PREFACE

This special issue of the *Alberta Law Review* is a collection of nine essays on the subjects of equity, restitution, and unjust enrichment in Canada. The contributors are seven academic lawyers in Canadian universities, a practicing lawyer, a graduate law student in England, and an academic lawyer in Australia. The papers are not the product of a conference, nor were specific topics assigned. The contributors were asked to write on some aspect of equity, restitution, or unjust enrichment which they believed to be of current interest to the Canadian legal community. It is significant that contributors, working independently, identified the same issues as important. McInnes wrote on the structure of the laws of unjust enrichment and restitution, as did Stevens and Neyer. Fridman and Rafferty both wrote on restitution for the value of services, Berryman and Perrell on equitable compensation, and Bryan, Rotman, and Chambers on the constructive trust.

These areas of law are found outside the more familiar categories of contract, conveyance, and tort, which form the core of law school curricula and many law practices. They are not as well developed nor as well understood as the more traditional areas. Those who venture off the beaten paths at the core risk becoming lost in what can appear to be a haphazard overgrowth of common law and equitable doctrine. There are two difficulties which have long impeded the development of the law in these areas. The first is an archaic and sometimes impenetrable language. The second is the lack of a well understood framework for organizing the common law. These are continuing difficulties and might be regarded as the themes of this special issue of the Alberta Law Review.

Both common law and equity have long had to cope with terminology which is unhelpful and, at times, misleading. The various uses of the constructive trust provide a perfect example. As discussed below in Bryan's essay, "The Receipt-Based Constructive Trust," someone might be declared a constructive trustee for the purpose of imposing a personal obligation to pay a sum of money, either as compensation (for losses caused by dishonestly assisting a breach of trust) or as restitution (of unjust enrichment by the receipt of assets misappropriated from a trust). However, "constructive trustee" can also be used to describe someone who holds assets subject to a trust created by operation of law in response to wrongdoing, unjust enrichment, or some other event. The language of constructive trust does not distinguish between personal and property rights, nor does it identify the source of those rights. It is an unnecessary and unhelpful abstraction inserted between the causative event and the legal response to that event.

The essays on equitable compensation, by Berryman and Perrell, highlight another kind of language problem. Unlike "constructive trust," the phrase "equitable compensation" does not mislead, but provides an accurate description of the legal response: compensation for losses caused by a breach of an equitable duty. However, it does obscure an important connection with the common law, which also compensates for losses caused by breach of duty, but under the more familiar label, "damages." Both bodies of law are directed towards the same goal and a court of equity should not

ignore the familiar and sophisticated principles developed at common law without sufficient justification. The use of different language makes it easier to overlook this essential and central issue.

The second difficulty faced by common law and equity is the development of an accepted structural framework. Without a taxonomy for organizing legally significant events, it is difficult, if not impossible, to make rational distinctions and comparisons among the infinite variety of human affairs. The taxonomy must be rationally defensible, so that like cases may be treated alike, and must be comprehensible and generally accepted, so that people can plan their affairs with certainty and embark on litigation only when absolutely necessary.

The problem of equitable compensation illustrates the difficulty of using an outmoded taxonomy. If the historical jurisdictional division between chancery and courts of common law no longer provides a rational basis for distinguishing between one plaintiff's losses and another's, then either the equitable and common law approaches ought to be assimilated or some other rational boundary established.

In recent decades, lawyers and judges around the world have turned their attentions to these under-developed aspects of common law and equity. One of the great achievements of the common law this century has been the recognition of unjust enrichment as a distinct source of legal rights. The U.S.A. led the way among common law jurisdictions with the publication by the American Law Institute of the *Restatement of the Law of Restitution* in 1937. Canada was next with the landmark case of *Deglman* v. *Guaranty Trust Co. of Canada.*[1] Australia and England followed the North American lead much later with *Pavey & Matthews Pty. Ltd.* v. *Paul*[2] and *Lipkin Gorman* v. *Karpnale Ltd.*[3]

The benefits of these international efforts have been felt in at least two ways. First, the addition of unjust enrichment as a distinct category of legally significant events reduces the miscellany beyond the core which has long been difficult to understand. For example, undue influence need not be understood and developed as an isolated equitable doctrine, but can usefully be compared with other equitable and common law responses to unjust enrichment, such as mistake, duress, or exploitation of weakness. This provides a foundation for real progress in a number of areas previously regarded as unrelated, but now understood as unjust enrichment.

A second great benefit is the flurry of judicial and scholarly activity generated by the recognition of unjust enrichment in a number of jurisdictions. Much of the writing produced is of international importance, thanks to a prevailing methodology which is both comparative and analytical. This work has greatly accelerated the long delayed

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1 [1954] S.C.R. 725.
2 (1987), 162 C.L.R. 221.
3 [1991] 2 A.C. 548.

development of the law of unjust enrichment and has inspired lawyers to use the same methods to make advances in other areas.

The late recognition of unjust enrichment as a distinct part of equity and the common law necessitates the re-drawing of boundaries. Unjust enrichment will no longer remain hidden as quasi-contract or constructive trust, and lawyers and judges must work to establish the principles which separate unjust enrichment from contract, wrongdoing, and other events. Fridman and Rafferty provide an example of the work that must be done with their essays on quantum meruit. The Latin for "as much as he deserved" tells what the law is doing: ordering the defendant to pay for the value of services performed by the plaintiff. However, it does not say why. Fridman and Rafferty remind the reader that an obligation to pay for services may be created by a promise or by unjust enrichment. The boundary between contract and unjust enrichment must be drawn correctly. Treating promissory obligations as unjust enrichment is as much an error as the previous treatment of unjust enrichment as implied promise under the label "quasi-contract."

There is a healthy and vigorous debate over where the lines should be drawn. Should unjust enrichment be defined broadly, as McInnes suggests, or narrowly, according to Stevens and Neyer? The importance of the task is also the subject of debate. Is it essential to clearly and correctly identify the events which give rise to legal rights, as Chambers argues, or is Rotman correct in suggesting that judicial conscience will prove to be a sufficient guide? These are questions which will not be answered easily. One thing is clear, however. The work towards the resolution of these issues must continue, for it will determine the course of Canadian law in the next century.

This is an exciting time for those interested or involved in these issues. The international scholarly attention devoted to these subjects in recent years is unsurpassed. A quick glance through the latest issue of the *Restitution Law Review* will make plain just how widespread this activity has become. Canadian lawyers and judges should be well placed to contribute to these comparative and international efforts, thanks to Canada's early recognition of unjust enrichment, its close connection with both the U.S.A. and the Commonwealth, and its own civilian jurisdiction. However, Canadian lawyers can find it difficult to access international developments in the law of unjust enrichment. They face two impediments which flow from the Supreme Court of Canada's use of unjust enrichment as a basis for distributing family property on the breakdown of a marriage or similar relationship.

First, as McInnes explains in his essay, the Supreme Court of Canada defined unjust enrichment in common law Canada using language (borrowed from Quebec civil law) which differs significantly from that used in other common law jurisdictions. Consequently, dialogue with American or Commonwealth lawyers on the subject of unjust enrichment requires translation. There are no similar barriers to international discussions on the common law of tort or contract. If such an impediment had existed in 1954, the Supreme Court of Canada might not have drawn on the American learning

which made *Deglman* possible. However, this alienation from other common law traditions has not moved the common law in Canada closer to the civilian tradition. The Canadian common-law definition of unjust enrichment does have a counterpart in section 1493 of the *Civil Code of Quebec.*[4] However, that is just one of several sections (such as section 1491, "Reception of a Thing Not Due") dealing with the rights and obligations which, in other provinces, form part of the common law of unjust enrichment. The similarity of language should not be mistaken for more substantial similarities of scope or method.

The second impediment is that the body of law governing the distribution of family property is not easily applied to other situations. The factors which determine a contributing spouse's entitlement to share the family home do not shed light on questions such as whether a bank can recover a mistaken payment or whether that right should be personal or proprietary. A lawyer or judge faced with such uncertainty derives little guidance from the family property cases which the Supreme Court of Canada has used to develop the law of unjust enrichment. Lawyers and judges abroad face the same problem when they attempt to include the Canadian law of unjust enrichment in their comparative analyses.

A great deal of work remains to be done in developing both the Canadian law of unjust enrichment and the other areas of law which are outside the traditional categories of tort and contract and still in need of a doctrinal home. Canadian lawyers and judges engaged in that work will benefit from the experiences of those working with the same problems in other jurisdictions. They must strive to overcome the impediments to international dialogue if they are to reap the benefits of international scholarship. The same is true if they are to contribute on an international stage. It is hoped that this issue of the *Alberta Law Review* will form part of an ever increasing body of Canadian contributions to international efforts now taking place. Thanks are due to the editors of the *Alberta Law Review* for making this possible with their hard work and kindness.

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4 S.Q. 1991, c. 64.