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Restitution of Illegal Rent: Re Kasprzycki and Abel, Re Symons and Alexander

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RESTITUTION OF ILLEGAL RENT: RE KASPRZYCKI AND ABEL; RE SYMONS AND ALEXANDER

Jack Fleming*

I. THE ISSUE

In two recent Ontario cases[1] before District Court Judges sitting as local Judges of the Supreme Court, restitution of rent paid under void notices of rent increases was ordered. In both cases rent had been paid according to written notices of rent increase which had been served less than the required statutory ninety days prior to the time of increase. As the landlords in each case were obliging enough to serve notices (rather than omit them entirely) and the tenants fortunate enough to retain their copies over the years, the facts were not disputed and the clear legal issue was before the judges. This note will review these two cases and the issue of restitution of illegal rent payments generally.

In *Re Symons and Alexander,* four notices of rent increase had been served over as many years. The first two notices failed to give ninety days notice, but the last two notices were proper apart from the amounts (being based on the amounts illegally set by the void notices). Restitution of $2,205.00 was ordered and the legal rent for the apartment was declared to be $416.86 per month rather than the $460.00 per month claimed by the landlord.

In *Re Kasprzycki and Abel,* the tenant had been given seven notices of rent increases over the years, all giving less than ninety days notice (most around one month, some around two months). Both parties stated in their affidavits that they were unaware of the ninety day notice requirement. Some of the increases were also in excess of the statutorally allowed percentage[2] or too soon after a previous increase.[3]

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1 *Re Symons and Alexander* (1986), 55 O.R. (2d) 395 (L.J.S.C.); *Re Kasprzycki and Abel* (1986), 55 O.R. (2d) 536 (L.J.S.C.).

2 *Residential Tenancies Act,* R.S.O. 1980, c. 452, s. 125.

3 *Residential Tenancies Act,* R.S.O. 1980, c 452, s. 124.

His Honour Judge Carnwath held that Mr. Kasprzycki was entitled to the return of $4,555.00 in excess rent paid and declared that the legal rent for the unit was $200.00 per month (the rent payable prior to the void notices) rather than the $345.00 per month being charged.

Both the *Landlord and Tenant Act* and the *Residential Tenancies Act* contain a requirement of ninety days notice of rent increase but neither Act provides a remedy for lack of proper notice, apart from authority for the refusal of a tenant to pay an increase pursuant to a void notice.

JURISDICTION

The *Residential Tenancies Act* does provide a remedy for rent increases which are in excess of the statutory percentage allowed or where an increase takes place within twelve months after a previous increase.[4] The Residential Tenancy Commission had held that it has no jurisdiction to provide any remedy in cases of lack of proper notice.[5]

In determining overpayments under Section 129 the Residential Tenancy Commission will not take into account the fact that notices of increase were void and generally will simply calculate the maximum increases which could have been taken under the legislation to determine the amount of overpayment.[6]

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4 *Residential Tenancies Act*, R.S.O. 1980, c. 452, s. 129(2). This section only deals with rent increases in violation of Part XI of the *Act*. Section 60, containing the notice requirements, is found in Part V. The Residential Tenancy Commission also has a monetary jurisdictional limit of $3,000.00, but s. 84(4) of the *Act* provides that proceedings may be taken in a court of competent jurisdiction when the amount claimed exceeds $3,000.00. Thus, it is only cases of improper notice which lack a remedy. However, this lack of remedy is less clear in the light of the decision of the Ontario Court ofAppeal in *Rae* v. *Rank City Wall* (4 September 1985), 1172/84 (Ont. C.A.), where it was held that "the validity of a notice given pursuant to s. 60 of the Act is, indeed, a matter or a question arising under the Act." This decision does not go so far as to hold that a remedy may be granted under s. 129, but (as now reflected in the R.T.C. Interpretation Guidelines) if a matter is otherwise properly before the R.T.C., the effect of invalid notices may be considered. Exactly what effect this will have on R.T.C. decisions is unclear, but given the practice of "deeming" proper increases (see footnote 6), it is unlikely to have any effect.

5 *Re 30 Springhurst Ave.* (1981), 2 R.T.C. 64 (Residential Tenancy Commission).

6 An exception to this general rule is where evidence of actual increases paid is available, as s. 125 of the *Residential Tenancies Act* provides that increases cannot be more than 4% of "the last rent that was charged for an equivalent rental period". Thus, if an increase was not charged, it will not be deemed. But if it was charged excessively, or too frequently, or without proper notice, it will be deemed to the appropriate amount (as if maximum increases had been properly taken): *Re Lightfoot and VI-GO Holdings Ltd.* (1983), 2 T.L.L.R. 129 (Residential Tenancy Commission); *Re Philpott and Anderson* (1985), Ottawa 4206/85 (Ont. Dist. Ct.);

It should be noted that in cases where the increases were made without proper notice and also violated Part XI of the *Residential Tenancies Act*, it may be preferable to bring a restitution action in court rather than an application to the Commission (in which the increase will be deemed at the maximum allowable amount). The difference in the amount recoverable may be significant.

An initial issue in bringing such an application before the court is that of the court's jurisdiction over illegal rent cases. The Commission is given exclusive jurisdiction over "all matters and questions arising under this Act".[7] The short answer is that this is not a matter or question arising under the *Act* as the *Act* provides no remedy in these cases. As well, the Divisional Court has confirmed that judges may consider the legal rent payable for a rental unit when it is necessary for a matter otherwise properly before them.[8]

However, when the illegality of rent increases arises not only from lack of proper notice, but also due to breach of the provisions of Part XI of the *Residential Tenancies Act*, then it would appear that the Commission does have jurisdiction to hear the case.[9] This is not, however, an exclusive jurisdiction.[10]

II. EFFECT OF THE NOTICES

The first point to be considered in these cases is the effect of the notices of rent increase. In some cases no written notice will have been given at

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Re Anderson and Philpott (3 June 1985), (Resid. Tenancy Comm. Appeal Panel) [unreported]. But for an opposite decision see *Re Sovie and Toronto Apt. Buildings* (1985), 6 R.T.C. 51 (R.T.C. Appeal Panel), where a rent not charged was deemed. *Quaere* whether "charged" means demanded by the landlord or actually paid by the tenant. Presumably if a landlord gives less than 90 days notice and the tenant refuses to pay, the rent was not "charged". See also the comment on *Rae* v. *Rank City Wall* in note 4.

7 *Residential Tenancies Act*, R.S.O. 1980. c. 452, s. 84(1).

8 *Re 364579 Ontario Ltd. and Murray* (1983), 44 O.R. (2d) 100 (Div. Ct.). Note that this is without prejudice to any later determination of the lawful rent by the R.T.C.. If the court declares the lawful rent on the basis of void notices and the landlord subsequently applies to the R.T.C. and gets a declaration of the rent based on deemed increases, what is the net result? Presumably, the decision of the R.T.C. would take precedence, but this would not affect the judgement obtained by the tenant for restitution of illegally paid rent: it would only affect the subsequent legal rent payable. It should also be noted that the only way that a landlord could bring such a matter before the Commission would be to serve notice of a rent increase in excess of the allowable percentasge and apply for whole building review: *Residential Tenancies Act*, s. 126(1).

9 *Rae* v. *Rank City Wall*, *supra*, note 4 at 3.

10 *Ibid*, at 4.

all by a landlord, but in both *Symons* and *Kasprzycki* written notice was given, the only defect being that less than ninety days notice was given.

The *Symons* case was argued by the landlord's counsel entirely on the basis that the notices were not valid but were effective ninety days after service. The tenant's right to return of the money if the notices were void was not disputed.

Section 129 of the *Landlord and Tenant Act* sets out the notice requirements:

> "129(1) a landlord shall not increase the rent for residential premises unless he serves on the tenant a notice in writing setting out his intention to increase the rent and the amount of the increase intended to be made not less than ninety days prior to the end of,
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> (a) the period of the tenancy; or,
>
> (b) the term of a tenancy for a fixed period.
>
> . . .
>
> (4) Subject to the provisions of the *Residential Tenancies Act*, an increase in rent by the landlord where the landlord has not served a notice according to the provisions of subsection (1) is void."

Section 60 of the *Residential Tenancies Act* is similar:

> "60(1) A landlord shall not increase the rent for a rental unit unless he gives the tenant a notice in the prescribed form setting out his intention to increase the rent and the amount of the increase, expressed both in dollars and as a percentage of the current rent, intended to be made not less than ninety days before the end of,
>
> (a) a period of the tenancy; or
>
> (b) the term of a tenancy for a fixed period.
>
> (2) An increase in rent by the landlord where the landlord has not given the notice required by subsection (1) is void."

Both Acts are framed in mandatory language: "a landlord *shall not* increase the rent" without proper notice, and both provide that an increase without proper notice is *void*. The wording is quite clear.

Both Acts provide for deemed acceptance of a notice of rent increase when a tenant served with such a notice does not then give notice of termination to the landlord.[11] This only has application when the tenants

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11 *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 129(2); *Residential Tenancies Act*, R.S.O. 1980, c. 452, s. 61(1); *Re Cando Property Management and Wilson* (1983), 44 O.R. (2d) 123 (Div. Ct.). Note that 90 days notice was given in that case.

have been served with proper notice of rent increases: there cannot be deemed acceptance of a void notice.[12]

There is an important substantive reason for the notices being void if not properly served ninety days prior to an increase. The ninety days notice gives the tenant one month within which to give the sixty days notice of termination[13] should the tenant decide to move rather than pay the increase.

Section 121 of the *Residential Tenancies Act* does state that substantial compliance with forms is sufficient, but this section deals only with the content of forms, not with the required notice period.

In summary on this point, the language of the statutes is clear and mandatory; the legislation allows for correction of other defects, but not for lack of proper notice; the Divisional Court has, in other contexts, made it clear that mandatory notice requirements in the *Landlord and Tenant Act* are to be strictly interpreted; and short notice deprives a tenant of the right to terminate a tenancy prior to an increase.

These arguments succeeded in both *Symons* and *Kasprzycki*. In *Kasprzycki* it was held that there had never been a legal increase as all of the notices were void. In *Symons*, two of the four notices were void and the subsequent two were valid for a proper percentage increase over the legal rent as recalculated on the basis of the first two notices being void, rather than for the amounts set out in the notices.[14] The next question became whether the illegal rent paid could be recovered.

III. RESTITUTION OF ILLEGAL RENT

Restitution is based on the concept that monies paid by mistake may generally be recovered as they are not "voluntary" and it would be against conscience and equity to retain them. Obviously, a tenant who pays an illegal rent knowing it to be illegal will be making a voluntary payment

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12 *Cando Property Management, supra,* note 11 at 127, is authority for the proposition that a void notice of increase cannot be deemed effective an appropriate length of time later (in that case, the notice was 12 months early). See also on this point *Re Burton-Lesbury Holdings and Holt* (1984), 27 A.C.W.S. (2d) (Co. Ct.), where the tenant gave one month's notice of termination, left two months later and argued (unsuccessfully) that the notice was effective sixty days after being served - similar to the landlord's argument in *Symons*. See also the many cases indicating that the notice requirements of the *Landlord and Tenant Act* generally are interpreted strictly by the courts: *Bianchi* v. *Aguanno* (1983), 42 D.L.R. (2d) 76 (Div. Ct.); *Re Devitt and Sawchyn* (1976), 12 O.R. (2d) 652 (Div. Ct.).

13 *Landlord and Tenant Act,* R.S.O. 1980, c. 232, s. 101; *Re Devitt, supra,* note 12.

14 *Landlord and Tenant Act,* R.S.O. 1980, c. 232, s. 129(2)(b); *Residential Tenancies Act,* R.S.O. 1980, c. 452, s. 61(1)(b).

(unless compulsion can be shown) and will not be able to recover.

ACQUIESENCE

It might be argued that a tenant who has paid in ignorance may nonetheless be barred as having aquiesed to the notice. There are two responses to this. First, both the statutes under consideration prevent a tenant from contracting out of his or her rights under the legislation.[15] Secondly, no acquiesence could be deemed on the part of a tenant who is not acting on full knowledge of the facts.[16] Similarly, the defence of laches is unavailable where the tenant did not have full knowledge of his or her rights, even if the tenant had the means of easily obtaining this information.[17]

MISTAKE OF FACT

It has been held that money may only be recovered when paid under a mistake of fact, not a mistake of law (with certain exceptions).[18] The Supreme Court of Canada has recently limited the exceptions to cases of compulsion and illegal transactions.[19]

In *Symons* it was held that payment of rent pursuant to void notices of increase was a mistake of fact. This was based upon the Supreme Court of Canada case of *George (Porky) Jacobs Enterprises* v. *City of Regina.*[20] In that case, the plaintiff promoted wrestling exhibitions and was required to pay a licence fee for the privilege, pursuant to a municipal bylaw. Had the bylaw been correctly interpreted, Mr. Jacobs would have been required to pay an annual fee. Labouring under a common mistake, a daily fee was demanded and paid for four years. This was held to be a mistake of fact, as the parties believed that a law existed which did

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15 *Landlord and Tenant Act,* s. 82; *Residential Tenancies Act,* s. 2; *Kay* v. *Parkway Forest Developments* (1982), 35 O.R. (2d) 329 (Div. Ct.).

16 J.S. Williams, *Limitation of Actions in Canada,* 2d ed., (Toronto: Butterworths, 1980) at 34-37: "Aquiesence and ratification must be founded on a full knowledge of the facts..." (at 37). *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cite´ et du Dist. de Montreal* (1887), 13 App. Cas. 111 at 118 (J.C.P.C.).

17 *Kelly* v. *Solari* (1841), 9 M & W 54, 152 E.R. 24; *Lindsay Petroleum* v. *Hurd,* [1874] L.R. 5 P.C. 221; *George (Porky) Jacobs Enterprises* v. *City of Regina* (1964), 44 D.L.R. (2d) 179 (S.C.C.).

18 *Kelly* v. *Solari, ibid.*

19 *Hydro Electric Commission of Nepean* v. *Ontario Hydro* (1982), 132 D.L.R. (3d) 193 (S.C.C.).

20 *Supra,* note 17.

not. In *Symons*, the parties were unaware of the existence of a law and this was held to be a mistake of fact. This argument did not succeed in *Kasprzycki*.

COMPULSION

One exception to the usual bar to recovery in mistake of law cases is where compulsion can be demonstrated. It is not necessary that no other recourse be available; practical compulsion is sufficient.[21]

A case of practical compulsion in the payment of rent was found in *Re Statton and Zalan and Tessenyi*.[22] In that case the notice of rent increase given did not meet the requirements of Section 60 of the *Residential Tenancies Act*. The County Court Judge found that practical compulsion existed as:

> (1) The tenants did not wish to incur the expense of moving;
>
> (2) One of the tenants had undergone quadruple bypass heart surgery after moving in and the stress of moving again could be dangerous;
>
> (3) They did not wish to interrupt the schooling of a child living with them prior to completion of Grade 6.

Restitution was ordered, citing the *Eadie* v. *Township of Brantford* case. Arguably, compulsion always exists in these cases, given that the alternative is for the tenants to move. Certainly, with the current extremely tight housing market in Ontario, a good case could be made for compulsion in any case of notice of rent increase.

IN PARI DELICTO

In the *Kasprzycki* case, restitution was ordered on the basis that the parties were not *in pari delicto* (equally at fault). The leading case on this point is *Kiriri Cotton* v. *Dewani*.[23] In that case there was an illegal key deposit paid for the privilege of renting a rent controlled apartment in Uganda. It was a clear mistake of law: both parties had lawyers, but they misinterpreted the relevant legislation; both thought it legal to do what they did.

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21 *Eadie* v. *Township of Brantford* (1976), 63 D.L.R. (2d) 561, where under a mutual mistake of law, a severance fee was demanded and paid (under a bylaw which was subsequently found to have been illegally passed) to enable the plaintiff to develop his land; *Canadian Mortgage Association* v. *City of Regina* [1917] 1 W.W.R. 1130 (Alta. S.C.), where taxes were paid to avoid the land being sold for taxes.

22 (1983), 1 T.L.L.R. 267 at 277-278 (Co. Ct.).

23 [1960] A.C. 192 (P.C.).

In *Kiriri,* as in *Kasprzycki,* the legislation made no direct provision for recovery of the illegal payment, therefore the case fell to be decided on the basis of general restitution law. The judgement of the Privy Council was delivered by Lord Denning, who stated the issue as being "are they *in pari delicto* ?".[24] It was argued that because the parties were equally mistaken, they were *in pari delicto* . That proposition was answered as follows:

> "Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the protection of the other - then they are not *in pari delicto* and the money can be recovered back."[25]

Thus, the case stands for the proposition that where the illegality of the payments arises from a statute designed to protect a class of people of whom the plaintiff is a member, then the parties are not *in pari delicto ;* and where they are not *in pari delicto* recovery may be had for a mistake of law.[26] Many cases have established that the *Landlord and Tenant Act* is remedial legislation enacted for the protection of tenants.[27]

NEPEAN HYDRO

The leading statement of the Supreme Court of Canada on restitution is found in *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro.*[28] In the dissenting judgement of Dickson J. (as he then was) concurred in by Laskin C.J.C., the distinction between mistakes of fact and law was criticised:

> "when we ask what is the distinction between "law" and "fact" no exact answer is discoverable in the law reports."[29]

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24 *Ibid.* at 203.

25 *Ibid.* at 204

26 See also *Re Ontario Securities Commission and British Canadian Options* (1979), 93 D.L.R. (3d) 208 (O.H.C.); *Sidmay Ltd.* v. *Wehttam Investments* [1967] 1 O.R. 208 (C.A.), [1968] S.C.R. 828; *Browning* v. *Morris* (1778), 2 Cowp. 791, 98 E.R. 1364; *Haug and Nellermoe* v. *Murdoch* (1916), 26 D.L.R. 200 (Sask. S.C.).

27 *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 717 at 718; *Re Baker and Hayward* (1977), 16 O.R. (2d) 695 (C.A.); *Re Bruns and Fancher* (1977), 16 O.R. (2d) 781 (Div. Ct.). On the *Residential Tenancies Act,* see *In the Matter of 326 Bethune Street* (1980), 1 R.T.C. 7 at 8: "... the public policy inherent in rent review legislation supersedes the intent of the parties themselves."

28 (1982), 132 D.L.R. (3d) 193 (S.C.C.).

29 *Ibid.* at 201.

The now Chief Justice discussed the condemnation of the distinction by many legal writers and jurists, and cast doubt upon the "ill conceived" origins of the concept.[30]

Dickson J. went on to detail various exceptions to mistake of law which developed to circumvent the absurdities of the distinction. The *Kiriri* principle was described as follows:

> "A further judicial development to circumvent the rule barring recovery under mistake of law is what might be termed the *Kiriri* principle (*Kiriri Cotton Co. Ltd.* v. *Dewani*, [1960] A.C. 192). Basically it allows a party to benefit from a "protective statute" and to recover money paid under a mistake of law, where the "law" in question is a statute whose purpose is to protect his interests. This is surely a common sense proposition. It is impossible to know all the law, presumptions and maxims to the contrary notwithstanding. To deprive a citizen of the benefit of a statute designed precisely for his protection solely because he is unaware of its existence is an absurdity".[31]

Having reviewed the absurdity of the law/fact distinction and having put his stamp of approval on the *Kiriri* exception, Dickson concluded by writing:

> "I should prefer to reach this result by putting mistakes of law and mistakes of fact on the same footing rather than by increasing the number of exceptions engrafted on the rule and which have already, to a great extent, emasculated the rule... The true doctrine must surely be that enunciated by Lord Mansfield C.J. in *Bize* v. *Dickason, Supra* : "[W]here money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."".[32]

Estey J., writing the majority judgement (Martland and Lamer J.J. concurring), dealt with this attempt to abolish the fact/law distinction summarily by merely stating that the appellant's submission did not argue it and that his "considerations have been confined to the operation of the doctrine of mistake of law as argued."[33]

In Mr. Justice Estey's review of the law of restitution, he held that it was settled law that money paid under a mistake of law could not be recovered while money paid under a mistake of fact could be, until the *Kiriri Cotton* case significantly varied the accepted rule.[34]

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30 *Ibid.* at 201ff.

31 *Ibid.* at 209.

32 *Ibid.* at 211. On reform of the law, see also G.H.L Fridman and J.G. McLeod, *Restitution*, (Toronto: Carswell, 1982) at 166ff.

33 *Ibid.* at 243.

34 *Ibid.* at 226.

Estey J. considered the facts in the *Nepean* case as they related to the *Kiriri* principle and found that the plaintiff had not brought itself within those principles. But he did not stop there.

Mr. Justice Estey then reviewed the caselaw cited for the proposition developed in *Kiriri* and concluded that these earlier cases did not support the general proposition in *Kiriri*,[35] thus deciding that the fact that the parties were not *in pari delicto* does not, by itself, constitute an exception to the bar against recovery in mistake of law cases.

Estey J. then concluded by finding that recovery can be had for mutual mistake of law only where there is compulsion or an illegal transaction and that in "the case of illegal transactions, the concept of *in pari delicto* is introduced to determine entitlement to recovery".[36] On the facts of that case, where charges not authorized by the statute were billed and paid, for the supply of power, Mr. Justice Estey held that there was no illegal agreement, merely money paid under a mutual mistake of law.

Thus, while dismissing the proposition that the parties not being *in pari delicto* constitutes an exception to mistake of law cases, Estey J. did accept that this is a relevant consideration where there is an illegal contract and he did accept *Kiriri* as as an illegal contract case.[37] The law regarding the recovery of money paid under illegal transactions where the parties are not *in pari delicto* was stated to apply only to those situations where the transactions are "contrary to public policy or prohibited by statute".[38] In *Nepean Hydro*, neither party offended any prohibition in law.

KASPRZYCKI AND ABEL

In *Kasprzycki*, the *Nepean Hydro* case was reviewed by Carnwath D.C.J., who expressed sympathy for the position of Mr. Justice Dickson that the fact/law distinction should be abolished. He went on to note that Estey J. found:

> "... that the principle of *in pari delicto* as enunciated by the Privy Council in the *Kiriri* case was neither the law of England nor in Ontario and disposed of the *Nepean* case on other grounds."[39]

His Honour Judge Carnwath decided the *Kasprzycki* case by holding that the tenant and the landlord were parties to an illegal contract, and not *in pari delicto* in accordance with the "class protecting statute" prin-

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35 *Ibid.* at 238.

36 *Ibid.* at 242.

37 *Ibid.* at 229.

38 *Ibid.* at 239.

39 *Kasprzycki, supra,* note 1 at 542.

ciple in *Kiriri.*[40] The payments in *Nepean Hydro* were merely not authorized by the Act. Those in *Kasprzycki* were specifically prohibited by the legislation and therefore constituted an illegal transaction as defined by Estey J.[41]

IV LEGISLATIVE CHANGE

Bill 51[42], currently before the Ontario Legislature*, is intended to totally re-vamp Ontario's rent review system. It's effect on the type of situation raised in the *Kasprzycki* and *Symons* cases is not entirely clear, but this note will offer some analysis and suggestions.

NOTICE REQUIREMENTS

Section 5 of the Bill is analogous to section 60 of the *Residential Tenancies Act.*

> "5. (1) The rent charged for a rental unit shall not be increased unless the landlord gives the tenant a [90 days] notice in the prescribed form...
>
> (2) An increase in rent by the landlord where the landlord has not given the notice required by subsection (1) is void."

There is a section providing that actual notice of documents is sufficient, but only if there is notice within the proper time.[43] A tenant receiving no written notice, or less than ninety days notice, would be entitled to refuse to pay a requested increase. The increase would be delayed until proper notice was given and the ninety days from that notice expired.

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40 *Ibid.* The concepts of an "illegal contract" existing where statutory prohibitions are violated, the restitution of money paid under an "illegal contract" when the parties are not *in pari delicto,* and the finding that they are not *in pari delicto* in "class protecting statute" cases are found in a number of other cases: *Re Ontario Securities Commission, supra,* note 26; *Browning* v. *Morris, supra,* note 26; *Haug and Nellermore, supra,* note 26; *North Saskatchewan Seeds* v. *Couch* (1960), 31 W.W.R. 253 (Sask. Dist. Ct.).

41 *Kasprzycki, supra,* note 1 at 542.

42 Bill 51, *An Act to Provide for the Regulation of Rents Charged for Rental Units in Residential Complexes,* 2d Sess., 33d Leg. Ont., 1986.

* Subsequent to the writing of this article, Bill 51 (the *Residential Rent Regulation Act, 1986*) was passed by the Ontario Legislature, and proclaimed, in December of 1986.

43 Bill 51, s. 21(4).

WHERE ILLEGAL INCREASE PAID

What of the tenant who unwittingly pays a requested increase without proper notice? Section 95(1) provides as follows.

> "95(1) No tenant is liable to pay any rent increase in excess of that permitted to be charged under this Act."

The wording "this Act" rather than "this Part" means that improper notice cases are not necessarily excluded from the remedy found in section 95. Section 95(2) provides that where a tenant applies and the Minister finds that a "landlord has charged an amount of rent that is in excess of that permitted by this Act", the Minister *shall* declare the maximum rent which may be charged and *shall* order repayment of any excess rent paid.[44]

The key question is what is meant by the phrase "in excess of that permitted by this Act". Is this intended to refer to "maximum rent" (which is defined in section 1 as the lawful maximum rent which could have been charged had all permissible increases been taken), or is an increase without proper notice (a "void" increase) not one which is "permitted by the Act"? In short, is it intended to deem all permissible increases or not? If the latter interpretation is the correct one, then a tenant who has paid an illegal increase would have a remedy under section 95.[45] If increases are not deemed, then an increase taken without proper notice would be in excess of increases "permitted by the Act".

The calculation of the excess rent paid would not be the same as in the *Kasprzycki* and *Symons* cases, as section 71(4) provides that the annual increase[46] may exceed the statutory increase[47] as long as the amount of the new rent does not exceed the "maximum rent" (see definition above). Thus, where a void notice is followed by a valid notice the following year, the second notice would not be valid only for a statutory percentage increase of the 'legal rent' (i.e. the rent prior to the void notice); it would be valid for its full amount up to the "maximum rent".

If, on the other hand, "permitted by this Act" is intended to be equivalent to the concept of "maximum rent", then there is no remedy in section 95 for recovery of excess rent paid due to void increases. In that case, it might be argued that an ordinary restitution action may be undertaken, on the grounds that this falls outside of the exclusive jurisdiction given

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44 Subject to a $3,000.00 limit (s.13(4)), but a tenant may apply to court for amounts over $3,000.00 (s.13(5)).

45 An exclusive remedy, as s.13 gives the Minister and the Board exclusive jurisdiction over "all matters and questions arising under this Act".

46 The rent cannot be increased sooner than 12 months after the last increase: s.70.

47 A percentage set each year - 5.2% for 1987. A landlord who feels that a higher increase is justified must apply to the Minister of Housing.

to the Minister as it is not a 'matter or question' arising under the Act as no remedy is provided in the Act. The argument is similar to that successfully made regarding the *Residential Tenancies Act.* As in the earlier Act, it is clearly stated that an increase is void, but no remedy is contained within the Act.

The interpretation including section 5 cases within the remedy of section 95 is probably the correct one. Had the drafters intended to invoke the concept of "maximum rent", a defined term, they could easily have done so.

PAST ILLEGAL INCREASES

What then of the tenant who has paid illegal increases prior to the passage of Bill 51? What law governs those cases?

First, it should be noted that the actual date in question is not the proclamation date, but rather August 1st, 1985. The Bill regulates (retroactively) increases from that date on, thus any increases from August 1st, 1985 are governed by the discussion in the previous section.

If illegal rent payments prior to August 1st, 1985 are covered by Bill 51, a tenant will find that his or her right of recovery may be severely limited. Section 95(3) limits an order for repayment of illegal rent payments prior to that date to the excess paid over the amount that *could have been charged* had "all increases permitted under" *The Residential Premises Rent Review Act, 1975* [48] and the *Residential Tenancies Act* been taken. This would deem legal increases which were not taken and essentially nullify recovery in these cases.

If that is not enough, section 66(1) provides that where a landlord files the statement required under section 67 (for the new rent registry) within the permitted time, *no repayment of excess rent* will be ordered under section 95(2) for pre August 1985 overpayments.

Clearly, it is in the interests of tenants that these situations not be covered by Bill 51, and such appears to be the case.

Section 95(2) of Bill 51 provides for repayment of rent paid in excess of that permitted by that Act or *Part XI* of the *Residential Tenancies Act.* Thus, the same cases that were covered by section 129 of the *R.T.A.* are covered by section 95(2) of Bill 51; the Bill claims no repayment jurisdiction over *R.T.A.* section 60 cases, only over Part XI cases.

LANDLORD AND TENANT ACT

One further jurisdictional argument should be mentioned; one which applies to all void increases, both pre and post Bill 51. Section 129(4) of the *Landlord and Tenant Act* provides that "[s]ubject to the provisions of

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48 S.O. 1975 (2d session), c.12, predecessor to the *Residential Tenancies Act.*

the *Residential Tenancies Act* an increase in rent [without the required notice] is void."[49] Could this be relied on in a restitution action with no reference at all to rent review legislation?

Both Acts have sections declaring their primacy over other Acts.[50] Presumably that in Bill 51 will take precedence, as it will be the more recent piece of legislation.[51] Is section 129(4) of the *L.T.A.* a provision which conflicts with a provision of Bill 51? It does not conflict with section 5 of Bill 51. It does not conflict directly with any provision of Bill 51. Restitution granted pursuant to the voiding of an increase by section 129(4) would conflict with the scheme set up by sections 95 and 71(4) but that is a result of the operation of the equitable remedy of restitution upon section 129(4) rather than a matter of a provision of a statute being in conflict. Overlapping provisions which are not inconsistent need not be construed to avoid duplication.[52]

This note only raises the question without delving into it, but it may be a large escape hatch for tenants from the strictures of Bill 51 in recovery of illegal rent payments.

V. IMPACT OF DECISIONS

The decisions in the *Kasprzycki* and *Symons* cases should have an impact beyond their immediate facts. Certainly, they should make more landlords aware of their obligations regarding notices of rent increase. If restitution had not been allowed in these cases, landlords would be in the situation of suffering no penalty for lack of proper notice, unless the tenant caught the landlord at the beginning and refused to pay. The cases also have implications for purchasers of rental buildings. A claim of restitution would be against the landlord who had actually received the illegal rent, but a declaration as to the current legal rent has an impact on the current value of a property (pending any subsequent decision by the Residential Tenancy Commission). Also, a new landlord could inherit an illegal rent situation and accept illegal payments unwittingly for some time. A new landlord could be in for some surprises, as could his or her solicitor if this danger is not investigated, or at least pointed out, when a building is purchased.

Finally, these cases are examples of the role of legal clinics in developing test case litigation. The impact of the cases will probably go beyond

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49 Being subject to the *R.T.A.* provisions only affects increases taking effect at the start of a new tenancy, for which notice is not required. In any event, upon proclamation of Bill 51 the *R.T.A.* is repealed: Bill 51, s. 126 and 127.

50 *Landlord and Tenant Act*, s.82(1); Bill 51, s.2.

51 E.A. Driedger, *Construction of Statutes*, 2d. ed. (Toronto: Butterworths, 1983) at 235.

52 *Ibid.* at 236.

assisting some individual clients to, hopefully, influencing the future behavior of landlords, to the benefit of many tenants. As well, now that the point has been tested in court, many of the individual cases which do arise may be handled by the private bar.