal Code*.⁸⁹ The SCC looked back over the divided case law with some decisions having picked up on the absence of juristic reason language in some of the family home cases,⁹⁰ and others using more familiar unjust factors language.⁹¹ The dichotomy had become, according to McInnes, “intolerable.”⁹² The Court in *Garland* said that the proper approach to unjust enrichment came in different parts: first, the plaintiff must show that the defendant was enriched; secondly, he or she must show that there is a corresponding deprivation.⁹³ Canadian law has come to use a “straightforward economic approach”⁹⁴ here. While English law talks of “at the expense of” the claimant and does not require that there be a precise matching of enrichment and deprivation, Canadian law does.⁹⁵

In *Garland*, Iacobucci J affirmed that there was a two-stage or two-limbed inquiry to the juristic reason analysis.⁹⁶ Firstly, the plaintiff must show that no juristic reason from an established category exists; this includes contract, donative intention, dispositions of law, and “other valid

⁸⁹ *Garland*, *supra* note 5 at paras 4–6.

⁹⁰ See e.g. *Pettkus*, *supra* note 4; *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621.

⁹¹ See e.g. *Canadian Pacific Air Lines Ltd v British Columbia*, [1989] 1 SCR 1133, 59 DLR (4th) 218.

⁹² McInnes, “Garland’s Unitary Test”, *supra* note 1 at 177. For a survey of pre-*Garland* law, see Chris DL Hunt, “The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada” (2010) 43:1 UBC L Rev 173 at 178–80.

⁹³ *Supra* note 5 at paras 44–47.

⁹⁴ *Kerr v Baranow*, 2011 SCC 10 at para 37, [2011] 1 SCR 269 [*Kerr*].

⁹⁵ *Ibid* at para 39.

⁹⁶ *Supra* note 5 at para 41.

common law, equitable or statutory obligations”.⁹⁷ At the second stage of the analysis, the prima facie case can be rebutted by the defendant showing that there is another reason to deny relief, bearing in mind both public policy and the parties’ reasonable expectations.⁹⁸ This reversal of the burden of proof is, as du Plessis would point out, unique. In South African law, for example, the plaintiff is required to prove all the elements of the action. There are three categories of cases under the second limb. Iacobucci J said the following:

It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment.⁹⁹

Iacobucci J called this a “distinctive[ly] Canadian approach”,¹⁰⁰ which was consistent with both the approach in Quebec and the “traditional ‘category’ approach” outlined in the case of *Peel (Regional Municipality) v Canada*.¹⁰¹ McLachlin J in *Peel* had outlined four overlapping classes of category in which claimants had succeeded in recovery: compulsion, necessity, ineffective transactions, and benefits transferred at the defendant’s request.¹⁰² McLachlin J did not seem to have seen the list as exhaustive, nor the categories as hermetically sealed from each other.

⁹⁷ *Ibid* at para 44.

⁹⁸ *Ibid* at para 45.

⁹⁹ *Garland, supra* note 5 at para 46.

¹⁰⁰ *Ibid* at para 42.

¹⁰¹ *Ibid* at para 47.

¹⁰² [1992] 3 SCR 762 at 789, 98 DLR (4th) 140 [*Peel*].

Iacobucci J's formula has come under heavy criticism for several reasons.¹⁰³ First, the list of juristic reasons is incomplete. It is not a closed list and perhaps cannot ever be closed. Iacobucci J's references (as quoted above) to the recognition of either a new category of juristic reason, or one confined to the particular facts gives some support to this.¹⁰⁴ Secondly, the list gives the impression of a mixture of unjust factors and absence of basis. Lionel Smith therefore says that "donative intention" is not a legal institution but a question of primary fact, the lack of which the plaintiff demonstrates through, for example, mistake.¹⁰⁵ This, as we see, is not quite right, but it does demonstrate the need for Canadian courts to get to grips with the idea of performance, if it is to achieve the result *McInnes*, for one, sees as necessary. Thirdly, the second limb leaves unwanted discretion to the courts and makes reference to an expectation interest often thought of as relevant to contract.¹⁰⁶ It is unclear what the distinction is between the second stage of the juristic reasons enquiry and defences properly so-called. In *Garland*, Iacobucci J in fact referred to this stage as "a category of residual defence".¹⁰⁷ Iacobucci J went on to decide that on the facts of the case the gas company had levied a charge that was in contravention of the *Criminal Code* and that this trumped the authorisation given by the Province of Ontario.¹⁰⁸ Consequently, he awarded restitution. Yet the result is dubious. The gas company had been given authority to generate a particular amount of revenue. There is no doubt that had they been barred from raising that revenue in one way they would have raised it in another.

¹⁰³ See e.g. Mitchell *McInnes*, "Making Sense of Juristic Reasons: Unjust Enrichment After *Garland v Consumers' Gas*" (2004) 42:2 *Alta L Rev* 399 at 417–18 [*McInnes*, "Making Sense of Juristic Reasons"].

¹⁰⁴ *Garland*, *supra* note 5 at para 46.

¹⁰⁵ Smith, "Demystifying", *supra* note 9 at 290–91.

¹⁰⁶ Chris DL Hunt, "Unjust Enrichment Understood as Absence of Basis: a Critical Evaluation with Lessons from Canada", online: (2009) Oxford U Comparative L Forum 6, nn 118–26 <ouclf.iuscomp.org/articles/hunt.shtml>.

¹⁰⁷ *Garland*, *supra* note 5 at para 45.

¹⁰⁸ *Ibid* at para 57.

More importantly, consumers paid under a contract,¹⁰⁹ the apparent validity of which the SCC ignored,¹¹⁰ although conceivably it could have been avoided for illegality.

Almost immediately after *Garland*, the SCC decided the case *Pacific National Investments Ltd v Victoria (City)*.¹¹¹ That decision involved a contract between the City of Victoria and the plaintiffs, under which the City received a park, designed and constructed by the plaintiffs, on the basis of an invalid *ultra vires* promise to rezone, a rezoning which would have allowed the plaintiffs to construct shops and apartments, the profits from which would pay for the park.¹¹² The benefit to the City was valued at slightly over \$1 million Canadian.¹¹³ After having run through the different juristic reasons at stage one, the Court found that none of them applied to this case.¹¹⁴ Moving to stage two, the onus fell on the City to show that the claim of unjust enrichment would frustrate the reasonable expectations of the parties. The City failed to satisfy its burden of proof.¹¹⁵ Binnie J suggested that it was not part of Canadian public policy to allow public authorities to take advantage of windfalls caused by their *ultra vires*

¹⁰⁹ See Mitchell McInnes, “Unjust Factors, Juristic Reasons and Contracts in Anglo-Canadian Law” in Paula Giliker, ed, *Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Leiden, Netherlands: Koninklijke Brill, 2007) 23 at 40–41.

¹¹⁰ See Mitchell McInnes, “Revising the Reason for Restitution: *Garland* Ten Years After” (2016) 57:1 Can Bus LJ 1 at 26 [McInnes, “Revising the Reasons for Restitution”].

¹¹¹ 2004 SCC 75, [2004] 3 SCR 575 [*PNI* cited to SCC]. Subsequent cases citing the new two-stage approach include: *Jedfro Investments (USA) Ltd v Jacyk*, 2007 SCC 55, [2007] 3 SCR 679; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at paras 182–84, [2009] 1 SCR 222; *Bond Development Corp v Esquimalt (Township)*, 2006 BCCA 248, 268 DLR (4th) 69; *Kerr*, *supra* note 94; *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 at para 38, [2007] 1 SCR 3 [*Kingstreet*].

¹¹² *PNI*, *supra* note 111 at para 1.

¹¹³ *Ibid.* See also Sheenan, “Unjust Factors”, *supra* note 88, nn 1–101; Mitchell McInnes, “The Test of Unjust Enrichment in Canada” (2007) 123:1 LQR 34 at 36–37.

¹¹⁴ *PNI*, *supra* note 111 at paras 28–52.

¹¹⁵ *Ibid* at para 53.

actions.¹¹⁶ He also commented that the new approach required the claimant to prove a negative.¹¹⁷ Nevertheless, a positive proof of mistake remains relevant given his comment that “[i]f there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.”¹¹⁸

While mistake and absence of juristic reason coexist in *PNI*, in *BMP Global Distribution Inc v Bank of Nova Scotia* Deschamps J made no mention at all of absence of juristic reason.¹¹⁹ In that case, the claimants, BMP, sold a business franchise paid for by a fraudulent cheque. The cheque proceeds were paid into a bank account with the Bank of Nova Scotia, which was subsequently frozen. Part of the money was in fact returned to the Royal Bank of Canada on whom the fraudulent cheque was drawn, and BMP’s account debited accordingly. Deschamps J decided the case on the basis that a mistake caused the payment honouring the cheque to be made.¹²⁰

BMP is unusual as a SCC decision in not affirming the juristic reasons approach. In *Kerr v Baranow* the SCC attempted another exposition of the principle of unjust enrichment and did reaffirm juristic reasons analysis.¹²¹ *Kerr v Baranow* and its companion decision, *Vanasse v Seguin*,¹²² were family home decisions. Canadian courts have used unjust enrichment as a malleable tool of social policy in the area, which might limit the usefulness of these cases for other jurisdictions. Indeed, Lionel Smith has argued that the case should be seen as effectively separating the family home cases into

¹¹⁶ *Ibid* at para 57.

¹¹⁷ *Ibid* at para 24.

¹¹⁸ *Ibid* at para 31. See also *Kingstreet*, *supra* note 111 at paras 38–39 (Bastarache J also talking of mutual mistakes of law).

¹¹⁹ 2009 SCC 15, [2009] 1 SCR 504 [*BMP Global* cited to SCC].

¹²⁰ *Ibid* at para 93. For a critique of the decision, see Mitchell McInnes, “*BMP Global Distributions Inc v Bank of Nova Scotia: The Unitary Action in Unjust Enrichment*” (2009) 48:1 Can Bus LJ 102.

¹²¹ *Kerr*, *supra* note 94 at para 9.

¹²² 2009 ONCA 595, 96 OR (3d) 321.

an entirely different category; one reason for this is that the quantum of relief is not what one would expect—it creates a fair division of assets rather than putting the claimant back *in statu quo ante*.¹²³ Smith himself admits that the SCC did not expressly separate the family home cases from unjust enrichment, however. For the moment at least, therefore, the family home should be treated under the general legal framework for unjust enrichment claims set out by the SCC. As Cromwell J noted in *Kerr v Barranow*, “something must have been given by the plaintiff and received or retained by the defendant without juristic reason.”¹²⁴ He went on that a number of categories had been developed—including benefits conferred by mistake, and benefits conferred under ineffective transactions—and outlined how Canadian law also permits recovery whenever the three-stage test, including an absence of juristic reason, is met.¹²⁵ Despite talking of mistake, Cromwell J also clearly said the common law model had been “overtaken” by *Garland’s* juristic reason analysis.¹²⁶

2. THE MCINNES–MCCAMUS DEBATE

McInnes, as we have seen, argues that Canadian law has made a switch from one system to the other: from unjust factors to absence of basis. He came to this conclusion almost immediately when *Garland* was handed down. While accepting that there would be a temptation to marginalize the decision and to carry on awarding restitution on the basis of unjust factors, he argued this was not possible.¹²⁷ Iacobucci J, and subsequently Cromwell J in *Kerr v Baranow*, had been too clear in their meaning. Iacobucci J

¹²³ Lionel Smith, “The State of the Law of Unjust Enrichment in Common Law Canada” (2015) 57:1 Can Bus LJ 39 at 49–50 [Smith, “The State of the Law”]. For a comparative examination of the use of unjust enrichment in family breakdown cases, see Anne Sanders, “Cohabitants in Private Law: Trust, Frustration and Unjust Enrichment in England, Germany and Canada” (2013) 62:2 ICLQ 629 [Sanders].

¹²⁴ *Kerr*, *supra* note 94 at para 31.

¹²⁵ *Ibid* at paras 31–43.

¹²⁶ *Ibid* at para 121.

¹²⁷ McInnes, “Making Sense of Juristic Reasons”, *supra* note 103 at 408.

had—McInnes insisted—intended to make a major switch in Canadian law.¹²⁸

Despite *Garland*, as we have seen, the SCC used mistake as part of its reasoning in *BMP Global*. John McCamus gave a detailed analysis of Deschamps J’s treatment of mistake in the latter decision, and proceeded to argue that while *Garland* had provided an opportunity for McInnes to argue that the SCC had unwittingly replaced the old law with an absence of basis alternative, *BMP Global* proved there was no such intention.¹²⁹

In examining *Garland*, McCamus denied that Iacobucci J had ever intended to replace the old common law unjust factors approach with the civilian absence of basis approach.¹³⁰ He argued that had there been such an intention—itself unlikely given the court’s preference for incremental change—it would have been clearly signposted as such.¹³¹ It was not. Secondly, McCamus pointed to the reliance in *Garland* on *Peel*.¹³² Earlier we saw that McLachlin J in *Peel* listed—non-exhaustively—a number of traditional categories and also discussed what she described as the newer “principled” approach which picked up the juristic reasons analysis of Dickson J in *Pettkus v Becker*.¹³³ McCamus argued that absence of juristic reason was therefore at the level of general principle and was intended as a means to fill in gaps in cases where there was no easy answer on the established categories.¹³⁴ McInnes’s response was that this was impossible. For him, McCamus’s view implies that two entirely different tests for

¹²⁸ *Ibid.*

¹²⁹ John McCamus, “Unjust Enrichment and the Supreme Court of Canada: Two Comments on *BMP Global Distribution Inc v Bank of Nova Scotia*” (2009) 48:1 Can Bus LJ 76 at 96 [McCamus, “Two Comments on *BMP Global*”].¹³⁰ *Ibid* at 98.

¹³⁰ *Ibid* at 98.

¹³¹ *Ibid.*

¹³² *Ibid* at 100.

¹³³ *Supra* note 102 at 739.

¹³⁴ McCamus, “Two Comments on *BMP Global*”, *supra* note 129 at 95; McInnes, “*Garland’s Unitary Test*”, *supra* note 1 at 392–93.

liability apply simultaneously in the law of restitution—one test applies to old and established cases and another to novel cases.¹³⁵ According to McInnes, the question arises: how do you tell the difference between old and new?¹³⁶

McCamus replied by suggesting that McInnes is not using what he (McCamus) considers the traditional common law methodology and that McInnes should take seriously what Iacobucci J actually said in *Garland*, when he referred to *Peel*.¹³⁷ McCamus points to Cromwell J's reliance on *Peel* in his judgment in *Kerr v Baranow*, to suggest that Cromwell J never intended to abandon unjust factors.¹³⁸ This, however, sits a little uneasily with Cromwell J's statement that *Garland* has "overtaken" the older analysis, but McCamus seems to think the analyses are not inconsistent with each other.¹³⁹ McCamus in the end suggests that McInnes is ideologically committed to a Birksian shift to absence of basis from unjust factors.¹⁴⁰ McInnes himself, however, argued pre-*Garland* that a civilian system should not be adopted in Canada, and plainly one does not need to believe that such a shift is a good thing to believe Iacobucci J meant to make it.¹⁴¹

To some extent, the debate just described is one of the deaf. The two scholars are simply talking past each other. Kit Barker has usefully identified a number of different meanings or roles for the "unjust enrichment

¹³⁵ McInnes, "Garland's Unitary Test", *supra* note 1 at 167. See also Chris DL Hunt, "The Civilian Orientation of Canadian Unjust Enrichment Law: A Reply to Professor McCamus" (2009) 48:3 Can Bus LJ 498 508–12.

¹³⁶ McInnes, "Garland's Unitary Test", *supra* note 1 at 192.

¹³⁷ McCamus, "Two Comments on *BMP Global*", *supra* note 134 at 97–98.

¹³⁸ *Ibid.*

¹³⁹ *Ibid* at 101.

¹⁴⁰ John D McCamus, "Unjust Enrichment, Existing Categories and *Kerr v Baranow*: A Reply to Professor McInnes" (2012) 52:3 Can Bus LJ 390 at 394–96 [McCamus, "A Reply to Professor McInnes"].

¹⁴¹ Mitchell McInnes, "Unjust Enrichment, Restitution, Absence of Juristic Reason: *Campbell v Campbell*", Case Comment, (2000) 79:3 Can Bar Rev 459.

concept.”¹⁴² He argues that it might be a classificatory unit without normative force.¹⁴³ Secondly, it might be an extrinsic principle that will justify altering the law, but stands aside from it.¹⁴⁴ Thirdly, it might be a legal principle with legal force and normative power.¹⁴⁵ As such, it has only limited dispositive power. It does not dispose of cases, but mediates a set of lower level ideas. The final role is as a cause of action. It is legally dispositive in particular cases.¹⁴⁶ For McInnes, absence of juristic reason is a cause of action—it takes Barker’s fourth and final role. For McCamus, it is a general legal principle underlying the whole area and takes on Barker’s third role. The ultimate question is: what role does “absence of juristic reason” play and is it a helpful one? As such, the debate has real parallels with the debate that has recently started in South Africa. The dispute in Canada is about the relationship between absence of juristic reason and unjust factors, and exactly the same debate, albeit in a very different context, is going on in South Africa.

McInnes has argued for a limited reconciliation between juristic reasons and unjust factors on the basis that each system is based on a concern for the parties’ autonomy. This would allow courts to use previous case law to inform their decisions post-*Garland*.¹⁴⁷ The unjust factor would in his view, at the very least, provide the reason why there is no basis or juristic reason for the transfer. Birks also talked in his 2005 book of a limited reconciliation, and a pyramid whereby unjust factors gave the reason why there was no basis.¹⁴⁸ McInnes claimed in 2011 that his analysis

¹⁴² Kit Barker, “Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons” in Jason W Neyers, Mitchell McInnes & Stephen GA Pitel, eds, *Understanding Unjust Enrichment* (Oxford and Portland, Or: Hart, 2004) 79 at 84.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* at 85.

¹⁴⁵ *Ibid* at 86.

¹⁴⁶ *Ibid* at 84–88.

¹⁴⁷ McInnes, “Garland’s Unitary Test”, *supra* note 1 at 194–96.

¹⁴⁸ Birks, *Unjust Enrichment*, *supra* note 3 at ch 5.

simply gives form to that pyramid.¹⁴⁹ McCamus, as the reader might guess, has rejected this pyramidal view of Canadian restitution law, arguing that the Birksian pyramid is mentioned nowhere in any Canadian cases and, in any case, is likely to mislead.¹⁵⁰

B. STAGE 1: THE ESTABLISHED LIST OF JURISTIC REASONS

If we assume that Canadian law is going down the route of using *Garland* as a directly applicable cause of action, as McInnes says it must, how would it develop? Can it make sense of *Garland* as a directly applicable test for liability? I suggest a possible reformulation below; I do not claim it is the only possible reformulation, just that it is probably the simplest reformulation, and one consistent with much—but not all—of what McInnes has said. The exercise requires some creative thinking. As Lionel Smith points out, “*Garland* on its own needs a lot of glossing to become the basis of a workable law of unjust enrichment.”¹⁵¹ The exercise is helpful though, because we can see more easily that the implementation of a civilian-style system can most easily be done by refining the *Garland* formula in ways that Canadian law currently seems unwilling or unable to do. The SCC, despite the apparently unitary quality of the *Garland* formula, sees variety and variation in the law of unjust enrichment; we see this, for instance, in the inclusion of the family home and in continued references to the categories of unjust enrichment from *Peel*. The overlap between these categories means that what the SCC is not doing is developing a workable performance claim or set of performance claims. Importantly, we should not see it as a criticism that the SCC is not “civilian enough”. Overlapping categories of law are not in themselves problematic. Their importance is in demonstrating that Canadian common law is not developing along the lines McInnes claims and that, in itself, is neither to Canadian law’s credit nor discredit. What the SCC actually is doing and

¹⁴⁹ McInnes, “Garland’s Unitary Test”, *supra* note 1 at 195.

¹⁵⁰ McCamus, “A Reply to Professor McInnes”, *supra* note 140 at 410–13.

¹⁵¹ Smith, “The State of the Law”, *supra* note 123 at 45. The amount of glossing required may well help to prove the point that this is not what the court had in mind.

how the law is developing may yet be unclear. After reviewing recent case law, Lionel Smith for one has concluded that the SCC seems unable to make up its mind.¹⁵²

1. SUBJECTIVE VERSUS OBJECTIVE METHODOLOGIES

If McInnes is correct, one choice Canadian law must make is whether it adopts a subjective or objective approach to enrichment by transfer. If it is an objective approach, I have in the past criticized the Canadian law on the basis that the list of juristic reasons which the SCC provided in *Garland* is, as I put it, “somewhat eclectic and haphazard, and clearly does not cover the field completely.”¹⁵³ This seems critical. If we do not have a complete list of justifying factors it becomes difficult to apply an objective methodology. The common law methodology, as Scott and Visser argue, however, tends to look for a positive reason to decide in favour of the claimant.¹⁵⁴ McInnes, as we have seen, consistent with the subjective methodology, argues that the heart of a civilian approach is the purpose of the claimant and that Canadian law should move down this track.¹⁵⁵ He also, and inconsistently with this, talks of complete absence of purpose, and how a civilian approach handles “ignorance” better.¹⁵⁶ In his example of theft of an item or money from the claimant, McInnes argues there is no hint of a juristic reason and so plainly unjust enrichment bites. For McInnes, there are two possibilities: the plaintiff may prove that the transfer was (1) undertaken for a purpose that ultimately failed, or, (2) non-purposive in that it was not intended to occur at all.¹⁵⁷ Upon satisfying this, the plaintiff should be entitled to

¹⁵² Smith, “The State of the Law”, *supra* note 123 at 56.

¹⁵³ Sheehan, “Unjust Factors”, *supra* note 88 (indeed, I also described Canadian law as on the verge of chaos).

¹⁵⁴ Helen Scott & Daniel Visser, “The Impact of Legal Culture on the Law of Unjustified Enrichment: the Role of Reasons” in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) 153.

¹⁵⁵ McInnes, “Garland’s Unitary Test”, *supra* note 1 at 196.

¹⁵⁶ *Ibid.*

¹⁵⁷ McInnes, “Making Sense of Juristic Reasons”, *supra* note 103 at 414.

restitution. This takes us astray, and in fact causes problems with the analysis of one case that McInnes discusses in his most recent contribution: that of heat rising from the downstairs flat.¹⁵⁸ The example is that the plaintiff lives in a poorly insulated flat and spends money on heating, which then heats the upstairs flat too, as heat rises through the process of convection. As McInnes himself admits, in Germany, the answer would be simple.¹⁵⁹ There is no direct purposive transfer, and no claim, but without this idea of the purposive transfer or performance, the explanation is much the more complicated. Germany also deals with the theft cases within property law, not unjustified enrichment; this is a function of the view that German (and Scots and South African) law takes the position that there is a critical normative distinction between performance and non-performance claims. Essentially, in the theft cases, just as in the “heat rising” cases, there is no deliberate conferral of a benefit by the claimant, nor any transfer to the defendant with any particular putative purpose in mind. Because there is no performance, property cannot pass and reliance can be put on the retention of title by the victim. For McInnes, however, the same principles must apply in both sets of case, and his discussion of non-purposive claims is intended to demonstrate this.¹⁶⁰

Prior to *Garland*, Lionel Smith had argued against the adoption of a juristic reasons analysis because it required the plaintiff to prove a negative.¹⁶¹ Iacobucci J in *Garland* talked about “closing the list” in reply to Smith’s objection that it is next to impossible to prove a negative.¹⁶² He applied a subjective approach. If I pay with donative intention, for example, I pay with the purpose of completing a gift. If that is my putative purpose, a

¹⁵⁸ The example is ultimately derived from *Edinburgh & District Tramways Co Ltd v Courtenay*, 1909 SC 99, 1909 SLT 548 (Ct Sess Scot). See also Sheehan, “Resulting Trusts”, *supra* note 88 at 9–11.

¹⁵⁹ McInnes, “Revising the Reasons for Restitution”, *supra* note 110.

¹⁶⁰ Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis Canada, 2014) chs 5–6.

¹⁶¹ Smith, “The Mystery”, *supra* note 20.

¹⁶² *Supra*, note 6 at para 42–44. This was used by Hunt as evidence that Iacobucci J really had signposted a momentous shift in Canadian law. See *supra* note 135 at 512–13.

subjective approach stops and asks simply whether that proven purpose succeeded. “Donative intention” is not therefore the primary fact that Smith claims (or at least not only a primary fact), it is a legal institution—*causa donandi*—one of the possible legal bases in a subjective system. McInnes has also suggested that the “established categories” represent the case where the transfer was made for an apparent purpose that failed, as where money is paid pursuant to a non-existent contract.¹⁶³ This seems right. On the assumption *Garland* civilianizes the law, therefore, the first limb should be in effect modelled as a *condictio indebiti* (although neither McInnes nor the case law use this language), dependent on the failure of a purpose to discharge an obligation or make a gift. The non-purposive cases should, however, be jettisoned. They cannot be treated under the same head of claim.

2. IDENTIFYING JURISTIC REASONS IN THE CASE LAW

Things are not quite so straightforward though—and this is an important cautionary note. In practice, the courts often do two things. First, they look about for a reason why restitution should be barred. If they find one, they usually call it a juristic reason. We can see a few examples of this. A contract provides a juristic reason,¹⁶⁴ unless it is, for example, unlawful or rescinded for fraud.¹⁶⁵ Other cases ask whether necessitous interventions,¹⁶⁶ statutory provisions,¹⁶⁷ or judicial orders provide juristic reasons.¹⁶⁸ The ability to

¹⁶³ McInnes, “Making Sense of Juristic Reasons”, *supra* note 103 at 415.

¹⁶⁴ See e.g. *Hutka v Aitchison et al*, 2006 BCSC 1169, 58 BCLR (4th) 377; *Kosaka v Chan*, 2009 BCCA 467, 312 DLR (4th) 32. Sometimes, counter-intuitively, the ending of a legal relationship can be a juristic reason. See e.g. *Skibinski v Community Living British Columbia*, 2012 BCCA 17 at para 85, 346 DLR (4th) 688 (where there was no acquiescence in the continued care).

¹⁶⁵ See e.g. *Swift Current (City) v Saskatchewan Power Corp*, 2007 SKCA 27 at para 44, 293 Sask R 6 (illegality); *Shoppers Drug Mart Inc v 6470360 Canada Inc*, 2014 ONCA 85, 372 DLR (4th) 90 (fraud).

¹⁶⁶ See e.g. *Moosa v Mississauga (City)*, 2013 ONSC 4887, 2013 CarswellOnt 11322.

¹⁶⁷ See e.g. *City of Toronto Act*, SO 2006, c 11, s 306; 80 *Mornelle Properties Inc v Malla Properties Ltd* 2010 ONCA 850, 327 DLR (4th) 361; *New Skeena Forest Products Inc v*

apply for an order is not, however, a juristic reason as it is not a given that such an order will be granted. In *R v 1431633 Ontario Inc.*,¹⁶⁹ Rona sought an order that they could recover the cost of lumber supplied to the accused. The Ontario Supreme Court said it could not have been in the reasonable contemplation of the parties that they not be paid.¹⁷⁰ The Court also affirmed that the forfeiture provisions in the *Criminal Code*, allowing the Crown to apply for an order to take profits from criminal activity, were not a juristic reason, but a mechanism for seeking a judicial order subject to third party rights.¹⁷¹

The second and related thing that courts do is hide the real reason for denial of relief behind juristic reasons talk. In *M Robert Birmingham Ltd v Perth-Andover (Village)*,¹⁷² a subcontractor had the opportunity to register a mechanics' lien, but failed to do so. There was a remedy already, and one cannot escape an inability to fit oneself, because of one's own actions, into an existing remedy by saying the defendant is now unjustly enriched. The case was discussed and distinguished, enabling the question of unjust enrichment to go to trial despite the plaintiff not registering the liens.¹⁷³ This implies that some courts see failure to register not in terms of subsidiarity, but in terms of the presence or absence of a juristic reason. The habit, however, of clothing a conclusion reached for other reasons in the language of juristic reason makes it hard to see what exactly is going on. At the same time, the habit should not surprise. It is not immediately obvious

Kitwanga Lumber Co 2007 BCSC 808, 2007 CarswellBC 1323; *Halifax (City of) v Nova Scotia (AG)* (1997) 163 NSR (2d) 360, 1997 CarswellNS 262; *Holowa Estate v Stell-Holowa*, 2011 ABQB 23, 330 DLR (4th) 693 (statutory rights to pension entitlement had been waived by the deceased's ex-wife, and the plan appointing pension beneficiaries was no juristic reason barring relief).

¹⁶⁸ *Koliaska Enterprises Ltd v Carson*, 2010 ABPC 53, 2010 CarswellAlta 349.

¹⁶⁹ 2010 ONSC 266, 250 CCC (3d) 354 [1431633].

¹⁷⁰ *Ibid* at para 63.

¹⁷¹ 1431633, *supra* note 169 at para 57.

¹⁷² (1981), 34 NBR (2d) 320, 1981 CarswellNB 272, *aff'd* (1981) 130 DLR (3d) 545, 1981 CarswellNB 196.

¹⁷³ See *Man-Shield Construction v 117398 Alberta Ltd* 2007 ABQB 603, 2 WWR 647.

that the test for unjust enrichment set out in *Rathwell v Rathwell*, *Pettkus v Becker*, and *Garland* should relate only to the reversal of transfers where the transferor had a purpose in making the transfer which failed (McInnes as we saw attempts a wider formula); some creative glossing of the dicta is needed to fashion a concept of performance or *Leistung*. There is, therefore, on the face of the matter only one apparent limit to relief: the presence of a juristic reason. If there is on the face of it only one limiting factor, it should not surprise us if it gets used with abandon to limit relief in every circumstance where the court decides restitution is inappropriate.

C. STAGE 2: REASONABLE EXPECTATIONS AND PUBLIC POLICY

After this first stage is completed, the defendant has an opportunity to show that despite there being no recognized juristic reason, there is still a reason to deny relief. This reversal of the burden of proof is unfortunate. The plaintiff should have to show that the basis for payment has failed in all cases. At the second stage, the court is able, according to Iacobucci J, to take into account public policy and the reasonable expectations of the parties.¹⁷⁴ McInnes suggests that at the second stage as well, courts should look at the purposes of the claimant in making the transfer.¹⁷⁵ In other words, we need to reverse the burden of proof and have the claimant demonstrate the expectations of the parties had failed.

The question is determining the purpose McInnes is referring to. Glossing the second limb of *Garland* proves more complex than glossing the first limb. McInnes raises three possibilities. The inquiry, he argues, might first be aimed at identifying new reasons for retention that operate in the same way as the established categories; he raises natural obligations as a possibility.¹⁷⁶ If so, it adds little and can be drawn into stage one. Natural obligations can be discharged and so a payment made in circumstances where a natural obligation exists is a valid payment *solvendi causa*—to discharge an obligation, albeit one that is

¹⁷⁴ See *Garland*, *supra* note 5 at para 47.

¹⁷⁵ McInnes, *supra* note 86 at 415.

¹⁷⁶ McInnes, “Making Sense of Juristic Reasons”, *supra* note 103 at 416.

unenforceable.¹⁷⁷ McInnes, seemingly unconvinced by the first possibility, suggests secondly that Iacobucci J had in fact something a little different in mind. He argues that Iacobucci J presented the second stage as an opportunity to show there is some other overriding reason for denying relief.¹⁷⁸ In the context of *Garland*, McInnes gives an example of what he means. There was a reasonable expectation that those who pay their bills late incur penalties. We could say, for example, that there was a common understanding between company and customers that a penalty paid because of late settlement of the bill would not be recoverable. The third possibility McInnes raises is that plaintiffs can raise reasonable expectations to justify relief.¹⁷⁹ In *KBA Canada Inc v 3S Printers Inc*, the trial judge said that the provincial *Personal Property Security Act* provided a prima facie juristic reason for the defendant's priority over the plaintiff, but that the parties still had a reasonable expectation (or common understanding) that the plaintiff would enjoy priority and having failed to obtain that priority should have restitution.¹⁸⁰

The relevance of common understanding is made clearer by examining *Kerr v Baranow*. The Court in *Kerr* said the second stage of the juristic reasons analysis provides for consideration of individual autonomy¹⁸¹ and legitimate expectations.¹⁸² While individual autonomy does require that actors be able to make decisions on a stable basis, legitimate expectations import the autonomy of another party as well. One factor, cited in *Kerr*, is whether the parties worked collaboratively towards common goals.¹⁸³ This entails that it is the parties' joint autonomy, not their individual autonomy

¹⁷⁷ See Duncan Sheehan, "Natural Obligations in English Law" (2004) LMCL Q 172.

¹⁷⁸ McInnes, "Making Sense of Juristic Reasons", *supra* note 103 at 406, 407.

¹⁷⁹ McInnes, "Revising the Reasons for Restitution", *supra* note 110 at 12.

¹⁸⁰ 2012 BCSC 1078 at para 95, 2012 CarswellBC 2563. The appellate Court, although reversing the result, did not object to this analysis of *Garland*. See 2014 BCCA 117, 372 DLR (4th) 303.

¹⁸¹ *Kerr*, *supra* note 94 at para 45.

¹⁸² *Ibid* at para 41.

¹⁸³ *Ibid* at paras 90–93.

that is in play. That suggests joint cooperative activity and a collective (albeit extra-contractual) intention.¹⁸⁴

Language of joint enterprise is found in *Panara v Di Ascenzo*.¹⁸⁵ That was a family home decision where the woman had done extra work in the family restaurant. Russell J, writing for the majority of the Alberta Court of Appeal, said there was no contractual reason for the exceptional hours of work that she put in.¹⁸⁶ Russell J found that there was no donative intention and the relationship did not create a juristic reason.¹⁸⁷ There was a common long-term purpose that the parties shared in the benefits and profits of the business.¹⁸⁸ The SCC also rested its judgment in *Peter v Beblow* on the absence of the duty to perform work or services,¹⁸⁹ or any intention to make a gift.¹⁹⁰ The question of what the juristic reason might be was not, though, ever discussed. It remained “at large”. In *Pettkus v Becker*, however, it was said that Becker had done the work on the reasonable expectation that she would receive something back and Pettkus had freely accepted it on that basis.¹⁹¹ Burrows deals with free acceptance as part of a chapter on failure of

¹⁸⁴ It is not essential to the argument here, but I have elsewhere argued that cases which in common law are dealt with through the unjust factor of failure of consideration are based on the failure of a condition affecting a collective intention. See Duncan Sheehan, “Mistake, Failure of Consideration and the Planning Theory of Intention” (2015) 28:1 Can JL & Jur 155.

¹⁸⁵ 2005 ABCA 47, 464 AR 16 [*Panara*].

¹⁸⁶ *Panara*, supra note 185 at para 38.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid* at para 40. See also “legitimate expectations” and “reciprocal benefits” in *Wilson v Fotsch*, 2010 BCCA 226, 319 DLR (4th) 26; *Haigh v Kent*, 2013 BCCA 380, 364 DLR (4th) 544 (Harris J) [*Haigh*]. See also “joint family project” in *Ibbotson v Fung*, 2013 BCCA 171, 361 DLR (4th) 42.

¹⁸⁹ [1993] 1 SCR 980, 101 DLR (4th) 621.

¹⁹⁰ *Ibid* at paras 14–16. See also *Sorochan v Sorochan*, [1986] 2 SCR 38, 29 DLR (4th) 1.

¹⁹¹ *Pettkus*, supra note 4 at para 40. See also AJ McClean, “Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship—*Pettkus v Becker*”, Case Comment, (1982) 16:1 UBC L Rev 155. Contrast *Brennan v Gardy Estate*, 2011 BCSC 1337, 2011 CarswellBC 25553. For this interpretation, see also *Kerr*, supra note 94 at paras 118–19.

consideration.¹⁹² The central point is the loose understanding that the claimant would be “paid”. Cromwell J talks in *Kerr v Baranow* of bargains, not constituting a binding contract, representing the parties’ reasonable expectations at the second stage.¹⁹³ This is reflected in how the idea of free acceptance still crops up in the Canadian case law post-*Garland*, such as in *Gorisek v Aeckerle*. In that case, Gorisek was said to have harboured a reasonable belief that he was entitled to additional compensation and the defendant freely accepted the work done knowing it was not a gift.¹⁹⁴

At least some of the second limb cases look to be based on an expectation of reciprocal performance, which in turn looks like a *condictio causa data causa non secuta*. As we have seen in a civilian system, this action and the *condictio indebiti* are mutually exclusive, but the two limbs of the *Garland* test could equally have exclusive spheres of operation. Three issues might be raised to counter this analysis. The first is that the *condictio causa data causa non secuta* should not be analyzed in this way. It refers to failure of suppositions other than reciprocation. In South Africa, however, we have already seen that the *condictio* can lie where I perform, knowing the contract void, but seeking counter-performance anyway; clearly, some cases refer to failed counter-performance. By analogy, it is also likely that the *condictio* applies to cases where performance is made in the course of failed contractual negotiations, and this might be conceived as being on the basis of the failure of an expected counter-performance or payment. Alternatively, Hutchison has suggested that the failed assumption in these cases justifying the *condictio* is that a contract would eventuate.¹⁹⁵ So long as it is an extra-contractual purpose and the two limbs are exclusive, however, this need not be fatal to the gloss. It is the extra-contractual nature of the putative purpose that is critical.

¹⁹² Burrows, *supra* note 39 at 334–39.

¹⁹³ *Kerr*, *supra* note 94 at para 123.

¹⁹⁴ 2011 BCSC 624 at paras 120–22, 2011 CarswellBC 1168.

¹⁹⁵ Andrew Hutchison, “Liability for Breaking Off Contractual Negotiations?” (2012) 129:1 SALJ 104 at 107.

The second point is that the Alberta Court of Appeal contradicted this when it said that there was no juristic reason once a contract had been terminated for breach in *Van Camp v Laurentian Bank of Canada*.¹⁹⁶ As we have seen there are parallels with debates around cancellation for breach in South Africa, but more importantly this reflects the emphasis on the defendant's right to retain the enrichment in Canada, and the *condictio sine causa* in its guise as the *condictio ob causam finitam* is available in cases where there was a *causa* or valid basis initially, but which falls away.

The third and most difficult objection relates to the manner in which the family home cases appear to draw on rather different policy concerns altogether.¹⁹⁷ For one thing, realistically an expectation of staying together might be a better characterisation of events than an expectation of being paid. While there may be some cases where the parties see each other as hired help, more often the parties have a "joint family venture."¹⁹⁸ There is no doubt that different, more fairness-oriented considerations play a part here, particularly in the quantum of relief and in this idea that the family is a single economic unit, and we have seen suggestions that the family be treated entirely separately from restitution. That said, the *condictio causa data* is also seen as a possible cause of action between former unmarried cohabitants in German law. Contributions are assumed to have a legal basis, either gift or a family-specific agreement, and if the parties' shared purpose fails because of the breakup, an action might lie. The Bundesgerichtshof has, however, been criticized for illegitimately morphing the action into a rather more fairness-oriented approach, exactly as McInnes criticizes the SCC for.¹⁹⁹ At the very least, the second limb fits uncomfortably with the *condictio causa data causa non secuta*.

¹⁹⁶ 2015 ABCA 83 at paras 43–45, 381 DLR (4th) 721.

¹⁹⁷ See Smith, "The State of the Law", *supra* note 123, at 49–50.

¹⁹⁸ See *Kerr*, *supra* note 94 at para 84 (although Cromwell J does not adopt this presumption in married couple cases).

¹⁹⁹ See e.g. Sanders, *supra* note 123 at 646–47; Mitchell McInnes, "Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada", Note, (2011) 127:3 Law Q Rev 339.

D. IMPLICATIONS

1. IS THE SWITCH MCINNES ARGUES FOR POSSIBLE?

The point we seem to have reached is that if McInnes is right, Canadian law will first have to accept a more overtly subjective means of identifying the basis, or the purpose for which the plaintiff made the transfer. Secondly, it may need to morph the two stages of *Garland* into a *condictio indebiti* and a *condictio causa data causa non secuta*, and possibly split the second stage again to hive off a *condictio ob causam finitam*. This requires *Garland* to be positively manhandled. In fact, the first reason for suspecting McInnes's project will not succeed is precisely the uncomfortable fit between *Garland* and these *condictiones*. Another related reason is that the limbs overlap. In *Kerr v Baranow*, Cromwell J refers to different categories of unjust enrichment.²⁰⁰ In a true civilian system, these would not overlap; yet they seem in fact to do so.

In the abstract, it is easy enough to construct a system starting from a blank piece of paper, but Canadian law does not work this way. There are other areas of law that connect with and affect unjust enrichment; as McCamus puts it, starting “from scratch” risks chaos, or “dire” results.²⁰¹ Even McInnes admits that work must be done to integrate the revised scheme within the broader scheme of private law. He admits that this means that lawyers must develop a “civilian frame of mind” and learn to let go of the past.²⁰² This is certainly right. Any attempt by the Canadian courts to use much of the earlier case law drives it away from the distinctions a civilian system needs to make. Let us consider the more commercial cases on *quantum meruit*, which Canadian courts have inconsistently treated as a

²⁰⁰ *Kerr*, *supra* note 94 at paras 31, 32.

²⁰¹ McCamus, “A Reply to Professor McInnes”, *supra* note 140 at 394.

²⁰² McInnes, “Revising the Reasons for Restitution”, *supra* note 110 at 25. McInnes makes this suggestion despite his insistence that the courts do not need to wipe the slate clean: see e.g. McInnes, “Garland’s Unitary Test”, *supra* note 1 at 194–96.

remedy and a claim.²⁰³ As Lodder has cogently explained, this is not properly a cause of action, but a remedy.²⁰⁴ It is, however, driving some developments in Canadian jurisprudence in a way that precludes the reformulation of *Garland* presented above. The two limbs are not exclusive, and Cromwell J's categories of unjust enrichment do overlap in ways that drive us back towards unjust factors. If McInnes is right, Canadian law is quite simply not letting go of the past in the way it needs to. In essence, the second limb of *Garland* still sometimes behaves like a failure of consideration or free acceptance action applicable in cases where the parties mistakenly believed there was a contract or valid obligation.

In *Bond Development Corp v Esquimalt (Township)*,²⁰⁵ Bond did design and architecture work for the township to construct a new library and city hall. In return, they were to have the old city hall site transferred for redevelopment along with a cash payment. The agreement between the parties contemplated a further agreement to fix the value of the old city hall site to form part of the consideration.²⁰⁶ The relationship between the parties failed because of their inability to agree about the value.²⁰⁷ The township, however, went ahead and did the work with the same plan. The custom of the trade was that if a different design were used, the prior work by the architects was valueless and, therefore, unjust enrichment could not lie.²⁰⁸ This was not the case in *Bond*. The Court decided that Bond had not intended to donate its services. Because the contract was in Huddart J's words "unenforceable", he did not consider the contract at the first stage of

²⁰³ *Kerr* treats it fairly consistently as a remedy, but confusion remains. See *supra* note 94. Compare the Federal Court in *Intertech Marine Ltd v Menéndez* describing it as an "equitable remedy": 2006 FC 1445, [2004] FCJ No 1797 at para 60 (it is also called a claim in unjust enrichment in the same case).

²⁰⁴ AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford and Portland, Or: Hart, 2012) 78–79.

²⁰⁵ 2006 BCCA 248, 268 DLR (4th) 69 [*Bond*].

²⁰⁶ *Ibid* at para 1.

²⁰⁷ *Bond*, *supra* note 105 at para 20.

²⁰⁸ *Ibid* at para 41.

juristic reasons.²⁰⁹ There was a possible statutory juristic reason: section 232 of the *Local Government Act*, but he dismissed this possibility.²¹⁰ He went on that the effect of a failed contract was more appropriately dealt with at the second stage of the juristic reason analysis where reasonable expectations of the parties can be taken into account.²¹¹ The parties, Huddart J said, could not have expected that Esquimalt would take the benefit of the services without payment.²¹² Since the part of the agreement that failed concerned remuneration, this seems plausible. It seems a case of an assumption the work would be paid for because there would be a contract.²¹³

In English law this would be a failure of consideration case. In fact, the trial judge in *Bond* awarded *quantum meruit* for failure of consideration.²¹⁴ Fridman, in an article on *quantum meruit*, relied upon by Canadian cases including Melvin J at first instance in *Bond* but written before *Garland*, argued that *quantum meruit* is based on non-reciprocation for work done when the intention is not to do it gratuitously.²¹⁵ Under a civilian analysis, if there were no contract, but an assumption that there would be one, and *Bond* would be paid, that assumption failed when Esquimalt hired someone else to work from *Bond*'s plans. The claimants would be entitled

²⁰⁹ *Ibid* at para 32 (the British Columbia Court of Appeal is unclear as to whether the contract was unenforceable or abandoned, and may have considered—wrongly—that these are equivalent).

²¹⁰ *Ibid* at para 37.

²¹¹ *Ibid* at paras 32, 38.

²¹² *Ibid* at para 42.

²¹³ Similar joint intentions are apparent in cases such as: *Barrie Trim & Mouldings Inc v Country Cottage Living Inc*, 2010 ONSC 2107, 2010 CarswellOnt 2289; *Can-Auto Inspections Inc v Vascor Ltd*, 2011 BCSC 1644, 2011 CarswellBC 3197; *Consulate Ventures Inc v Amico Contracting & Engineering (1992) Inc*, 2007 ONCA 324, 282 DLR (4th) 697; *Litemor Distributors (Edmonton) Ltd v Midwest Furnishing & Supplies Ltd*, 2007 ABQB 23, [2007] 5 WWR 276.

²¹⁴ See *Bond*, *supra* note 205 at paras 83–92.

²¹⁵ GHL Fridman, “*Quantum Meruit*” (1999) 37:1 *Alta L Rev* 38 at 46–47.

to recover in the *condictio causa data causa non secuta*, even if the parties knew there was no obligation.

Huddart J said in *Infinity Steel Inc v B&C Steel Erectors Inc* that ineffective transactions form a discrete category of unjust enrichment for which a *quantum meruit* is available.²¹⁶ He relied on the SCC in *Kerr v Baranow* for the proposition.²¹⁷ Where there is an ineffective transaction—and *Bond* is said to be an example of an ineffective transaction as well²¹⁸—the payor’s legal purpose in making the payment is to discharge it, but since it is ineffective there is presumably nothing to discharge and so the claim lies. That should raise a *condictio indebiti*. We suggested earlier in this paper that the first limb of *Garland* be developed into a *condictio indebiti*–style action. Yet *Bond Developments* was seen as a second limb case. If so, it is the intention that the design work be done prior to Bond’s commencing building work in return for payment or anticipation of a contract that is the relevant intention. The logic of looking to a *condictio causa data*/failure of consideration claim in the failed contracts cases looks inconsistent with the logic of an absence of basis system, which suggests a *condictio indebiti*/mistake claim.

In *PNI*, the claimants argued that the city was unjustly enriched by work done to construct a park and other amenities in anticipation of a rezoning that never happened; this might—leaving public law complexities aside momentarily—be failure of consideration through lack of counter-performance.²¹⁹ In *PNI*, however, there is discussion of liability mistake by Binnie J; a liability mistake could ground a *condictio indebiti*. Just as in South Africa, we might say that the transfer was made to discharge a contractual obligation that was ineffective, and that as an additional requirement, there was a mistake as to liability. As Binnie J said, “[t]he

²¹⁶ 2011 BCCA 215 at paras 19–23, [2011] 6 WWR 575 [*Infinity Steel*].

²¹⁷ See *Kerr*, *supra* note 94 at para 31 (which itself got the category from *Peel*, *supra* note 102).

²¹⁸ *Infinity Steel*, *supra* note 216 at para 21.

²¹⁹ *Supra* note 111 at paras 2–8.

appellant's cause of action for unjust enrichment was complete when it put in place the extra works and improvements in the mistaken belief that its contract with the City in respect thereto was enforceable.²²⁰ The developers in *PNI* could argue they were mistaken as to the existence of a juristic reason. If, however, the parties intended that there be a park in return for a rezoning, restitution through the type of *quantum meruit* outlined in Fridman's article and approved in *Infinity Steel* and *Kerr v Baranow* should have been available to the developers if that collective intention or understanding failed. There was an ineffective transaction and work done with no donative intention, as demonstrated by Binnie J's comments regarding the developers' expectation of reciprocal performance, which was not in the end forthcoming.²²¹

On the precise facts, the ultra vires nature of the agreement meant public policy had to come to *PNI*'s rescue, but on different facts (perhaps nullity for informality) a court might be faced with the choice between the mistake analysis of *PNI* (transfer to discharge an obligation that turned out not to exist) and the failure of consideration/*quantum meruit* analysis of *Bond*, *Infinity Steel*, and *Kerr* (transfer not to discharge an obligation but to obtain counter-performance). The law drives us to concurrent causes of action; indeed, both analyses are fairly explicit in *PNI*. It looks in point of fact rather like Scott's explanation of South African law. On these facts, it is likely she would argue that the *condictio indebiti* lies here.²²² There was a liability mistake after all. She is also likely to argue that the *condictio causa data causa non secuta* could lie as reciprocal counter-performance failed; relying on the case of *Legator McKenna*, she might also point out that failure of reciprocal counter-performance is an (unjust) factor relevant to the availability of the *condictio indebiti*. It is that purpose to obtain

²²⁰ *Supra* note 111 at para 46.

²²¹ On lack of donative intention, Binnie J said the appellant company "did not get what the City undertook to give it. . . . It offered consideration for an implied undertaking it turned out the City was able to repudiate.": *ibid* at paras 48–49.

²²² Traditionally, the *condictio* claims are only money claims and *PNI* was a claim for the value of services. For ease of exposition, we will ignore that for now.

counter-performance referred to in *Legator McKenna*, which opens the door for Scott's unjust factors analysis. Indeed, we must stress that it is her explicit aim to reanalyze South African law in those terms.²²³ Yet if this is Canadian law, the switch to a civilian system championed by McInnes is going badly.

One could say that unjust enrichment claims and mistake claims are separate. Robert Chambers has argued that unjust enrichment and mistaken payment claims are different categories of restitution in common law Canada.²²⁴ Cases in Canada including, as we have seen, the SCC in *BMP*, still refer to mistake as a cause of action, and occasionally are decided on the basis of the old law of mistaken payments without reference to absence of juristic reason.²²⁵ According to this view, the law would look like Quebecois law where the *actio de in rem verso* applies to services and *répétition de l'indu* to money.²²⁶ Yet *PNI*, which talks of mistake, is a services claim. Canadian cases do not therefore seem to split in this way and even if they did, something would have gone awry. Why should enrichment by services be treated differently from money? It is increasingly recognized in mixed and civilian systems that services should be treated the same. Du Plessis, as we saw earlier, has argued that the *condictiones*, traditionally

²²³ See Scott, *Unjust Enrichment*, *supra* note 7 at 9–15.

²²⁴ See Robert Chambers, “Restitution of Overpaid Tax in Canada” in Stephen Elliott, Birke Häcker & Charles Mitchell, eds, *Restitution of Overpaid Tax* (Oxford: Hart, 2013) 303 at 305. This might be a Pyrrhic victory at best from McInnes's point of view since the pass would have been sold that there was more than one cause of action.

²²⁵ See *BMP Global*, *supra* note 119. See also *Great-West Life Assurance Co v King*, 2013 ABQB 529 at paras 20–23, 2013 CarswellAlta 1746 (Master Schlosser); *Carter v Sabiston*, 2006 SKQB 489, [2007] 2 WWR 351; *Vasquez v United Steel Workers of America Local No 1-3567*, 2006 BCSC 1399 at paras 23–24, 2006 CarswellBC 2280. On rescission of a dividend payment for mistake relying on *Pitt v Holt*, [2013] UKSC 26, [2013] 2 WLR 1200, see *Re Pallen Trust*, 2015 BCCA 222, [2016] 1 WWR 1.

²²⁶ See *Civil Code of Québec* art 1493 CCQ; *Willmor Discount Corporation v Vaudreuil (City)*, [1994] 2 SCR 210, 1994 CarswellQue 123; Smith, “The Mystery”, *supra* note 20 at 217.

money claims, should be broadened to other forms of enrichment as well.²²⁷ The point then is simple. At least as matters stand today, attempts to map Canadian law onto anything that resembles a civilian system fail because Canadian law does not in fact demand that only one putative basis of transfer be identified. Lying behind the civilian language is the fact of mistake and failure of consideration being concurrent analyses.

McInnes's reanalysis of the subject then encounters significant difficulties. If, assuming for the sake of argument McInnes is right, and Canadian law is to make the switch to a civilian system, the meaning of "ineffective transaction" and the relationship between the two limbs of the *Garland* test must be clarified. The fact of the matter is that it seems unlikely the law will develop this way. Whatever the SCC is doing, and as we have seen, Lionel Smith suggests it has not quite decided itself, it is not attempting the creation of a workable performance claim or set of performance claims.

2. MCCAMUS'S VIEW OF ABSENCE OF JURISTIC REASON

John McCamus takes a different approach to absence of juristic reason. He argues that it is simply a general principle to which the common law can have recourse where the established law has no ready answer. He says, "one begins by trying to fit the facts in issue into the rules established by the existing authorities. One may resort, however, to the underlying general principle as a basis for correcting or extending the existing law".²²⁸ Recourse to general principle in this way is far from objectionable. Common law lawyers do it all the time. McCamus's point is that absence of basis or absence of juristic reason lies behind the entire law as a general principle. Absence of juristic reason explains the common law unjust factors.

Lessons from the South African debate also appear strongly here. South African law, as we saw earlier, accepts an absence of basis structure to its law. There are different ways in which the putative basis for the enrichment can

²²⁷ See Du Plessis, *supra* note 11 at 102–03. In South Africa this has not happened yet. See Scott, *supra* note 56 at 437. But, it seems to have done so in Scots law. See *Shilliday v Smith*, 1998 SC 725, 1998 SCLR 502 (Ct Sess Scot).

²²⁸ McCamus, "A Reply to Professor McInnes", *supra* note 140 at 393.

fail which roughly correspond to different unjust factors, but do not exactly match.²²⁹ Mistake and duress are add-ons, prerequisites for liability, but not reasons for it. Du Plessis argues that in the common law mistake and duress and so on are the reasons for liability,²³⁰ and they are treated as such by Maddaugh and McCamus in their loose-leaf work. The unjust factors refer to the primary focus of the law on difficulties with our intentional agency and volition. Absence of basis simply does not have that as its primary focus. McCamus, however, draws support in the cases for the position that absence of juristic reason operates at the level of general principle. In *Peel*, McLachlin J said that new situations could arise “which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule.”²³¹ In the same vein, Cromwell J has said, “while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context.”²³² McCamus uses this particular quotation to support his view that the tripartite analysis can facilitate the recognition of new unjust factors.²³³

Yet, as we saw earlier in this paper, if absence of juristic reason operates at the level of general principle, it is not legally dispositive. It is mediated through lower level principles. If, however, this is the ultimate reason for restitution, or the primary focus of the law, a comparative look at the South African debate teaches us to be cautious. In other words absence of basis, as a legal principle taking on Barker’s third role, is surely mediated just as it is in in South Africa, through “failure to discharge a debt” (which takes form as the *condictio indebiti*) or “failure to induce counter-performance outwith a contract” (the *condictio causa data causa non secuta*). “Absence of basis”

²²⁹ On a general enrichment action in South Africa, see *McCarthy Retail Ltd v Shortdistance Carriers CC*, [2001] ZASCA 14, [2001] 3 All SA 236; *First National Bank of Southern Africa Ltd v Perry NO et al*, [2001] ZASCA 37, [2001] 3 All SA 331; Visser, *supra* note 42 at 51–53.

²³⁰ Du Plessis, “Labels and Meaning”, *supra* note 72, at 430.

²³¹ *Supra* note 102 at para 32.

²³² *Kerr*, *supra* note 94 at para 34.

²³³ See McCamus, “A Reply to Professor McInnes”, *supra* note 140 at 405.

reduces factors such as mistake to mere prerequisites for relief—add-ons to the relevant *condictio*. It does not seem possible—as we saw in the earlier section—to mediate it through the rather different categories in *Peel*. This is not what McCamus wants at all. His practitioner loose leaf discusses the different unjust factors as separate causes of action. Absence of juristic reason used as a general principle—the reason for relief—dictates quite a different result from the one McCamus wants. That said, given how little is actually said about “absence of juristic reason” in McCamus’s loose leaf, it may be that he does not in fact think it of huge importance and that what really matters is how different rules apply in different contexts, which is probably also the view of the SCC.

IV. CONCLUSION

By virtue of its attempt, as described by some cases, to be distinctively Canadian,²³⁴ and by virtue of the fact that there is a substantial chasm to cross to move from being an unjust factors approach to an absence of basis approach, McInnes’s approach leads Canadian law into no man’s land. This is not merely a point of theoretical purity; it has practical consequences. Limitation and liability questions might turn on it; there may be restrictions that we wish to place on claims where *quantum meruit* for failure of consideration is sought we do not wish to place on mistake claims, or vice versa. New concepts such as performance will need to be developed and our old sense of how failure of consideration works adapted. If we do not understand how those scenarios relate to each other and how these new concepts work, we will assume that similar terminology means similar ideas when it does not, or hide what we are really doing behind an abstract formula, and we will treat similar cases differently and dissimilar cases the same. Canadian common law perfectly illustrates the structural difficulties of making the switch between unjust factors and absence of basis. If McInnes is right about the necessity to switch, and if Canadian law is to make it successfully, it will need to let go of much of the previous case law and pay much closer attention to comparative scholarship. As of now, it has not done this. Nor is it likely to.

²³⁴ See e.g. *Annapolis*, *supra* note 87 at para 53.

As I said earlier, although the SCC seems to see variety, it does not seem to see a workable set of performance claims, and attempts to gloss *Garland* to form a workable civilian-esque system are becoming destabilizing. Lionel Smith has described the SCC as a “fox”.²³⁵ By this he means that rather than attempting to forge the unitary explanation for unjust enrichment McInnes seeks, it is happy with different, multiple, and diverse coexisting subcategories, including perhaps contextual categories like “the family home”. If so, it is unsurprising that McInnes attempts to forge that unitary cause of action end in failure. Yet recognition that McInnes’s attempt to remodel the law is likely to fail and to destabilize the Canadian law does not end the discussion. John McCamus’s view is potentially destabilizing for a different reason. He has taken the absence of juristic reason formula and used it as a principle, a reason justifying the grant of relief in new cases, but also because of its general nature purportedly justifying the traditional unjust factors. The formula of absence of juristic reason does not, however, represent a principle capable of underlying a general law of unjust factors. If Canadian law is to have an unjust factors system or indeed any system where the SCC sees unjust enrichment as comprised of a variety of different overlapping claims and categories, the language of juristic reason is an unnecessary confusion. McCamus in fact may also be a fox,²³⁶ and so (like the Court) not treat the formula as particularly important, but at the very least foxes should be wary of raising formulae that might lead others to construct grand unifying theories.²³⁷ Quite simply, the formula the SCC uses struggles to reflect the variety of actions the Court sees in the area.

²³⁵ Smith, “The State of the Law”, *supra* note 123 at 56–57.

²³⁶ See Smith, “The State of the Law”, *supra* note 123 at 44.

²³⁷ The hedgehogs among us.