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Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada

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The general rule that moneys paid under a mistake of law can not be recovered is something of an embarrassment to the common law. The rule coexists with great difficulty with another general rule to the effect that moneys paid under a mistake of fact are recoverable. The distinction between questions of law and questions of fact is notoriously difficult and has proven to be particularly so in this context. Courts are understandably reluctant to deny recovery of payments made on the basis of a misunderstanding of the payer's legal obligations and have often adopted the ruse of labelling as matters of fact misunderstandings which appear to be distinctly legal in character. Further, it is generally agreed that the traditional rationale of the rule, *ignorantia juris non excusat lex*, has no relevance in the context of claims to recover money paid in error. For obvious reasons, ignorance of the law will not usually be counted as an excuse for failure to comply with the prohibitions of the criminal law or of other regulatory schemes or for failure to adhere to duties imposed by the law of torts. It it with good reason that one is required to conform to laws of this kind, even if one is unaware of their existence. It is equally obvious that the ancient *ignorantia juris* maxim cannot offer an explanation for the traditional reluctance of the courts to allow recovery, for example, of moneys expended in overpayment of taxes or of an excess payment made under a contract where the overpayment results from a mistaken construction of the agreement or of a statute. Such individuals are not refusing to obey or comply with the law; they have conferred on the recipient of their payment an unearned and often unexpected windfall which

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they seek to recover. The payer now devoutly wishes that he had successfully obeyed or complied with the correct legal interpretation, and seeks to establish that state of affairs through recovery of the overpayment.

A more plausible explanation for the rule might be grounded in the policy of the common law favouring finality in the resolution of disputes. It would be inconsistent with that policy to allow one who has agreed to settle a dispute by the making of a payment, to seek recovery of the payment when it subsequently develops that the payer proceeded to make the payment on the basis of a misunderstanding of his legal position. Compromise agreements entered into on the basis of such errors would normally be binding. The payer would be taken to have assumed the risk of making errors of this kind. For similar policy reasons it may be argued that in a situation short of a compromise, a situation referred to by Goff and Jones as a "voluntary... submission to an honest claim," denial of relief can be defended on grounds of principle. Persuasive as this may seem, it is not, of course, a basis for a rule denying recovery of payments made under a mistake of law. The same considerations would be present whether the error in question was one of fact or law. To be sure, it may well be that errors of law may be more likely to arise (or, at least, may be assumed to be more likely to arise) in a dispute resolution context than would be errors of fact, and this might indeed offer a partial explanation for the emergence of the mistake of law doctrine. Nonetheless, it is obvious that both mistakes of fact and mistakes of law can and do arise in this context and that the policy favouring finality weighs with equal force against recovery premised on either kind of error.

A rule denying recovery for payments made under a mistake of law thus appears to represent a striking illustration of what is after all a not infrequent phenomenon in the growth of the common law, a rule which is ill-designed to capture within its rubric those cases touched by its underlying rationale. Only some cases of money paid under a mistake of law are cases in which the finality of dispute resolution rationale suggests that recovery should be denied. Moreover, the arguments favouring recovery in these cases are of a kind

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2 It will be suggested that although the principle espoused by Goff and Jones may usefully explain the decisions in earlier authorities, it is not self-evident that so broad a principle can be defended on policy grounds. See infra, the text at notes 99-100.
which have been treated favourably elsewhere by the common law. Leaving aside payments made to settle disputes, it generally may be said that the defendant in these cases will have received a windfall benefit at the plaintiff's expense. The windfall will not only be unearned but in many cases will have been extracted by an illegitimate or unlawful exercise of statutory power by a public authority. Both common law and equity developed a host of rules which may be said to have as their object the removal of windfalls of this sort. In the present century, this body of rules has been brought together under the banner of the unjust enrichment principle and is now generally referred to as the law of restitution. Whether or not one accepts the validity of this exercise in restatement and rationalization, it cannot be denied that there exists overwhelming evidence in the case law that the courts have traditionally abhorred and remedied situations in which one person has gained a windfall benefit at another's expense.

It is not surprising, then, that a luxuriant undergrowth of exceptions to the general rule denying recovery of payments made under a mistake of law has developed. Indeed, although this is something of an exaggeration, it is often said that the exceptions have wholly encrusted the general rule and that there are no situations, or at least very few, in which courts can not find a line of argument, consistent with authority, permitting relief. Indeed, Canadian courts, including the Supreme Court of Canada, have made their own contributions to what appears to be a lengthening list of devices for avoiding the harsh impact of the general rule.

A long list of exceptions is, of course, the most likely antidote the common law will develop for an unjust or inelegant rule. It is a rather unsatisfactory solution in the present case, however, inasmuch as the exceptions themselves establish an elaborate cluster of artificial distinctions and vague standards for relief which have created an unusually chaotic body of jurisprudence. The resulting confusion and the evident reluctance of many judges to completely ignore earlier authority has meant that the general rule still has a significant capacity for effecting unjust results. The proper disposition of

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claims for overpayments to public authorities has proven to be a matter of particular difficulty.

It is also not surprising that the call for reform has been frequently sounded. The foregoing critique of the general rule is standard fare in law reviews and in modern texts on contract and restitution. For convenience, we may refer to it as the orthodox attack on the rule. The rule has essentially been abolished by statutory reform enacted first in New Zealand and then in Western Australia, and confined in its operation by legislation enacted in a number of American states. In a thoroughly researched and persuasively written report, the Law Reform Commission of British Columbia has recently recommended the enactment of legislation based on the New Zealand model. The advocates of reform, whether it be by judicial restatement or legislation, almost invariably recommend the same reform technique: abolition of the distinction between mistakes of fact and mistakes of law. It would be difficult to identify another private law doctrine which has been so universally condemned or another reform measure which enjoys such widespread support.

The discerning reader may well wonder whether this moribund, if not dead, doctrinal horse needs yet another law review flogging. A recent decision of the Supreme Court of Canada, however, does suggest that the doctrine still retains at least some of its charm for judicial minds in high places. Perhaps more importantly, the decision suggests that the explanation for the traditional reluctance of the courts to embrace the orthodox attack on the general rule

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8 In 1942, New York enacted legislation stipulating that “[R]elief shall not be denied merely because the mistake is one of law rather than one of fact”. See New York Civil Practice Law and Rules, sec. 3005. A number of States have enacted “Field Code” provisions collapsing the distinction between mistakes of fact and mistakes of law for certain purposes. See, for example, California Civil Code, sec. 1578. For a discussion of these reforms see: supra, note 3, at 80-81; Lange, supra, note 6, at 465-70; Knutson, supra, note 5, at 42-47; Fridman and McLeod, supra, note 3, at 170-72.

9 Supra, note 4, at 82-84.
stems from an uneasiness concerning the imposition of restitutionary liability on public authorities and that this is a matter which may indeed benefit from some further analysis. In *Hydro Electric Commission of the Township of Nepean v. Ontario Hydro* the Court considered a claim brought by a municipal electric power utility to recover certain charges for power supplied to it by Ontario Hydro. The charges in question were held to be in excess of those authorized by Ontario Hydro's enabling statute. The majority of a divided Court denied the claim on the basis that the moneys had been paid under a mistake of law and were therefore irrecoverable. In an elegant and learned dissenting opinion, however, Dickson J., with Laskin C.J.C. concurring, mounted the orthodox attack on the general rule, expressed the view that payments made under a mistake of law should be accorded the same treatment as payments made under a mistake of fact, and concluded that the municipal utility should be permitted to recover the excess charges. Before turning to an assessment of the significance of the *Nepean* decision and a brief discussion of the difficulties inherent in the granting of recovery of this kind against public authorities, it will be useful to offer a brief account of the general rule and its exceptions and of recent developments pertaining to the rule that moneys paid under a mistake of fact can be recovered.

*The Mistake of Law Doctrine: Origins and Exceptions*

Lengthy and authoritative accounts of the origins of this doctrine and the various exceptions to it which have developed over the years are easily found elsewhere. A very brief account, placing emphasis on exceptions to the general rule of particular relevance to claims against public authorities, will be sufficient for present purposes.

It is well known that the doctrine finds its origin in two leading, if somewhat slender, nineteenth-century cases, *Bilbie v. Lumley*, decided in 1802, and *Kelly v. Solari*, decided in 1841. The former is the principal authority in the sense that it is the leading decision refusing recovery of moneys paid under a mistake of law.

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11 The standard texts on contract and restitution contain such discussions, as do the many law review articles dealing with this subject. See *supra*, note 5.

12 (1802) 2 East 469, 102 E.R. 448.

The latter, although it is a decision allowing recovery of moneys paid under a mistake of fact, assumes importance inasmuch as it explains (and narrowly distinguishes) *Bilbie v. Lumley* as a decision resting on the presence of a mistake of law. A close examination of these two authorities indicates that the inherently unsatisfactory nature of the mistake of law doctrine was abundantly evident at the time of its birth. In *Bilbie v. Lumley*, an underwriter sought recovery of moneys paid in response to a claim by an assured, on the basis that the money was paid under a mistake. The defendant had not at the time of insuring the risk disclosed a material fact relating to the time of sailing of a particular ship. It was established in evidence that a letter containing the information in question was made available to the underwriter at a later point in time, prior to the claim, and at trial, Rooke J. held that since the money had been paid with full knowledge or the means of full knowledge of all the circumstances, it could not be recovered. On the appeal, Lord Ellenborough C.J. asked counsel for the plaintiff whether there were previous authorities allowing relief in cases of mistake of law. No answer being given, Lord Ellenborough went on to deny recovery on the basis of the *ignorantia juris* maxim. It is notorious, of course, that there were a number of previous authorities allowing recovery and that Lord Ellenborough's mistake of law doctrine is therefore itself a product of a mistake of law. This is no doubt an evergreen source of classroom whimsy. It is perhaps less well known, however, that the facts of the later case of *Kelly v. Solari*, in which the opposite result was achieved, are very similar to those of the *Bilbie* case. In *Kelly*, the directors of an insurance company sought recovery of moneys paid to a widow under a policy of insurance on the life of the late husband. The deceased had mistakenly failed to pay one of the quarterly premiums on the policy and it therefore lapsed. This fact had been drawn to the attention of the directors but was later forgotten when the widow claimed the amount due to her under the policy. As good legal realists, we might expect that the widow's position might be treated more solicitously than that of the defendant in the *Bilbie* case. In fact, however, recovery was allowed on the basis that the mistake here was factual in nature.

In both cases the plaintiff insurer had made a payment on the mistaken assumption that the policy in question was valid and binding. Although the nature of the error differed, it would be very difficult indeed to offer a basis for the different results in the two cases which would persuade a layman that a sound policy had been
achieved in this context. Goff and Jones have explained *Bilbie v. Lumley* as a case of voluntary submission to an honest claim. It is not at all obvious whether *Kelly v. Solari* should not be so considered as well. One might distinguish the two cases by suggesting that the kind of error made in *Bilbie* related to a question which should be raised by the insurer at the time of processing the claim (and that the insurer therefore should be deemed to have taken the risk of error on this point when making the payment), whereas the error in *Kelly* was essentially clerical in nature (and therefore, arguably, not the sort of error within the risk assumed when making the payment). Whether or not one accepts this interpretation of these authorities, however, it is interesting to note that at this very early stage, the mistake of law doctrine’s capacity for promoting very dissimilar results in very similar cases was manifest.

Although there is apparently some disagreement among commentators with respect to the identity and scope of some of the exceptions to the general rule denying recovery, there would be broad consensus with respect to the following list. First, it is accepted that a mistake of foreign law is to be treated as a mistake of fact. Second, moneys paid on the basis of a mistake of law by a public authority are recoverable apparently on the theory that the public purse should for some reason be afforded greater protection than private purses. Similar payments made by an officer of a court are also recoverable. Fourth, payments made to an officer of the court under a mistake of law are recoverable. This rule was applied in *Ex parte James* to allow recovery from a trustee in bankruptcy. James L.J. secured immortality in that case by stating that the courts “ought to set an example to the world by paying [the money] to the person really entitled to it”. “In my opinion”,

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14 *Supra*, note 1, at 91.


17 E.g., in *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch. 91, at 93.


19 (1874) L.R. 9 Ch. App. 609.
he said, "the Court of Bankruptcy ought to be as honest as other people". Whether this exception can be extended to require public officials in general to behave similarly is a question to which we will return. Parties can, of course, contract in such a way as to require the repayment of future payments under agreements subsequently found not to be legally required and this might be counted a fifth exception. Sixth, recovery will be allowed in equity if the mistake is induced by some form of wrongdoing such as fraud or breach of fiduciary duty on the part of a payee. Seventh, questions as to marital status appear to be treated as matters of fact. Eighth, where moneys have been improperly paid out by an executor, trustee or personal representative (for example, on the basis of a misconstruction of a will), it is established that the persons who should have received the money can bring a claim against those who did in fact receive it. Curiously, however, it remains in doubt whether the executors, trustees or personal representatives could themselves bring such a claim. Ninth, recovery of moneys paid under a mistake of law is often provided for in some fashion by statute. The Law Reform Commission of British Columbia Report on Benefits Conferred Under a Mistake of Law lists sixteen provisions of this kind drawn from the Statutes of British Columbia.

A tenth, and perhaps more controversial, exception pertains to matters of so-called "private rights" as opposed to matters of "general law". Although the nature of this distinction is rather imprecise, it would appear that it could be construed to extend to

20 Id., at 614.
22 See Rogers v. Ingham (1876) 3 Ch. D. 351 per James L.J.; Harse v. Pearl Life Assurance Co. [1904] 1 K. B. 538 per Romer L.J.
25 It is established that overpayments may be set off against future payments. See Dibbs v. Goren (1849) 11 Beav. 483; Re Musgrave [1916] 2 Ch. 417. Nonetheless, it was suggested in Re Diplock by Wynn-Parry J. that it is assumed that such claim would fail because of the mistake of law doctrine. See Re Diplock, id., at 725-26.
26 Sugra, note 4, at 95-102. See also the Income Tax Act, S.C. 1970-71-72, c. 63, s. 164(1).
most questions of law pertaining to the mutual rights and obligations of private individuals. Misconstruction of a deed would clearly be covered by this exception, for example. The doctrine that relief would be afforded in cases of mistakes relating to “private rights” is, however, to be found in nineteenth-century English equity decisions and it therefore remains controversial whether the doctrine would be extended to common law claims for the return of moneys paid. Certainly, no less an authority than Winfield was of the view that the distinction between private rights and general law was applicable at common law as well, and there would appear to be no reason in principle to argue that relief in equity for such errors would be appropriate whereas it would not be at common law. Thus, it may be that courts will be prepared to allow recovery of moneys paid pursuant to mistakes as to private rights. An exception of this kind would, of course, apply quite neatly to the facts of Bilbie v. Lumley itself and, more generally, would substantially undermine the earlier case law denying recovery in similar situations.

The foregoing exceptions provide ample scope for confining the impact of the general rule, but they appear to leave untouched the situation of particular interest here, the exaction of excessive taxes or other charges by a public authority acting outside the scope of its statutory powers. Many of the foregoing exceptions would, of course, be applicable in fact situations involving public authorities, but none of them directly address this particular problem. There are, however, further exceptions or lines of analysis which afford relief in such cases and it is of particular interest that the Supreme Court of Canada has taken a leading role in articulating and expanding such exceptions.

Some of the exceptions listed above adopt the format of characterizing the particular error in question, for example, an error related to ownership rights, as a matter of fact rather than law. Surely the most remarkable use of this form of sophistry is to be found in the decision of the Supreme Court of Canada in George (Porky) Jacobs

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28 Earl of Beauchamp v. Winn (1873) L.R. 6 H.L. 223.
29 P. H. Winfield, Mistake of Law (1943) 59 L.Q. Rev. 327, at 339.
30 It is of no little interest that mistakes as to “private rights” are listed by Dickson J. in his dissenting opinion in Nepean as one of the exceptions to the rule “barring recovery of money paid under mistake of law” (suggesting thereby that recovery, i.e., common law relief, should be allowed). See supra, note 10, at 207-08.
Enterprises Ltd. v. City of Regina, a case which involved the overpayment by a wrestling promoter of municipal licensing fees. The plaintiff and the municipality had both assumed that the by-law under which the fees were exacted stipulated, as had previous by-laws on the subject, for a “per day” fee. In reality, the by-law merely required payment of the fee on an annual basis. The plaintiff was allowed to recover overpayments on the basis that his mistake was really one of fact not law. He was said to have been mistaken with respect to the existence of a by-law calling for a license fee on a per day basis. Many errors of law could be converted into factual errors on this basis. In the case of ultra vires legislation, for example, could one not argue that the legislation was a nullity and therefore did not, in fact, exist? Where the problem is one of misconstruction of a statute it would be difficult, presumably, for someone who has taken the trouble to examine the law in question and has unfortunately misconstrued it, to rely on the Jacobs analysis. In such a case, one might be able to say that the misconstruer had believed in the existence of a law requiring the payment in question, though in such circumstances the illogic of the analysis is much more visible. Whatever the outer limits of this proposition, mistakes as to the existence of a law must count as an eleventh exception.

A twelfth exception of particular relevance in the context of claims against public authorities has been drawn, in a somewhat surprising way, from the law of illegal contracts and, in particular, from the decision of the Privy Council in Kiriri Cotton Co. Ltd. v. Dewani. In that case, a prospective tenant agreed to pay and did pay a premium to his prospective landlord. Such payments were prohibited by a rent restriction ordinance then in force and the question which arose was whether the tenant could recover the payment. It may be noted that if the landlord was allowed to retain such payments, the underlying policy of the ordinance would be significantly undermined. Counsel for the landlord astutely argued, no doubt well aware of the capacity of the mistake of law doctrine for bewitching judicial minds, that the tenant must have paid the money under a mistake of law and therefore could not seek recovery. Lord Denning, noting that the obvious purpose of the ordinance was the protection of the tenant, held that the landlord must take primary responsibility for non-compliance with the ordi-

ANCE and that the parties were therefore not equally at fault, that is, not in pari delicto and that the landlord must return the premium. One might restate the holding of the case as follows: where a transaction is rendered illegal by a law designed to protect the position of the individual making a payment under the agreement, the payment is recoverable. Although Kiriri Cotton is now considered the leading authority on this subject, recovery on this basis has been allowed since the time of Lord Mansfield. In rejecting the submissions made on behalf of the defendant on the basis of the mistake of law doctrine, Lord Denning commented:

It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back.

The "something more" in Kiriri, of course, was that the plaintiff was not in pari delicto with the defendant as a result of the fact that the statute rendering the transaction illegal was designed to protect people in the plaintiff's position.

In recent Canadian case law, Lord Denning's rather opaque statement concerning the general nature of the mistake of law doctrine has been taken to be a leading pronouncement on the doctrine and the in pari delicto rule has been wrenched out of its illegal contract context and fashioned into an important exception to the general mistake of law rule. The principal authority is the decision of the Supreme Court of Canada in William Eadie v. The Corporation of the Township of Brantford. In that case, an owner of land who sought severance of the parcel was required by the municipality to pay a severance fee and convey a strip of land to the municipality. Although the owner originally refused to subject himself to these conditions, ultimately, for what might be described as compassionate reasons, he decided that he wished to go forward with the severance and so notified the municipality, agreeing to meet the conditions imposed. The by-law under which the payment

33 See Smith v. Bromley (1760) 2 Dougl. K.B. 696 n; Clarke v. Shee and Johnson (1774) 1 Camp. 197, 2 Dougl. 698.
34 Supra, note 32, at 204 (A.C.), 181 (ALL E.R.).
and transfer was required was subsequently challenged by another
landowner and held to be ultra vires. Eadie successfully sought re-
covery of the moneys paid and the land transferred. Spence J.,
writing for the majority of the Court, was prepared to allow relief
on the basis that the benefits had been extracted by compulsion, a
topic to which we will shortly turn, but that moreover, recovery
should be allowed because the landlord was not in pari delicto with
the municipality for the following reason:

In this case, the appellant, as a taxpayer and inhabitant of the
defendant corporation, was dealing with the Clerk-treasurer of the
corporation and that Clerk-treasurer was under a duty toward the
appellant and other taxpayers of the municipality. When that Clerk-
treasurer demands payment of a sum of money on the basis of an
illegal by-law despite the fact that he does not then know of its
illegality, he is not in pari delicto to the taxpayer who is required
to pay that sum.  

This extension of the “not in pari delicto” exception to public
officials could be viewed as an extension of the rule in Ex parte
James, concerning officers of the court, to public officials more
generally. Its justification would be that public authorities ought
to bear the primary responsibility for not exceeding their legal
capacity in extracting moneys and other benefits from the citizenry
and ought, therefore, to be obliged to restore benefits obtained
through an illegitimate exercise of their authority. Whatever the
merits of this position, it is again obvious that a broad application
of this line of analysis would permit recovery in many instances in
which recovery has traditionally been thought to have been pre-
cluded by the mistake of law rule.

Many writers would agree that there is a further exception to the
general rule in cases where the moneys in question have been paid
under duress. The duress analysis normally arises in the context of
moneys extracted by public authorities in situations where refusal to
pay will result in interference with the plaintiff’s rights; for ex-
ample, seizure of his goods. While the scope of this doctrine is
somewhat uncertain, the traditional position is that a mere threat
on the part of the recipient to litigate would not itself constitute
duress in the requisite sense. While this view may well rest on a
very unrealistic assessment of the significance for the average citizen

36 Id., at 583 (S.C.R.), 572 (D.L.R.).

37 The trial judge had cast the point in essentially these terms, and Spence J.
commented that there is “much to be said in support of such a view”. See
of a threat of litigation by a public authority, it does suggest that the underlying rationale of the rule is that in cases where litigation of the dispute is a possibility, payment of the disputed amount should normally be assumed to have been motivated by an intention to settle the dispute. In this way, the duress rule does seem related to what has been suggested above to be the underlying rationale of the mistake of law rule, that is, that payments made ought normally to be considered to close the matter in dispute. The duress exception does not accurately capture this rationale, however, as there would be many cases in which duress is absent and payment is nonetheless made without any intention of settling a dispute.

In the Eadie case, the Supreme Court of Canada appears to have relaxed the duress requirement to some extent. Counsel for the municipality argued that the plaintiff must establish that there was no alternative other than payment available to him. It was the view of Spence J., however, that the requirement is not this stringent and that it would be sufficient to establish that the plaintiff was under some practical compulsion to proceed. The plaintiff had in fact wished to proceed with severance of the property in order to sell it and establish his wife in more suitable circumstances. The plaintiff was at the time hospitalized as a result of illness and it was impractical for him to litigate the matter. The payment could, therefore, be said to have been made under a form of “practical compulsion”. The compulsion, we may note, results not from the threatened action of the municipality but rather from the personal circumstances of the plaintiff which made it desirable for him to proceed with severance of the land and undesirable or impractical to turn to litigation.

Again, this extension of prior law seems capable of rather broad application. There will, after all, be many circumstances in which it can fairly be said that litigation is not a practical alternative for an individual engaged in dealings with a public authority. The concept of practical compulsion is obviously an imprecise one, however, and the law reports suggest that the courts are having some difficulty in discerning its outer reaches. For example, the provincial courts of appeal of British Columbia and Ontario appear to differ on the question of whether an individual wishing to proceed with a development project for essentially commercial reasons can be said to have acted under practical compulsion.

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38 See Re Hay et al. and City of Burlington (1981) 131 D.L.R. (3d) 600 (Ont. C.A.), and compare Gliduray Holdings Ltd. v. Village of Qualicum
Parenthetically, it is of some interest that the status of the duress cases as an exception to the general rule is a bit curious. One might be forgiven for thinking that true cases of payment under a mistake of law and payments made under duress would be mutually exclusive phenomena. Presumably, if one is mistaken about the law, one pays because one believes one is obliged to do so by law. If one is responding to duress, it must be that the individual believes or strongly suspects that there is no legal requirement to pay.

The Supreme Court of Canada in Eadie, however, appears to accept that the facts of that case represent both an instance of payment made under a mistake of law and of duress or practical compulsion; on the basis, presumably, that although Eadie mistakenly assumed that he was obliged by law to make the payments upon severance (and therefore suffered from a mistake of law), he proceeded to sever the land and make the payments only because he was under practical compulsion to do so (and was therefore not motivated simply by a mistaken belief as to the current state of the law). But is this not, then, a rather odd case of duress? If Eadie believed, as appears to be the case, that the by-law in question was valid, we may assume that the thought of litigating this point did not occur to him. It may be true that if he wanted to litigate he would have determined that it was impractical to do so, but there is no evidence that the thought of challenging the validity of the by-law had ever occurred to him. When viewed from this perspective, it is not at all obvious that the plaintiff's circumstances in Eadie are materially different from those of any other individual who paid the severance fee under a mistake of law and the better explanation for the result thus appears to be the "not in pari delicto" rationale put forward in the alternative by Spence J. and discussed briefly above.

Even without this Canadian gloss, the duress principle is, as

_Beach_ (1981) 129 D.L.R. (3d) 599 (B.C.C.A.). In both cases improper charges were levied by municipalities in the context of granting approval for development projects. The Ontario Court allowed and the B.C. Court denied relief. See also _J.R.S. Holdings Ltd. et al. v. District of Maple Ridge_ (1981) 122 D.L.R. (3d) 598 (B.C.S.C.) in which Berger J. refused, in similar circumstances, to hold that the payment had been made under compulsion but was prepared to allow relief on the grounds that the parties were not in pari delicto. _Re G. Gordon Foster Developments Limited v. Township of Langley_ (1979) 102 D.L.R. (3d) 730 (B.C.C.A.), (similar circumstances but with the difference that the developer at the time of deciding to comply with the requirement to pay charges did not hold the land but held an option on it; recovery denied).
P. B. H. Birks has demonstrated, a most unsatisfactory device for imposing liability on public authorities. First, the rule has undesirable consequences from the point of view of public policy. If a threat of some sort is a necessary element in the cause of action, individuals who cheerfully pay what they are told they must pay by a public official will have no recourse. Only those less trusting individuals who may have access to legal advice and who challenge the authority will provoke the requisite threat. A rule which penalizes citizens who are inclined to assume that public authorities act within the law does not accord with common sense. Second, to the extent that the duress rule rests on the notion that the public authority has required payment for something to which the payer was in reality entitled free of charge, the rule carries with it the anomaly that if payment is made under a legislative scheme (say, a licensing scheme) which is completely ultra vires, no recovery will be allowed (because the payer was not entitled to a licence of any kind). The more illegitimate the assertion of power, the less likely one is to recover. Finally, a close examination of the English cases on duress reveals that they can not all be explained as cases of threatened withholding of entitlements but rather represent a broader phenomenon of permitting recovery of moneys extracted by the ultra vires action of public authorities. It would be misleading to characterize them as requiring an element of compulsion.

Whatever the true nature and current status of these apparent exceptions to the general rule, it may fairly be said that the Supreme Court of Canada indicates, in the Jacobs and Eadie decisions, that it is prepared to be somewhat agile in its interpretation of the traditional doctrines in order to visit liability on public authorities acting in excess of their statutory mandate. There are two further decisions of the Supreme Court consistent with this trend, the first of which might be thought to establish an entirely new and very important exception to the general rule concerning payments made

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41 The decision in Steele v. Williams (1853) 8 Ex. 625, 155 E.R. 1502, is of particular interest inasmuch as that case involved an improper imposition of charges for the taking of extracts from a parish register, but the charges were in fact imposed only after the extracts had been taken. There was thus no threatened withholding of an entitlement at the time the payment was made. See Birks, *supra*, note 39, at 200-01.
under a mistake of law. In *Amax Potash Ltd. et al. v. Government of Saskatchewan*\(^\text{42}\) the Court held that legislation denying taxpayers recovery of taxes paid under ultra vires taxing legislation would itself be ultra vires. The impugned provision was a section of the *Proceedings Against the Crown Act*\(^\text{43}\) which purported to preclude proceedings against the Crown with respect to anything done or omitted in the exercise of a power or authority conferred by enactments which are beyond the legislative jurisdiction of the Legislature. Were it not for this provision, the facts of the *Amax* case were such that recovery at common law on the basis of duress should have been possible. However, the reasoning of the Court does not suggest that the unconstitutionality of the provision relates only to situations of this kind.\(^\text{44}\) Rather, the conclusion of the Court is that the provision in question was "*ultra vires* the Province of Saskatchewan in so far as it purports to bar the recovery of taxes paid under a statute or statutory provision which is beyond the legislative jurisdiction of the Legislature of Saskatchewan".\(^\text{45}\)

The *Amax* decision is of great interest to public lawyers inasmuch as it suggests the existence of an inherent limitation on legislative power deriving from the essential nature of federalism. The interest of this holding in the present context, is that the recovery of payments made, say of taxes, under ultra vires legislation would generally be thought to be precluded by the mistake of law doctrine. Yet, legislation which so prescribes, we are told in *Amax*, is itself ultra vires. Surely, it must follow from this that a court could not now at common law deny recovery on the basis of a principle which would, if enacted by a legislature, be ultra vires. We should add to


\(^{43}\) R.S.S. 1965, c. 87, s. 5(7).

\(^{44}\) The point of constitutional law established in *Amax* is sufficiently novel that some caution should be expressed with respect to opinions such as that stated in the text. Nonetheless, it would be surprising if the Court were ultimately to attempt to restrict the *Amax* principle either to legislation which permits recovery where public officials have exercised duress, or to situations in which the legislature has evidently attempted to do indirectly what it can not do directly; that is to say that it has wilfully enacted legislation for the purpose of retaining moneys which it knows it has collected or will collect under specific legislation which it knows to be ultra vires. With respect to the former suggestion, the idea of placing a limit on the exercise of legislative power that traces along the path of the rationale in the *Eadie* case would be to introduce a constitutional doctrine of unattractive subtlety and uncertainty. With respect to the latter suggestion, a constitutional doctrine which limited capacity on the basis of the "state of mind" of the legislature would have obvious flaws, not the least of which would centre on problems of proof.

\(^{45}\) Supra, note 42, at 594 (S.C.R.), 13 (D.L.R.).
our list, then, a fourteenth exception to the general effect that moneys paid to the federal or a provincial government under a mistaken assumption as to the constitutional validity of the legislation requiring the payment are recoverable.

Finally, the decision of the Supreme Court of Canada in Kew Property Planning & Management Ltd. v. Town of Burlington might be taken as some evidence, albeit rather indirect, of support for the view that municipalities ought not to be permitted to retain tax revenues exacted in excess of those permitted by their statutory taxing powers. The facts of this case were most unusual in nature, involving the subsequent retroactive repeal of the provision under which the taxpayer's liability was initially determined. Estey J., writing for a unanimous Court, held that the moneys paid under what appeared to be perfectly valid legislation at the time of payment could be recovered on the basis that the retroactive repeal of the legislation by the province meant that the municipality "had no right to make the additional assessment nor to collect any taxes based on such additional assessment, and the respondent can demonstrate no right by which it can now retain the moneys thus obtained from the appellant". This is a very different fact situation from that in which the municipality acts in excess of its existing statutory powers, but it is not at all clear that it would be consistent to allow recovery in the Kew Property case and not in the context of other situations in which a municipality collects taxes without having any statutory authority to do so. If, as in Kew Property, a municipality cannot retain taxes collected under legislation which was at the time of collection valid, a fortiori, it may be argued, a municipality ought not to be able to retain taxes collected without any statutory authority whatsoever. There is, however, earlier authority which suggests that municipalities can retain taxes or other charges paid in just such circumstances and it would be rather too much of a jurisprudential leap to suggest that they have been indirectly overruled by the decision in Kew Property. The result in Kew Property might be explained on the basis that civil relief is tacitly mandated by the retroactive nature of the statute. Perhaps it is not too much to suggest, however, that Kew

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47 Id., at 275.
Property, when read together with Amax Potash Ltd., does suggest that the earlier authorities may require future reconsideration.

This brief review of the exceptions to the general rule concerning payments made under a mistake of law suggests two conclusions. First, the substantial length of the list of recognized exceptions and the evidence of its continuing growth offer support for the view that the general rule is gradually being overwhelmed by its exceptions. Second, in the case of public authorities, the decisions of the Supreme Court of Canada strongly suggest that the distinction between mistakes of fact and mistakes of law is being significantly eroded and, were it not for the decision in the Nepean case, one might have speculated that the distinction would soon be simply jettisoned. Before turning to consider the problematic aspects of a general rule imposing liability on public authorities, it will be useful to briefly consider recent developments in mistake of fact doctrine. The argument for collapsing the distinction would be significantly undermined if the current state of mistake of fact doctrine was itself unsatisfactory.

Recovery of Moneys Paid Under a Mistake of Fact: Recent Developments

Although it is generally understood that moneys paid under a mistake of fact are recoverable, the precise nature of the elements of the cause of action have been a matter of dispute over the years and have only quite recently, it will be suggested here, been subjected to a rational restatement by English and Canadian courts. This point is worthy of more extended statement and defence than it will be given here. However, it will be useful to suggest the main lines of argument as a prelude to considering the desirability of abolishing the distinction between mistakes of fact and those of law.

The rules relating to the recovery of moneys paid under a mistake of fact illustrate the disconnection between rules, and underlying reasons, prevalent in the mistake of law context. Thus, although critics would no doubt for the most part agree with the results of decided cases, there would often be a dissonance between the reasoning of the court and what seems to be the reason underlying the decision to grant or deny relief. The recent restatement of the rules elevates the underlying reasons to a status of articulated rules governing liability. To illustrate this point, it will be useful to compare

For a useful discussion see C. A. Needham, Mistaken Payments: A New Look at an Old Theme (1978) 12 U.B.C. L. Rev. 159.
one of the classic Canadian statements of the general rule with two modern authorities which, when considered together, effect a systematic restatement of the old rule.

In *Royal Bank v. The King*,[50] Dysart J. suggested that recovery would be allowed where the following four conditions were met.

First: that the mistake is honest.... The second condition is that the mistake must be as between the person paying and the person receiving the money.... The third condition is that the facts, as they are believed to be, impose an obligation to make the payment.... This obligation must be legal or equitable or moral.... The fourth condition to recovery is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer....[51]

The general thrust of the criticism of the old formulation of the rule is that requirements such as the second, that the mistake must be "as between" the parties, do not accurately state the reasons for denying relief. Demonstrably, this particular condition is not a genuine requirement of relief. There are decisions of high authority in which the requirement is ignored.[52] In the *Royal Bank* case, in order to ensure that the mistake was as between the parties, the Court held, somewhat artificially, that the individual inducing the mistaken payment was an agent of one of the parties.[53] Similar criticisms have been made of the third condition: relief has been awarded in the absence of errors of this kind.[54]

The principal reasons for denying relief, visible beneath the doctrinal orthodoxy of the old rule, were that the payer had assumed the risk of his error (the finality of dispute resolution rationale, discussed above) or that the recipient of the payment had, in reliance on the receipt of the payment, changed his position to his

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[50] [1931] 2 D.L.R. 685 (MAN. K.B.).

[51] *Id.*, at 688-89.


[53] The Court held that the actions of the defendant in receiving and retaining the moneys paid under a mistake amounted to a ratification of the actions of the individual who induced the plaintiff to make the payments, thus rendering him their agent and establishing privity to the mistake. On the basis of this line of analysis, of course, the mistake will always be between the parties inasmuch as a receipt in retention of the moneys will establish an agency relationship which will necessarily make this so.

detrimentso that it is unfair to require repayment. The essentials of a modern restatement of the rule would, it has been argued, hold that where moneys have been paid under a mistake of fact, providing that the payment was caused by the error in question, recovery will be allowed unless the payer must be taken to have assumed the risk of error or the defendant has detrimentally changed his position in reliance on the receipt.\textsuperscript{55} This version of the mistake of fact rule is essentially that found in the American restitutiorinary law\textsuperscript{56} and it has been thought that the Supreme Court of Canada's embrace of the American unjust enrichment analysis of restitutiorinary problems\textsuperscript{57} might facilitate a modern restatement along these lines in the Canadian context.

Until quite recently, two major stumbling blocks stood in the path of a judicial restatement of this kind. First, English and Canadian courts had not yet accepted the validity of a change of position defence per se. The defence of estoppel by representation responds to similar concerns relating to detrimental reliance but English courts were unwilling to conclude that the mere making of a payment under a mistake of fact amounted to a representation that the moneys were owed, and accordingly an estoppel would not be raised in cases where a mere payment without an accompanying representation was followed by a change of position.\textsuperscript{58} Second, even if a change of position defence were recognized, it would not necessarily be the case that the courts would agree that the old conditions could be swept away and replaced by a more simplified rule containing as one of its constituent elements a change of position defence.

The first obstacle has been eliminated, for Canadian purposes at least, by the decision of the Supreme Court of Canada in \textit{Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.}\textsuperscript{59} in which the Court recognized the existence of a change of position defence of the American variety in Canadian law. It is of particular interest

\textsuperscript{55} See \textit{id.;} and \textit{supra,} note 1, at 69-89.


that Martland J., writing for the Court, noted that the unjust enrichment principle has been accepted as a basis for claims of this kind in Canadian law and that in this respect Canadian law would appear to differ from English law. The change of position defence was not, however, available on the facts of the Storthoaks case. The plaintiff oil company, having surrendered certain oil leases, mistakenly continued to pay royalties with respect to them to the defendant municipality. The attempt of the municipality to rely on the change of position defence was unsuccessful, as it was unable to show that it had acted to its prejudice in reliance on the receipt of these payments. Martland J. noted that there was:

no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the Municipality altered its position in any way because these moneys were received. The mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment.\(^60\)

As thus conceived, the defence is a rather stringent one in that it requires a demonstration of a clear connection between receipt of the overpayment and the taking of the new initiative. It may well be that the defence would receive a broader interpretation in a context other than the expenditure of funds by public authorities.

The second obstacle to the modernization of the rule — possible judicial reticence to engage in the project of restating the rule — may be taken to have been removed by the judgment of Goff J., as he then was, in Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd.\(^61\) In determining whether a bank could recover moneys mistakenly paid over a stop payment order, Goff J. engaged in a lengthy and masterly reconsideration of the prior English case law on the general question of the recovery of moneys paid under a mistake of fact and demonstrated that they can best be reconciled along the lines of what has been described above as the modern restatement of the rule. To the extent that English law does not yet clearly accept the existence of a change of position defence and does not appear to accept the unjust enrichment analysis of restitutionary claims, it may well be that the Barclays Bank analysis is vulnerable to attack in subsequent English case law. On the other hand, the existence of the Storthoaks authority should mean that Goff J.’s analysis would be hospitably received and considered to be a valu-

\(^60\) Id., at 164 (S.C.R.), 13 (D.L.R.).
\(^61\) [1979] 3 All E.R. 522 (Q.B.).
able restatement of the rule for the purposes of Canadian law on this subject.

Prior to these recent developments, one might well have argued that to relegate mistake of law problems to the mistake of fact rules would simply be to withdraw them from the frying pan in order to place them in the fire. If, however, we may assume that the mistake of fact rules have been or will shortly be subjected to a sensible restatement, a collapse of the distinction between mistakes of law and mistakes of fact could not be objected to on this basis. It remains to consider whether the more particular problem of imposing restitutionary liability on public authorities gives rise to special considerations which may not be adequately accommodated by the modern rule permitting recovery of moneys paid under a mistake of fact.

The Imposition of Restitutionary Liability on Public Authorities: Special Considerations

Moneys might be paid to a public authority as a result of any one of a broad range of different kinds of legal errors. The reported case law suggests, as one would expect, that such payments normally arise in circumstances where the public authority is itself labouring under the same mistake. Often, of course, representations made on behalf of the authority will have been the source of the payer's confusion. Payments may be required under federal or provincial legislation which is ultimately determined to be ultra vires or under regulations which may be determined to be beyond the regulation-making power conferred by statute. Subordinate bodies, such as municipalities, may require the payment of money in an illegitimate exercise of their rule-making powers. Indeed, ultra vires municipal by-laws appear to be a particularly fertile source of litigation. Public officials at any level may insist on the payment of moneys on the basis of an erroneous interpretation of the legislative mandate. Abolition of the distinction between mistakes of law and those of fact would mean that in all of these situations, restitutionary liability would normally be imposed in the absence of some defence.

A number of arguments in favour of relief in these circumstances can be made. In general terms, the policy of the common law of preventing unjust enrichment weighs heavily in favour of relief. The recipient will have secured, in an unauthorized or illegitimate way, a benefit at the expense of the person making the payment. Further, it may be argued that the courts have already recognized the force
of the unjust enrichment policy in this context inasmuch as relief is readily allowed where the mistake is one of fact as in the Storthoaks case, or where the circumstances can be said to fit within one of the many exceptions to the mistake of law rule. To eliminate the last vestiges of the general rule would result in a more elegant doctrine and would conduce to more consistent results in the decided cases. The most important of the existing exceptions is arguably that of duress. It has been suggested above that to premise relief on this basis is to reward fractious and/or well-advised members of the community and to punish those who are law-abiding, unsuspicious of public authority or without the means or inclination to seek legal advice. Quite apart from these concerns, the duress exception is itself plagued with uncertainty and points of difficulty which render it an unsatisfactory device for granting relief. Abandonment of the invidious and unsound distinctions of the duress case law would be a very desirable consequence of the adoption of a general rule favouring relief.

Some observers might find arguments based on constitutional considerations even more persuasive. P. B. H. Birks has argued\(^\text{62}\) that relief ought to be allowed as a general matter on the basis of the fundamental principle that there must be no taxation without the consent of Parliament, a principle enshrined in the Bill of Rights of 1688\(^\text{63}\) and of no little importance in our constitutional history. Public officials acting outside the ambit of a statutory authority are taxing without the consent of the governed, expressed through their legislature. It would, it is suggested, be inconsistent with fundamental principle to allow retention of tax revenues acquired in this fashion. Do we not find a rather similar theoretical premise underlying the judgment of the Supreme Court in \textit{Amax}? It appears to be the view of the Court that legislatures in the federal system do not have the legislative power to legislate in such fashion as to retain tax revenues levied from the public on the basis of ultra vires tax measures. It appears to be Dickson J.'s point that it would be inconsistent with the federal system of government to permit one level of government to retain moneys gathered in this fashion; although it is not clear that the underlying premise is the concern that to hold otherwise would enable one level of government to trench on the taxing powers of another, or rather the concern raised by Birks that in so acting the government is acting beyond the scope

\(^{62}\) \textit{Supra}, note 39.

\(^{63}\) 1 W. & M. Sess. 2, c. 2.
of its democratic mandate and ought to be required to disgorge the ill-gotten gains.

This appeal to basic democratic values may well underlie the inclination of the Supreme Court of Canada in the decisions previously discussed to impose restitutionary liability on public authorities acting in excess of their authority. This inclination is evident not only in the context of ultra vires legislation but in the context of invalid rule-making of subordinate bodies in *Eadie*, and the misinterpretation of a valid law in *Jacobs*. Thus, it would appear to be a broadly conceived concern, of the kind raised by P. B. H. Birks, rather than a narrow concern relating to the distribution of legislative power in a federal system. To the extent that one accepts these broader concerns as legitimate a strong case is made for imposing restitutionary liability on public authorities more readily than on private citizens, and this is consistent with the line of reasoning advanced by Spence J. in *Eadie* with respect to the extension of the "not in pari delicto" exception to public officials generally.  

If there are persuasive reasons favouring relief, there are also reasons to hesitate before adopting a general rule imposing liability in these cases. One would wish to be confident that these concerns are accommodated in any new rule and it may well be that hesitation on this point has led judges over the years, and the majority of the Supreme Court of Canada in *Nepean* in particular, to resist outright rejection of the mistake of law rule.

First of all, there may be some concern that a general rule allowing recovery could result in fiscal chaos where a long-standing taxation practice is established to be misconceived for some reason or other. While it might be thought to be appropriate to allow recovery where the problem is relatively idiosyncratic in nature, such as an interpretation of a taxing provision applicable to a reasonably small subset of the population, an attack on the entire basis of a scheme under which enormous revenues may have been gathered might place the public treasury in some difficulty or, at the very least, create tax burdens for the current generation of taxpayers which some might think to be unreasonable. It is this concern with the possibility of disruption of fiscal affairs that explains, in Palmer's

64 Cf. B. McKenna, *Mistake of Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid* (1979) 37 U. of T. Fac. L. Rev. 223 in which it is argued that the *Kiriri* and *Eadie* cases can be read in support of the proposition that public authorities are under a duty to observe the law for the protection of citizens and must therefore accept responsibility when it has misled a citizen with respect to the legality of a demand for payment.
the fact that American courts have been reluctant to allow recovery of moneys paid under invalid statutes but willing to accord relief where the problem involves essentially an overassessment under a valid tax statute. There is some irony, therefore, in the fact that the holding in the *Amax* case appears to entail the proposition that moneys paid under ultra vires schemes of this sort are indeed recoverable. The facts of the *Amax* case do provide a basis for suggesting, however, that the bright line test based on vires which is evidenced in the American experience is an inappropriate basis for identifying situations in which relief should be denied. The legislation impugned in the *Amax* case did in fact apply only to members of a particular industry, and it would be a very harsh result indeed to deny relief to a small group of participants in that industry simply because the consequences of an ultra vires holding in other contexts might result in serious disruption to the treasury.

The concern with respect to fiscal disruption may be found by some to be sufficiently troublesome to justify retention of the mistake of law rule. This would, in my view, give too much effect to what is after all a remote possibility. As the reported cases indicate, recovery can normally be allowed without any significant disruption of public finances; and if the fair result as a general matter is to award recovery, the fact that it might be very difficult to do so in an extremely unusual case suggests that recovery ought to be allowed as a general rule. An exception to the general rule should be tailored to meet the very unusual case. A preferable approach is to hold that recovery is normally allowed except where it can not be achieved without major disruption of the financial affairs of the level of government or public authority involved. It would be helpful, I would suggest, in identifying such cases if the source of the public treasury, the taxpayer, be kept in mind as the ultimate bearer of any liability to be imposed. In weighing the unfairness of denying relief to those who have overpaid in the past against the unfairness of fixing this burden on the current generation of taxpayers, it may be possible to identify situations in which the granting of relief would create an injustice for the latter group and ought therefore to be denied. It will ultimately be suggested here that the facts of the *Nepean* case may represent a situation of this kind and that this possibility is not sufficiently acknowledged in the dissenting opinion of Dickson J., which favoured the granting of relief.

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When considered against this background, the common sense underlying the duress line of analysis emerges. In the traditional duress context, where protest was present, the government would be on notice that the legality of the requirement to pay was under challenge and could conduct its fiscal affairs accordingly. My own view, however, is that this is not in itself sufficient basis for limiting recovery to the duress context. In the duress cases themselves, as the *Eadie* case demonstrates, the requirement of protest has disappeared. Moreover, recovery is frequently allowed in the context of the other exceptions to the mistake of law rule without any notice whatsoever and, of course, in the context of payments made under a mistake of fact as well. It is not the case under present law, then, that recovery is allowed only in cases where the public authority in question is aware of the potential difficulty. This, together with the deficiencies of the duress analysis outlined above, suggests that it is an inadequate basis for resolving disputes of this kind.

Before leaving this point, it is important to note that the change of position defence established by the Supreme Court of Canada in the *Storthoaks* case would not, as it is there interpreted, solve this problem. It was Martland J.'s view that a change of position would not be established simply by demonstrating that the revenues collected had been dispersed by the defendant municipality. To raise the defence, it was thought to be necessary that some new initiative made in reliance on the existence of the additional revenues be shown to have been undertaken. Thus, a defence based on the concern for fiscal disruption would, for doctrinal purposes, have to be included simply as an addition to the traditional list of reasons why it is “inequitable” to award recovery. This is not to suggest, however, that relief should have been denied in *Storthoaks* on this basis. There did not appear to be any evidence that serious fiscal disruption would result in that case.

Other problems are revealed if one attempts to determine in any particular context who the ultimate beneficiaries of the original overpayment were, and who the ultimate bearers of the cost of any liability imposed will be. If, for example, the original overpayment was made by a commercial party who simply passed the cost thereof on to his consumers, might it not be argued that recovery should be denied on the ground that the plaintiff can not establish that the benefit was conferred on the state at the plaintiff’s expense?66 Similarly, if it were established that the funds yielded by the illegitimate

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66 Such arguments have prevailed in some American case law. See *id.*, at 251-52.
levy were spent by the public authority in such a way as to increase the value of the payer's assets (for example, by improving his land) might it not be thought that this is again a case in which the state has not been enriched at the payer's expense? In short, an attempt to identify the ultimate winners and losers in a chain of events of this kind may suggest that there are reasons why it would be inequitable to grant relief which are quite peculiar to the context of unauthorized revenue collection by public authorities.

Interesting problems of a similar nature would arise in cases where the public authority had chosen the wrong instrument to collect the revenues, in the sense that it could have achieved the original legislative objective through lawful means. Thus, there could arise the situation in which a statutory levy, say on a resource industry, which has been impugned as ultra vires might have been collected through valid contractual agreements requiring royalty payments. If it could be demonstrated that such arrangements would have been agreed to in the first instance, and that it is now too late to revive them, it might be thought to be inequitable to allow recovery.

A number of these kinds of situations which may give concern to adherents of the traditional mistake of law doctrine, of course, be quite adequately resolved by the existing mistake of fact rules. Thus, the change of position defence recognized in Storthoaks would resolve problems of detrimental reliance of a relatively straightforward kind. Further, any concern there might be that the finality of compromises might be threatened would be misconceived inasmuch as this is also a problem which must be and is accommodated in the mistake of fact context.

An additional concern weighing against a general rule awarding recovery might be that the prospect of such relief might encourage public officials to take an unduly cautious view of their statutory powers. Although this would be consistent with the general principle favouring narrow construction of taxing provisions and might, more generally, be welcomed by many as a positive social good, it may be thought by others that a rule which conduced conservative

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68 There may, of course, be situations in which the possibility of intra vires legislation having retroactive effect would undermine the basis of this defence. See, for example, Canadian Industry Gas & Oil Ltd. v. Government of Saskatchewan [1978] 2 S.C.R. 548, 80 D.L.R. (3d) 449, and its aftermath, described in W. D. Moull, Natural Resources: The Other Crisis in Canadian Federalism (1980) 19 Osgoode Hall L.J. 1, at 25-27.
interpretation of statutory mandates conferred by legislatures would be inconsistent with the legislative intent in many statutory contexts. It would not be sensible, in my view, to place much emphasis on this sort of consideration. There are other pressures present in the political system which are likely to be more influential than the law of restitution in determining the degree of caution or abandon exhibited by public officials in the discharge of their responsibilities. It seems more appropriate, therefore, to consider the possibility of undue caution a potential cost of a rule allowing recovery rather than a reason for not adopting this approach.

There are, then, relevant considerations which are peculiar to the context of restitutionary claims against public authorities. A number of these considerations weigh in favour of the granting of recovery and appear to add force to the argument that the distinction between mistakes of fact and of law in this context should be abandoned. There also appear, however, to be a number of problems specific to this context which suggest that there may be reasons for denying relief and which may not be easily captured by the change of position defence. The solution proposed here is simply to accept that these peculiar situations be recognized as such and considered as the foundation for a holding that the grant of recovery would be inequitable in the circumstances of the particular case.

Hydro Electric Commission of the Township of Nepean v. Ontario Hydro

The fact situation giving rise to the Nepean litigation\(^69\) provided an interesting context within which to consider the general question of the continuing vitality of the mistake of law doctrine and the particular problem of the imposition of restitutionary liability on public authorities. The claim arose as a result of a scheme developed by Ontario Hydro for charging municipalities for the cost of electric power which it supplied to them. In simple terms, the charges reflected both a capital cost element and an element reflecting other costs involved in the supply of power. The billing practice which proved to be contentious was Hydro's scheme, revised from time to time over the years, which required newer municipalities to contribute more heavily to the capital cost of the hydro system than older municipalities. Older municipalities were credited with a so-called "return on equity" which had the effect of reducing the

\(^{69}\) Supra, note 10.
amount charged by Hydro for power supplied, whereas the newer municipalities were charged an offsetting "cost of return" on equity. The underlying premise of this scheme was that the older municipalities had over the years made a substantial contribution to the capital cost of the system and therefore ought not to be required to contribute on an equal basis with newer municipalities to the capital investment required for expansion of the system.

In this litigation, the Township of Nepean successfully challenged the legal basis for the version of this scheme which had been in effect from 1966 to the time of the commencement of the action. Although Nepean had vigorously protested the nature of the scheme during the period from 1966 to 1973, it was not until 1974 that it came to the conclusion that the charges assessed for "cost of return" had no legal basis in the enabling legislation of Ontario Hydro. At that time, Nepean discontinued making these annual payments. The trial judge and unanimous appeal courts at both levels agreed in holding that Hydro’s statutory right to pass on the "costs" of supplying power to its customers did not extend to the imposition of levies of this kind on the newer municipalities. The relief sought by Nepean was the return of some $921,463.00 of such charges paid from 1966 to 1973. Hydro counterclaimed for charges of this kind allegedly owing for the period from 1974 to 1978.

At trial, Craig J. dismissed both the claim and the counterclaim and this result was upheld in both the Ontario Court of Appeal and the Supreme Court of Canada. Having determined that Ontario Hydro had no authority to structure its billings in this fashion, Craig J. went on to consider the merits of the plaintiff’s claim for return of the money already paid on the basis of the propositions advanced by the Supreme Court in the Eadie case. The plaintiff argued that it ought to succeed either on the basis that the payments had been made under a practical compulsion or on the basis that the plaintiff was not in pari delicto with the defendant. With respect to the compulsion point, it was Craig J.’s view that compulsion had not been established on the facts. Although a Hydro official had suggested in conversation with a representative of the plaintiff that if the latter refused to make payments Hydro would "put the trustees in," it was apparently Craig J.’s view that this was not a serious threat and that it was therefore not a situation in which payment had been made to avoid a "threatened evil". The payment was a voluntary payment made under a mistake of law.

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Turning then to the *in pari delicto* analysis, Craig J. expressed the view that the decision of Spence J. in *Eadie* established a right to recover moneys paid under a mistake of law where the parties are 'not *in pari delicto*'. In the present case, it was Craig J.'s opinion that Ontario Hydro "had the primary obligation and responsibility to observe the requirements of the Power Corporation Act; and particularly of knowing what charges can be imposed on municipalities and their utilities" and accordingly, that the plaintiff should be entitled to succeed in the absence of any basis for holding that it would be inequitable to allow recovery. The latter requirement was drawn from the famous passage from *Moses v. Macferlan* where Lord Mansfield, in discussing the general nature of money had and received claims, said that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."\(^{72}\) The defendant was not so obliged in the present case, in Craig J.'s view, for three reasons. First, relying for this point on the discussion of the general principle of unjust enrichment found in *Goff and Jones*, Craig J. noted that Ontario Hydro had in fact received no benefit in the sense that the debits charged some municipalities were matched by credits allocated to others. Secondly, Craig J. noted that the source of funds to satisfy any judgment given would ultimately be municipal utilities and, accordingly, it would be impossible to restore the *status quo ante*. It was Craig J.'s view that Hydro would have no claim against the older municipalities with respect to the credits given and accordingly that all municipalities would be required to bear the burden of any award to Nepean through increased rates. This would impose, in effect, a "double penalty" on some utilities. Thirdly, "in balancing the equities between the parties", Craig J. noted that Ontario Hydro was acting bona fide and that "Nepean had ample opportunity to investigate its legal rights and take legal advice in the first year or two of the system — rather than waiting eight years."\(^{73}\)

The decision of Craig J. was upheld in the Ontario Court of Appeal on the basis that "the trial Judge in the instant case was entitled to consider the facts and factors which he did and the unusual circumstances and history of the involvement of two statutory public bodies as well as their relationship to other public bod-

\(^{71}\) *Id.*, at 502.

\(^{72}\) (1760) 2 BURR. 1005, at 1012; 97 E.R. 676, at 681.

\(^{73}\) *Supra*, note 10, at 506 (ONT. H.C.).
and that the Court could not say that the trial Judge had erred in concluding that it was inequitable to order Hydro to repay the moneys paid. Although the Court agreed with Craig J.'s conclusion with respect to compulsion, it declined to pronounce on the validity of his reading of the Eadie decision with respect to the in pari delicto analysis. This issue did, however, receive extensive discussion in the majority opinion of the Supreme Court of Canada.

In the Supreme Court, the plaintiff again advanced the two alternate grounds for relief, payment under compulsion and payment to a party not in pari delicto. The compulsion argument did not receive elaborate consideration in the majority opinion of Estey J. It appears that the majority accepted the findings below on this point and felt no need to elaborate on them. Much greater attention was paid to the “not in pari delicto” analysis and the insecure foundation for Spence J.’s extension of the prior law on this point in Eadie was exposed at great length. Estey J. pointed out that the Kiriri doctrine finds its basis in cases of illegal contract where the plaintiff fits within a class protected by the statute and that the doctrine has not historically been linked to the general problem of recovering moneys paid under a mistake of law. This, of course, is a perfectly defensible view from the perspective of stare decisis. In suggesting that the “not in pari delicto” rule could apply generally to facilitate recovery of moneys paid to a public authority, Spence J. was introducing an innovation which appeared capable of quite general application with the result that public authorities might well be subjected, as a general matter, to restitutionary liability for money paid under a mistake of law. Estey J. appeared to regard this as an unsatisfactory development — Eadie is to be explained, in Estey J.’s opinion, as a case of duress — and therefore reaffirmed the general principle that moneys paid under a mistake of law can not be recovered.

The policy basis for this reassertion of the binding force of the mistake of law rule is to be found in the following passage in the majority opinion:

These authorities, both old and current, relating to the situation where a mistake of law alone is present, are founded, in my respectful view, on good sense and practicality. Certainty in commerce and in public transactions such as we have here is an essential element of the well-being of the community. The narrower rule applicable to mistake of law as compared to that applicable to mistake of fact

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74 Id., at 259 (Ont. C.A.).
springs from the need for this security and the consequential freedom from disruptive undoing of past concluded transactions. Mistake of fact is, of course, limited to the parties and has no \textit{in rem} consequences; hence the more generous view. In any event, nothing has been brought to light in a review of the law by the parties on this appeal to indicate any basis for the merging of the principles applicable to the categories of mistake, and indeed the wisdom embodied in the authorities augurs for the maintenance of this ancient distinction.\textsuperscript{75}

It is surprising to find a doctrine riddled with exceptions, many of them of a rather open-ended nature, defended on the basis of "certainty". The more persuasive reason, with respect, appears to be that hinted at in the discussion in this passage of the contrast between the mistake of fact and mistake of law rules. Although the reference to "\textit{in rem} consequences" remains obscure to this writer at least, the essential point appears to be that the granting of recovery of moneys paid under a mistake of fact is more defensible inasmuch as such mistakes would normally not have any impact beyond the rights of the immediate parties; whereas a mistake of law, as in the \textit{Nepean} case itself, might be applicable to a broad range of transactions involving other parties. Although Estey J. does not expressly link this point to the particular problems of public authorities, it might further be suggested that this is indeed more likely to be the case in a situation where the actions of a public authority are attacked either on the basis that it has exceeded its statutory mandate or on the basis that it is acting under ultra vires legislation. Perhaps it is not reading too much into the majority opinion, therefore, to suggest that this reaffirmation of the orthodox rule rests ultimately on concern with respect to the possible financial disruption of a public authority which might result from the granting of relief.

It has been argued above that there may well be room for legitimate concern with respect to potential disruption of this kind. It should be emphasized, however, that a concern of this kind does not appear to justify rigid adherence to the general rule that moneys paid under a mistake of law can not be recovered. There are many cases in which payments are made under a mistake of law which do not give rise to a problem of this kind. In reality, the distinction between mistakes of fact and mistakes of law does not distinguish between cases where only the parties are involved on the one hand and cases where transactions involving other parties are involved on

\textsuperscript{75} \textit{Id.}, at 243 (S.C.C.).
the other. For this reason, it was argued above that an appropriate response to this concern would be to articulate a rule that recovery would not be allowed where to do so would place public finances in a state of chaos. Even if one accepts that the potential for disruption of the finances of public authorities is a serious and legitimate concern, it is not at all necessary to preclude the recovery of moneys paid under a mistake of law as a general matter or, indeed, in the particular context of payments made to public authorities.

The majority opinion of Estey J. will no doubt be considered by many to be rather disappointing. It reaffirms a private law rule which has been thoroughly discredited and does so, moreover, in the face of a dissenting opinion of Dickson J. which thoroughly catalogues the traditional deficiencies of the rule and argues persuasively for its abolition. The Dickson opinion mounts the case against the traditional rule with some care, quoting at length the opinions of jurists and scholars on the question and subjecting a number of the ambiguities of the general rule and its exceptions to critical scrutiny. Dickson J. concluded “that the distinction between mistake of law and mistake of fact serves no useful purpose” and that “there is no compelling reason why recovery of payments made under mistake should be denied simply by reason of the fact that the mistake is one of law rather rather than of fact.”

Having reached the conclusion that recovery should be allowed and the traditional distinction be abolished, Dickson J. found it unnecessary to consider the in pari delicto argument based on the Eadie decision. Dickson J. did, however, indicate his agreement with the trial Judge that “the primary obligation for interpretation of the relevant issue rests on the shoulders of Ontario Hydro” and suggested that an analogy could, in fact, be drawn from the in pari delicto analysis of the Eadie case.

Dickson J. drew support for his reshaping of the rules for recovery of money paid under a mistake from previous case law in which the Supreme Court of Canada has clearly adopted the unjust enrichment principle as the theoretical basis for the granting of relief in restitutionary cases. The rules permitting recovery of moneys paid under a mistake of fact (and not under a mistake of law) are, of course, a part of the old law of quasi-contract which is now generally considered to be a part of the law of restitution. These rules

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76 Id., at 210.
77 Id., at 211-12.
78 Id., at 209.
are restated in the *Restatement of Restitution* and are the subject of extensive treatment in modern texts on the law of restitution. The analysis of resitutionary claims on the basis of the unjust enrichment principle, set forth in the *Restatement* and embraced not only by the Supreme Court of Canada but by many modern writers on the subject, was put forth primarily as a basis for a rationalization and restatement of the existing rules of quasi-contract and constructive trust. Recognition of the underlying principle of this area of the law has, however, served to highlight the anomalous nature of various aspects of the traditional rules of quasi-contract and has provided a basis for restating them in a more coherent manner. Thus, in *Nepean*, Dickson J. states that "[o]nce a doctrine of restitution or unjust enrichment is recognized, the distinction as to mistake of law and mistake of fact becomes simply meaningless." It is perhaps not perfectly clear whether Dickson J. views the unjust enrichment principle as simply the theoretical underpinning of an existing body of doctrine which provides a basis for reshaping and restating anomalous rules, or rather as a collateral or alternate theory of liability which is to be added on to the causes of action established in the old quasi-contract cases. The former view would be the more orthodox interpretation of the role of the unjust enrichment principle and appears to be the position adopted by Dickson J. in another case. It also would appear to underlie his conclusion in *Nepean* that the traditional distinction between mistakes of fact and law should henceforth be ignored.

It is difficult to understand why the majority of the Court did not find the reasoning of Dickson J. convincing. On the general question of whether the distinction between mistakes of fact and those of law should be retained, it appears to be irresistible. Estey J. responded on behalf of the majority in the following terms:

Since writing the foregoing I have had the opportunity of reading the reasons of my colleague Dickson J. The thrust of the appellant's

79 *Supra*, note 3.
80 See the texts referred to in *id.*
81 *Supra*, note 10, at 209 (S.C.C.).
submission was centered on the question as to whether the parties to the mistake of law were in pari delicto. Unjust enrichment is mentioned in its factum only with reference to the argument that the appellant and the respondent were not in pari delicto. In the course of argument the appellant, in response to a question from the Court, stated that it was not urging and not founding its appeal on the abolition of the distinction in law between mistake of fact and mistake of law. Indeed, the rule was accepted, and the application sought in the appellant’s argument was that said to have been followed by this Court in Eadie v. Township of Brantford, supra. Accordingly, my considerations have been confined to the operation of the doctrine of mistake of law as argued.\textsuperscript{83}

There are a number of curious features to this passage. In the previous paragraph of his judgment, Estey J. had opined that the traditional rule was founded on “good sense and practicality” and that “the wisdom embodied in the authorities augers for the maintenance of this ancient distinction.”\textsuperscript{84} Yet, in the above paragraph, Estey J. appears to be suggesting that his opinion ought to be read as if it assumed the existence of the traditional distinction rather than defended or reaffirmed it. It is not at all clear whether it is the view of the majority that the traditional rule could indeed be subjected to reconsideration along the lines suggested by Dickson J. were it not for the limited nature of the argument made on behalf of the appellant. Although there are obvious reasons for declining to decide cases for reasons which have not been argued by the parties — indeed, it is of interest that Dickson and Estey JJ. found themselves on opposite sides of this sort of issue in another recent decision of the Court\textsuperscript{85} — surely in a case such as this it would be preferable to invite further argument rather than to leave the matter in so uncertain a state. With respect to the concern expressed by Estey J. that unjust enrichment was not generally pleaded, it may be answered that it is not at all clear that the Court was not invited to consider the merits of the appellant’s claim on a broad restitutio-nary basis. The appellant’s factum includes a submission to the effect that “the limits of the doctrine of restitution have not yet been fixed and this Court has the jurisdiction to grant restitutionary relief in situations where it has not previously been granted, if the cir-

\textsuperscript{83} Supra, note 10, at 243 (S.C.C.).
\textsuperscript{84} Reproduced supra, at note 75.
cumstances justify such an expansion.\textsuperscript{86} Although Dickson J.'s opinion may seem rather a mighty oak when compared to this modest acorn, there does appear to be some justification in the material filed for Dickson J.'s view that a more broadly conceived analysis was permissible in this case. To be sure, however, the failure of counsel for the appellant to take the high road of arguing for the abolition of the traditional rule creates some basis for the hesitancy of the majority. More important, perhaps, the fate of the appellant's strategy here offers a lesson of some interest to counsel concerning the Court's willingness to reconsider the merits of quite well-entrenched doctrine.

The Dickson opinion is, in short, a \textit{tour de force}. Although some will no doubt derive comfort from the apparent suggestion of the majority that the larger theoretical questions were not before the Court and therefore remain at large, it is to be regretted that the majority did not seize upon this occasion to resolve an ancient conundrum in the manner suggested by the dissenting opinion. It may seem churlish, therefore, to argue that there may well be something to be said for the result achieved by the majority and to argue that the hesitancy of the majority to grant relief can be supported on grounds which are, or at least should be considered to be, compatible with the new approach to mistaken payments advocated by Dickson J. Problems for the position taken in dissent do arise with respect to "what is perhaps the most difficult issue of the case", that is, in the words of Dickson J.: "are there any equitable reasons which preclude recovery by Nepean?"\textsuperscript{87} At trial, as indicated above, Craig J. held that there were three such reasons: first that Ontario Hydro had not received a benefit, second that the burden of a judgment against Ontario Hydro could not be passed on to the true beneficiaries of the original credits, and third that Nepean's failure to investigate its rights in circumstances where it was aware that the benefits were being passed on to other municipal utilities should preclude it from recovery. The first two grounds raise squarely the problem of whether the special characteristics of public authorities suggest that there need be special defences in claims of this kind. The third ground raises the more general question of whether a failure to undertake enquiries should, in some circumstances at least, be taken to be a basis for imposing the risk of error on the payer.

\textsuperscript{86} Appellant's Factum, p. 22, para. 61.
\textsuperscript{87} \textit{Supra}, note 10, at 212 (S.C.C.), \textit{per} Dickson J.
Dickson J. dismisses the first two points on the following grounds. First, relying on the Storthoaks case, Dickson J. states that “[t]he mere spending of money is not, of itself, sufficient to establish a defence.” Accordingly, the mere fact that the payments received from Nepean had been passed on in the form of credits to others was, in his view, irrelevant. With respect to the second point, Dickson J. expressed the view that Craig J.’s concern with the ultimate source of recovery would amount to a “means test”, a consideration not previously considered relevant in cases of this kind. Moreover, there did not appear to be a sufficient basis in the record at trial to permit a finding as to “what manner and from what source Ontario Hydro might properly pay any judgment recovered against it by Nepean”. Speculation with respect to this matter was said by Dickson J. to be “both unwise and unnecessary in the present litigation”.

It has been argued above that the special character of public authorities does suggest that considerations such as these should indeed be relevant in determining the appropriateness of imposing liability on a public authority. The facts of the Nepean case do provide an interesting context within which to test this proposition. The effect of the holding in the case is that ratepayers living in particular municipalities have been benefiting at the expense of ratepayers in other municipalities by virtue of the Hydro pricing mechanism. It is evident that any attempt to redress this difficulty by requiring repayment by Ontario Hydro will result in an increase in Hydro rates either across the province or with respect to particular municipalities. It may well be wondered whether this is a satisfactory means of redress. In either case, a substantial proportion of ratepayers will be required to pay yet again an increased rate as a result of this billing practice. If the rates are increased across the province, ratepayers who have lived for some period of time in an overcharged municipality will again have their rates raised. If it were possible to impose a higher rate only on those municipalities that have received credit in the past, individual ratepayers who had moved from a new municipality to an old or whose municipality had been absorbed in the interim by an older municipality would again be subjected to higher rates. Given the mobility of the population in the province and of municipal boundaries, it would appear that significant unfairness would have resulted from the imposition

88 Id., at 214.
89 Id., at 216.
90 Id.
of liability on Hydro in this case. When we look behind the respective public authorities to the individual ratepayers, there would appear to be considerable difficulty in effecting a reasonable match of ratepayer defendants who have benefited at the expense of a group of ratepayer plaintiffs. Does this not suggest, then, that the "mere spending of the money" is in these admittedly unusual circumstances a "change of position" by Hydro which arguably should give rise to a defence to the claim? What is unusual about the case is that over a long period of time revenues have been collected through what is in essence a taxing system and redistributed throughout the system in such a way as to make it very difficult if not impossible to recoup the value of benefits conferred from those who have received them. The amounts involved, moreover, are rather substantial. Something like thirty million dollars of overpayments were made throughout the provincial power system. The larger the amount, it might be argued, the more significant the unfairness in a situation where it is impossible to accurately match those who have provided benefits with those who have been unjustly enriched. It might be thought that the Nepean facts are not particularly troubling on this point, but these do at the very least appear to be relevant considerations which might be dispositive in another case.

To the extent that the problem of affixing the burden of liability on appropriate parties increases with the passage of time, it might be thought that application of the doctrine of laches could provide an appropriately traditional doctrinal basis for dismissing claims which have become problematic for this reason. Interestingly, the Law Reform Commission of British Columbia's Report on Benefits Conferred Under a Mistake of Law, after canvassing difficulties of this kind in the context of claims being made against municipalities, recommends that a special limitation rule (requiring that such claims be brought within two years of the payment) be included in the Municipal Act. It is curious that the Report identifies this as a problem only in the municipal context. While municipalities, and especially small municipalities, may be especially vulnerable, the potential difficulty of a major disruption to fiscal arrangements or the difficulty, as in Nepean, of making an appropriate disposition of the burden of liability, are problems which could arise in the context of public authorities at all levels. If a limitation period is

91 Id., at 213.
92 Supra, note 4, at 84-88.
appropriate for municipalities, it is difficult to see why it would not be appropriate for other public authorities as well. Quite apart from the merits of the B.C. proposal, however, the Report does agree that the difficulties inherent in the imposition of restitutionary liability on public authorities may substantially increase with time in particular cases and in this way the Report may offer indirect support for the suggestion that a laches defence may be an appropriate mechanism for dismissing claims where problems of this kind have surfaced.

The third matter raised by Craig J. as a basis for an equitable defence to the claim seems closely related to the general notion that payments are irrecoverable if made in circumstances suggesting that the risk of error has been assumed by the payer. There is support in the mistake of fact cases for the proposition that in a situation where an individual who "might by investigation learn the state of facts more accurately, ... declines to do so, and chooses to pay the money notwithstanding", recovery will be denied. In the words of Goff and Jones, "a payment made in settlement of an honest claim is irrecoverable." Although there is considerable room for argument as to whether this principle ought to apply outside the context of genuine agreements of compromise, Goff and Jones are on solid ground in suggesting that in such circumstances relief has often been denied in the past. Bilbie v. Lumley appears to be a case in point. If one accepts the validity of this proposition, there are a number of circumstances in the fact situation of the Nepean case which provide a basis for its application. Craig J., it will be recalled, stressed that "Nepean had ample opportunity to investigate its legal rights and take legal advice in the first year or two of the system — rather than waiting eight years." The majority of the Supreme Court of Canada appeared similarly concerned that an enquiry should have been made by Nepean at the time of payment. As the majority opinion notes, the plaintiff and defendant are both "public authorities operating under a statute enacted by the Legislature to bring electric power at cost to all members of the provincial community. Each has its staff and organization, including legal ad-

93 Kelly v. Solari (1841) 9 M. & W. 54, at 58, 152 E.R. 24, at 26, per Lord Abinger, C.B.
94 Goff and Jones, supra, note 1, at 91.
95 Supra, note 12.
96 Supra, note 10, at 506 (Ont. H.C.), previously quoted at supra, note 73.
The billing arrangements under attack were the subject of intense debate between the parties over several years. "Legal practitioners experienced in the field were present and available for advice to the appellant at meetings." Hydro obviously believed that the scheme represented a valid exercise of its statutory powers and it might be argued that the situation was one in which the plaintiff should have appreciated that in the absence of timely objection, it was reasonable for Hydro to assume that the lawfulness of its billing practices was accepted by the plaintiff. Although these points are made by the majority in the context of their extensive rebuttal of the suggestion that the plaintiff was not in pari delicto with the defendant, it is suggested here that these circumstances could be offered as a factual basis for application of the traditional proposition that recovery should be denied in cases where enquiry has been waived.

I do not wish to suggest, however, that these points are unanswerable. It is not in my view self-evident that every "voluntary payment in submission to an honest claim" should be irrecoverable. In the absence of an actual intention to compromise a claim, there would appear to be no basis for engaging the policy of the common law favouring the enforcement of compromises. Further, even if one accepts the validity of a more broadly conceived "voluntary submission" principle along the lines suggested by Goff and Jones, it is surely arguable that its legitimate range extends only to situations where the parties have some awareness of the potential for legal uncertainty in their respective positions. There is no evidence in Nepean to suggest that either party was conscious of any uncertainty with respect to the legal basis of Hydro's billing scheme, or that payment was made with a view to "settling the matter." These issues — the proper role of a "voluntary submission" principle and its application in Nepean — are admittedly difficult ones. My point, simply, is that these are matters on which reasonable opinion could differ and on the basis of which the result advocated by the majority could have been and can be defended.

97 Id., at 230 (S.C.C.).
98 Id., at 232.
99 For American support for the view that a "voluntary submission" principle should operate only in the context of real compromises, see Phoenix Indemnity Company v. Steiden Stores (1954) 267 S.W. 2d 733, at 735.
100 This point is argued persuasively by Professor Palmer. See Palmer, supra, note 56, v. III, at 341.
Conclusion

The continued adherence of some judges to the rule that moneys paid under a mistake of law are irrecoverable is a grave disappointment for those who wish to believe that the common law method, whatever its deficiencies, has at least the virtue of being able, over time, to work itself pure by reworking and ultimately rejecting illogical and unsound doctrine. It is suggested here that this phenomenon may be explained, in part at least, by a particular concern with the consequences of imposing restitutionary liability on public authorities. Although there appear to be persuasive reasons for concluding that public authorities should, perhaps more than other types of defendants, be prepared to disgorge benefits obtained in such circumstances, there does appear to be legitimate room for concern with respect to the consequences of a general rule allowing relief. In an extreme case, the granting of recovery could have a seriously disruptive effect on public finances. In other circumstances, the granting of relief may not achieve the principal objective of restitutionary relief: the prevention of unjust enrichment of a defendant at the expense of a plaintiff. In identifying cases of the latter variety, it may be useful to examine the relationship between public authorities and their sources of revenue in order to determine who has benefited from mistaken payments and who must ultimately bear the burden of their repayment. To the extent that such concerns are legitimate the proper response to them is not continued adherence to the general rule but, rather, recognition that the special nature of public authorities as nonprofit bodies financed by public revenues suggests that some care should be taken in fashioning defences, such as change of position and laches, to preclude recovery from public authorities in appropriate circumstances.

Those who favour reform of the rule through abolition of the distinction between mistakes of fact and those of law will find much to admire in the recent Report of the Law Reform Commission of British Columbia and in the dissenting opinion of Dickson J. in the Nepean case. Those who favour reform through judicial restatement will, however, be greatly disappointed by the majority opinion of the Supreme Court of Canada in that case. Estey J. appears not only to reaffirm the general rule but to reject the admittedly novel extension of the "not in pari delicto" rule effected by Spence J. in the Eadie case. If the majority opinion is to be taken as an authoritative pronouncement on this subject, plaintiffs seeking to impose liability on public authorities will be forced to place greater reliance
on the vagaries of the compulsion rule. The fact that the majority ultimately took the view that the appellant had not squarely raised an attack on the merits of the traditional rule and that this issue was therefore not before the Court may, however, offer some encouragement to speculation that the views of the dissenting members of the Court may prevail in the relatively near future.