# LAW REFORM COMMISSION OF BRITISH COLUMBIA

# REPORT ON

# BENEFITS CONFERRED UNDER A MISTAKE OF LAW

## LRC 51

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TO THE HONOURABLE ALLAN WILLIAMS, Q.C.,
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

BENEFITS CONFERRED UNDER A MISTAKE OF LAW

In this Report, the Commission examines the common law rule that benefits conferred under a mistake of law are not recoverable. Although that rule is nearly two hundred years old, it has long been a source of dissatisfaction and injustice. It may be contrasted with cases involving mistakes of fact, in which a person who has conferred a benefit under a mistake has a *prima facie* right of recovery.

In recent years, Canadian courts have accepted the principle of unjust enrichment as the foundation of our law of restitution. The Supreme Court of Canada has affirmed that the basis of an action to recover a benefit conferred under a mistake is unjust enrichment. The continued existence of an arbitrary rule under which a person who has received a benefit under a mistake of law may retain it is incompatible with that principle. The principle that a person who has been unjustly enriched at the expense of another is prima facie obliged to return the benefit so received is wellentrenched in Canadian law. Moreover, Canadian courts have not been insensitive to the potential injustice to which the common law rule might lead, and have therefore created a bewildering and complex array of exceptions to the rule. The result is to make cases involving mistakes of law complex and uncertain undertakings. The recommendations contained in this Report are intended to rationalize the law respecting the rights of those who act under a mistake of law, and to ensure that the courts are able to grant relief in appropriate cases by application of restitutionary principles.

In the last few years, our courts have been faced with a number of cases involving payments made to municipalities pursuant to the terms of an ultra vires bylaw. We have made recommendations specifically addressing the problems arising from these cases. We think our recommendations would, if implemented, not only simplify the law, but also yield less arbitrary and more just results.

This Report has a very limited scope. We have primarily addressed the narrow question of whether there is any justification for treating mistake of law differently than mistake of fact. This should not be taken as signifying satisfaction on our part with the general law relating to mistake. To the contrary, our research indicates that body of law to be difficult and fraught with problems. Nevertheless, we concluded that the unfair results which often flow from the application of an arbitrary rule that benefits conferred under a mistake of law are not recoverable justified our confining this Report to the narrow issue of whether that rule should be abrogated by statute.

## CHAPTER I THE RESTITUTIONARY BASIS OF RECOVERY

The problems generated by mistakes of law cut across the lines separating contracts restitution and tort, as well as common law and equity. The law of restitution is particularly controversial, and so a brief delineation of the basis of recovery in respect of the noncontractual transfer of a benefit is necessary in order to give perspective not only to the discussion of the use of the restitutionary counts in mistake of law cases, but also to the discussion of

whether the current rule against recovery of benefits conferred under a mistake of law is compatible with Canadian jurisprudence concerning the recovery of benefits in other cases.

A common law action for the recovery of benefits conferred under a mistake of law may take the form of an action for money had and received, money paid, or for account; *quantum meruit* in respect of services; *quantum valebat* in respect of goods; or work and materials supplied. In equity the device of a remedial constructive trust is available, or the court may permit a plaintiff to trace his property. A jurisdiction to set aside a contract entered into under a fundamental mistake of fact or law has also been asserted. In fact, in certain cases a jurisdiction has been asserted in equity to award any remedy in equity's armoury where the circumstances of the case warrant.

The historical development of the law respecting these remedies is in large measure responsible for the confusion surrounding the nature of these common law counts. The *quantum* counts, as well as money had and received, developed from the old count of *indebitatus assumpsit*. A writ containing such a count was returnable in the Court of King's Bench, while the older writs of debt and account were triable only in the Court of Common Pleas. During the protracted struggle for jurisdiction which ensued between these two courts, there grew up in King's Bench the practice of permitting a plaintiff to plead a fictional promise on the part of the defendant. The promise was a necessary averment in order to found the jurisdiction of that court. The advantage to the plaintiff in avoiding the archaic rules which prevailed in Common Pleas (for example, wager of law) and the monopoly of the Serjeants (who alone were permitted to plead in Common Pleas) is obvious. The fictional nature of the promise was expressly recognized, and indeed it was held that the promise could not be traversed.

The decision of the Exchequer Court in *Slade's Case* resolved the jurisdictional dispute in favour of the Court of King's Bench. However, the necessity to plead a fictional promise continued to bedevil the law, notwithstanding the provisions of the *Common Law Procedure Act, 1852* which forbade the pleading of "fictitious" and "needless" averments, including significantly "the statement of promises which need not be proved, as promises in *indebitatus* counts.

Although early authority treated an action for money had and received as based upon an obligation imposed *ex aeguo et bono* (out of fairness and justice), the fictional implied promise, together with the stratification of the English common law of obligations into contract and tort, forced the derivatives of the *indebitatus* count into a contractual mold for which they were illsuited. In fact, one of the grounds upon which Viscount Haldane in *Sinclair* v. *Brougham* held that the foundation of the count for money had and received was implied contract was that:

> ... broadly speaking, so far as proceedings in *personam* are concerned, the common law of England really recognizes ... only actions of two classes, those founded on contract and those founded on tort.

*Sinclair* v. *Brougham* is the *locus classicus* of the implied contract theory, and was followed by the English Court of Appeal in *Re Diplock*.

> It is a well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt by the defendant to the use of the plaintiff the latter may recover as for money had and received to his use.

This case was relied upon by Lord Wright in the *Fibrosa Spolka* case, *infra* n. 14, at 65.

This very limited view of the basis of the law of restitution or quasicontract, as it came to be called required a court to find as a condition precedent to relief that a contract may be implied between the parties, under which the recipient of a benefit undertook to pay for it. This model is unsatisfactory in a number of respects. For example, in most cases a promise would be imputed rather than implied. Does a thief impliedly promise to return money he has stolen?

There is at substantial body of criticism and of law which rejects the implied contract theory, on the basis that it is not only an anomalous historical fiction, but also begs the question of when a contract is to be implied.

12. [1941] A.C. 1. In some cases, the implied contract will be an actual arrangement between the parties. In such a case, it is appropriate for the courts to imply as a term of such an informal agreement that a certain price be paid by the person who received goods or services. In other cases, "implied contract" means only that the courts are willing to grant restitutionary relief. It is the insistence on this latter fictional contract which has recently been called into question in England and Canada. The "implied contract" theory has been rejected in favour of unjust enrichment in two House of Lords cases. In *United Australia* v. *Barclay's Bank*, Lord Atkin rejected the notion that the plaintiff had to show that the facts were such that a contract could be implied:

> These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.

In the *Fibrosa Spolka* case, Lord Wright rejected the implied contract theory and expressly based his judgment on unjust enrichment. He stated:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasicontract or restitution. The root idea was stated by three Lords of Appeal, Lord Shaw, Lord Sumner and Lord Carson, in *R.E. Jones, Ltd.* v. *Waring & Gillow, Ltd.*, which dealt with a particular species of the category, namely, money paid under a mistake of fact.

Despite this high authority, and the acceptance of the theory of unjust enrichment in several other English cases,

> In my judgment there is no sufficient precedent for holding that the plaintiff should recover from the defendant in this case under the doctrine if unjust enrichment simpliciter, albeit, as Mr. Goodenday pointed out, the defendant was enriched by his free occupation of the property, both as a dwellinghouse and as an office inasmuch as he enjoyed the capital or the interest thereon which he would otherwise have required to use for the provision of alternate accommodation. It seems to me that it would be undesirable and would lead to uncertainty of the law if the doctrine of unjust enrichment were arbitrarily extended, at any rate where an alternative remedy was available to the plaintiff, as it is in this case.

This does not reflect the Canadian position: see Galvin v. McLean, [1972] .5 N.S.R. (2d) 288 (N.S. Co. Ct.),*James More & Son* v. *University of Ottawa*, (1974) 5 O.R. (2d) 162, 49 D.L.R. (3d) 666 (Ont. H.CL). the status of the principle as a part of English law remains uncertain. In *Orakpo* v. *Manson Investments*, Lord Diplock expressed the view that:
It remains to be seen whether the statement of the civil law will influence the development of its common law counterpart.

> ... there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law.

Lord Wright's statement in the *Fibrosa Spolka* case received a much warmer reception in Canada than in England. In the seminal case of *Deglman* v. *Guaranty Trust of Canada et al*, all seven members of the Supreme Court of Canada imposed an obligation upon an estate to compensate the plaintiff on a *quantum meruit* for services rendered under an oral contract to leave land by will, unenforceable under the Ontario *Statute of Frauds*. The court unanimously rejected the implied contract theory, founding the *quantum meruit* remedy upon unjust enrichment.

The Supreme Court of Canada has recognized the principle of "unjust enrichment" as a fundamental principle of Canadian law in four other case. In *County of Carleton* v. *City of Ottawa,* Hall J. expressly referred to the *Fibrosa Spolka* and *Deglman* cases in permitting the plaintiff to recover from the defendant the cost of caring for an indigent more properly a charge on the defendant. In *Rural Municipality of Storthoaks* v. *Mobil Oil of Canada Ltd.*, Martland J. *per curia* held that the obligation to repay money paid under a mistake of fact was based on the defendant's being unjustly enriched, and that accordingly the defence of change of position could be raised to establish

that the retention of a benefit would not be unjust in the circumstances. In the recent case of *Rathwell* v. *Rathwell*, all the members of the Supreme Court acknowledged the principle's existence, the only issue being whether in the circumstances the imposition of a constructive trust to give a proprietary remedy was appropriate. In *Pettkus* v. *Becker*, the Supreme Court of Canada authoritatively affirmed the place of the doctrine of unjust enrichment in Canadian law, and firmly rooted the concept of constructive trust in it. Dickson J. stated:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in AngloAmerican legal writing for centuries. Lord Mansfield, in the case of *Moses* v. *MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676, put the matter in these words:
>
> > "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."
>
> It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise ... The great advantage of ancient principles of equity is their flexibility; the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury.

Recent years have seen the steady growth of a body of case law in which courts have given remedies to prevent unjust enrichment, or, for one reason or another, held that the defendant was either not enriched or that his retention of the benefit was not unjust. The flexibility of the principle as a means of extending remedies to situations not covered by precedent is best illustrated by a judgment of Morden J. of the Ontario High Court:

> ... where a court, on proper grounds, holds that the doctrine or restitution is applicable, it is not necessary to fit the case into some exact category, apparently established by a previous decision, giving effect to the doctrine. Just as the categories of negligence are never closed, neither can [sic] those of restitution. The principles take precedence over the illustrations or examples of their application.

This broad view is generally held by academic writers in Canada.

Critics of the principle of unjust enrichment generally point to the ambiguous nature of the word “unjust.” It is said that this element vests too much discretion in the court, and that legal rights should not turn on such vague formulations. In *Pettkus* v. *Becker*, Dickson J. rejected this criticism. He stated:

> How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a. corresponding deprivation and the absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

A number of "juristic reasons" may be isolated from the common law cases. Goff & Jones list a number of limitations on the application of the principle. The retention of a benefit is generally not regarded as unjust, for example, if it is conferred officiously, or in the grantor's selfinterest. If it is received as the result of a gift or valid compromise, a benefit need not be returned. Goff & Jones go on to discuss a number of other limitations on the principle. We need not explore these limitations in detail, although they amply demonstrate that the common law of restitution is in the process of evolving into a coherent scheme of obligation as sophisticated as that of contract or tort.

The inevitable result of the recognition of unjust enrichment as a unifying principle in the Canadian law of restitution must be the reexamination of rules laid down when unjust enrichment was not seen as part of Canadian law. In particular, the significance of a party being "mistaken" must be reexamined. Once it is accepted that the basis of an action to recover a benefit conferred under a mistake is the fact of one party being unjustly enriched, then

mistake is no longer the *sine qua non* of recovery. The fact of a mistake having been made is relegated to a more limited role. A party who has acted under a mistake of law cannot be characterized as an officious intermeddler, and be denied relief on that ground. The recipient of a benefit conferred under a mistake would also be hard pressed to show either that the benefit was conferred by way of gift, or with the intent that the recipient retain it whatever the true state of affairs. This analysis suggests that the nature of the mistake allegedly made will be irrelevant in a system of recovery based on unjust enrichment.

In the balance of this report, we shall firstly examine the manner in which courts in British Columbia, as well as elsewhere in the common law world, currently deal with restitutionary problems generated by mistakes of law. Secondly, we shall examine both the efficacy of the current law and its compatibility with the developing Canadian law of restitution. Lastly, we shall examine legislation dealing with mistakes of law enacted in other jurisdictions, and draw on their experience to formulate our own recommendations for reform.

# CHAPTER II MONEY PAID UNDER A MISTAKE OF LAW

## A. Noncontractual cases

### 1. Generally

The problem facing the common law where money is paid under a mistake of law has been neatly summarized by R. J. Sutton:

> The problem is one of balancing points of view: that of the person who has made the mistake, and claims money he says is his own; that of the innocent recipient who in many cases has paid the money to someone else, or otherwise changed his position on the strength of the payment; and finally that of the court, which must evolve a simple, workable and reasonably predictable basis of decision.

The solution adopted by the common law, with the sole exception of two American states, is to deny recovery where the cause of payment was a mistake of law. Hereafter we shall refer to this rule as the "general rule."

The general rule is usually said to have been established by the case of *Bilbie* v. *Lumley*. In that case, the defendants made a claim on an insurance policy underwritten by the plaintiff. The plaintiff paid, later discovering that he could have repudiated liability on the ground of nondisclosure. In an action for money had and received, the plaintiff alleged that the money had been paid under a mistake of law, and won at trial. A rule *nisi* was granted and at the new trial Lord Ellenborough, after receiving counsel's advice that he knew of no case where a mere mistake of law had grounded recovery, rejected the claim. Lord Ellenborough stated:

> ... every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.

2. Connecticut and Kentucky. *See Bryant Smith, Correcting Mistakes of Law in Texas*, (1931) 9 Texas L. Rev. 309 at 311; W. Knutson, *Mistake of Law Payments in Canada: A Mistaken Principle*, [1979] Man. L.J. 23.

3. (1802) 2 East 469, 102 E.R. 448.

4. *Ibid*. at 472.

5. (1815) 5 Taunt. 143, 128 E.R. 641.

The general rule set out in *Bilbie* v. *Lumley* was reiterated in *Brisbane* v. *Dacres,* where the plaintiff, a naval captain, had paid "tribute" to his admiral out of profit earned carrying freight on his ship in the mistaken belief that he was obliged to do so.

These cases have been criticized on a number of technical grounds. It has often been pointed out, for example, that *Bilbie* v. *Lumley* was decided *per incuria*. In a number of earlier cases payments made under a mistake of law had been held recoverable. The ground for the decision can be narrowly construed to cover only payments made to compromise a *bona fide* demand. These factors, combined with the obvious absurdity of presuming everyone to know the law, has led one commentator to argue that the general rule denying recovery of money paid under a mistake of law was not in fact embedded into the common law until the decision of the Court of Exchequer in *Kelly* v. *Solari*, where Lord Abinger held:

> In the case of *Bilbie* v. *Lumley*, the argument as to the party having the means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule however is that if the party makes the payment with full knowledge of the facts, although under ignorance of law, there being no fraud on the other side, he cannot recover it back again.

Whatever the genesis of the rule, it is well established in Canadian law. In fact, in most cases the court is content to state the rule and then move immediately on to the question of whether or not the facts bring the plaintiff's case within one of the many recognized exceptions to the rule. *Eadie* v. *Township of Brantford* is a good example. Here Spence J. stated only that:

> It is, of course, a. trite principle that money paid under a mutual mistake of law cannot be recovered. That principle, however, is subject to several wellestablished exceptions.

This position is in contrast to that which has been adopted in cases turning on a mistake of fact, where the general rule favours recovery.

The existence of a blanket rule prohibiting recovery leads in many cases to unjust enrichment. The result has been the formulation of numerous exceptions to the rule of such wide scope that as a practical matter the courts can, when they wish, evade its application. It is only very recently that Canadian courts have addressed themselves to issues arising out of the conflicting results which might ensue if both the general rule and the principle of unjust enrichment are to be applied to the same facts. The recent case of *HydroElectric Commission of the Township Of Nepean* v. *Ontario Hydro*, a decision of Craig J. affirmed by the Ontario Court of Appeal is an example of the way in which courts may resolve the conflict between a general rule prohibiting recovery of money paid under a mistake of law regardless of the consequences and a general rule prohibiting the retention of unjust enrichments.

In this case the plaintiff municipality paid Hydro substantially higher sums than Hydro was entitled to charge, under a scheme whereby long term municipal customers were relieved of the burden of certain capital expenditures. Ontario Hydro, acting in good faith, had misinterpreted its powers under the *Ontario Power Corporation Act*. Craig J. at trial first analyzed the case as a standard mistake of law case, noting that money paid under a mistake of law is generally not recoverable. He then rejected the view that the plaintiff had been acting under a practical compulsion,

> A mere demand as of right of payment of money is not compulsion and money paid in consequence of it, with full knowledge of the facts, is not recoverable *(Brisbane* v. *Dacres* (1813), 5 Taunt. 143, *Barber* v. *Pott* (1859), 4 H. & N. 759, 768).

In the instant case Nepean was mistaken as to the law; but it was fully aware of the facts. but held that the plaintiff fell within the exception permitting recovery where the parties are not *in pari delicto* and the defendant is more at fault. However, Craig J. was of the view that "that is not the end of the matter." He stipulated that the basis of the action for money had and received was unjust enrichment, and that the plaintiff's claim was based on that principle. However, he held that the claim so framed must fail as Hydro had not received a benefit, having paid the money over to other municipalities,

> In my opinion Nepean's claim for the return of the money is based on the principle enunciated in these cases in substance on "the juristic concept as Lord Mansfield left it". I must, therefore, consider whether Ontario Hydro "is obliged by the ties of natural justice and equity to refund the money". In my view there are at least three important matters to consider with respect to this question. Firstly, I brave already mentioned that Ontario Hydro did not receive a benefit. While it is not authoritative the authors of Goff and Jones, *supra*, make this statement at p. 14:

> The principle of unjust enrichment is capable of elaboration. It presupposes three things:. first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

and that in the circumstances it was unfair to make Hydro repay. While one may quarrel with the first ground (it being difficult to see how the receipt of money is not a benefit), the substance of Hydro's defence was a change of position. That defence has been recognized by the Supreme Court of Canada as valid,

20. *See* Rural Municigality of *Storthoaks* v. *Mobil Oil*, [1975] 55 D.L.R. (3d) 1.

and it would have been preferable from a theoretical point of view for Craig J. to have analyzed the case in that fashion. In fact, in the Court of Appeal, MacKinnon A.C.J.0. expressly referred to the Supreme Court of Canada decision in the *Storthoaks* case, in which that defence was introduced into Canadian law.

The *Ontario Hydro* case is important in that it marks a first attempt to rationalize the mistake of law rules with unjust enrichment. It is implicit in Craig J.'s decision and in the decision of the Court of Appeal that even though the payment did not fall within one of the exceptions to the general rule, recovery would have been granted if there had been an unjust enrichment. It would otherwise seem very hard that the principle of unjust enrichment could be invoked to deprive the plaintiff of any recovery on the ground that the defendant was not unjustly enriched, but not to provide a ground for relief if the defendant was unjustly enriched. The latter issue was not before Craig J., but nevertheless the case illustrates the tension which exists between the older, more arbitrary rule and the principle of unjust enrichment.

Although in the future the principle of unjust enrichment may be used to escape the present confines of the common law, courts in the past have been forced to develop a large number of exceptions to the general rule to cover cases where, for one reason or another, the general rule was thought to be inappropriate. These exceptions are of general application and are canvassed in Chapter IV of this Report.

## 2. Money Paid Pursuant to Statute

### (a) *Money Paid Under an Ultra Vires Demand*

#### (i) *Payments Demanded Colore Officii*

Common law courts initially took the view that money paid pursuant to a demand purportedly authorized by statute but which was not in fact so authorized was recoverable. It is clear that the right to recover was not predicated upon the facts bringing the plaintiff within an exception to the general rule. In *Steele* v. *Williams*, the defendant, a parish clerk, charged the plaintiff 3s 6d for every extract from a registerbook of burials and baptisms. The charge was not authorized by the applicable statute, and the plaintiff brought action to recover the L4 7s 6d paid to the clerk. The plaintiff was unsuccessful at trial. The plaintiff obtained a rule *nisi*, and the decision was overturned by the Court of Exchequer. Baron Platt stated the relevant principle as follows:

> The defendant took it at his peril; he was a public officer, and ought to have been careful that the sum demanded did not exceed the legal fee. As to the defendant being the proper person to be sued, it is almost useless to make any observation. He was not justified in taking the money, and is responsible for his own illegal act.

Baron Martin concurred:

> As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of the person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration to call it a voluntary payment is an abuse of language. If a person

> who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, "I wish to make you some compensation for your time," that would be a voluntary payment. But where a party says, "I charge you such a sum by virtue of an Act of Parliament," it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back.

This doctrine is often referred to as *colors officii* (colour of office) although it is clear that it extends beyond mere demands made under colour of office. An absolute right to repayment exists in cases where a monopoly or common carrier charges fees which are unreasonable. In *Great_Western Railway* v. *Suiton*, Willes J. stated the principle as follows:

> ... when a man pays more than he is bound to do by *law* for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received.

It is clear that this right of recovery was not predicated upon the retention of money being "against conscience." The doctrine is designed primarily as a tool to assist courts in enforcing obligations imposed by statute. Consequently, as Baron Martin noted in *Steele* v. *Williams*, the question of "voluntariness" is irrelevant. The central question is whether the defendant properly carried out his obligation.

A distinction is drawn between cases concerning the performance of a duty for an unauthorized payment and the mere demand of a payment under a statute later declared *ultra vires*. We shall, therefore, turn to the question of payments made under *ultra vires* statutes.

(ii) ___*Constitutional Cases*

Canada is a federal state. Under sections 91 and 92 of the *British North America Act*, certain powers are expressly reserved to the federal and provincial governments respectively. When a provincial legislature enacts legislation dealing with a matter properly falling within the jurisdiction of the federal Parliament (or viceversa) the legislation is said to be *ultra vires*, and ineffective. *Ultra vires* is a Latin phrase which may be translated simply as "beyond its powers."

Where a taxpayer submits to *ultra vires* legislation and advances taxes levied by its terms, he may understandably wish to recover his money if it is found that the statute relied upon is *ultra vires*. This situation arose in *Amax Potash Ltd. et al.* v. *The Government of Saskatchewan*. The Government of Saskatchewan purported to enact legislation imposing a tax on potash ore reserves. The legislation was challenged on the basis that it was an indirect tax, which the provincial legislature had no jurisdiction to impose. Under the *British North America Act*, provinces are limited to direct taxation.

The plaintiffs were being pressed by the Government of Saskatchewan to remit the tax claimed under a threat to exercise the collection procedures authorized by the legislation. They were, however, reluctant to advance the money in view of section 5(7) of the Saskatchewan *Proceedings Against the Crown Act*, which provided in part:

> No proceedings lie against the Crown under this or any other section of the Act in respect of anything heretofore or hereafter done or omitted and purporting to have been done or omitted in the exercise of a power or authority under a statute or a statutory provision purporting to confer or to have conferred on the Crown such power or authority, which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the Legislature ...

The money was paid under protest. The plaintiffs then sought a declaration that the taxing legislation was *ultra vires* and claimed the repayment of money advanced under protest. To the latter claim the Government of Saskatchewan demurred on the ground that the action was barred by section 5(7). The plaintiffs submitted that insofar

as section 5(7) purported to bar a claim to recover money paid pursuant to *ultra vires* legislation; it was itself *ultra vires*.

This submission was accepted by the court. Dickson J. held *per curia*:

> Section 5(7) of the *Proceedings Against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. it affects, therefore, the division of powers under the *British North America Act*, *1867*. It also brings into question the right of a province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

He concluded:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means. The same thought found expression in the headnote to the *Antill* case ... in these words:
>
> > ... the immunity accorded by that Act (the *Barring Act* of 1954) to the unlawful exactions was as offensive to the Constitution as the unlawful exactions themselves ...

The *Amax Potash* case is restricted to legislation purporting to prevent a claim. The rejection of legislation designed to immunize the provincial treasury from claims for the return of money paid under an *ultra vires* statute is predicated upon the need to maintain the integrity of the federal system. To permit a legislature to immunize itself from the consequences of enacting *ultra vires* legislation would be to permit one level of government to trench upon the powers of another level.

By parity of reasoning, it may be argued that provincial legislatures should also be unable to rely on the general common law rule respecting money paid under a mistake of law, at least where the mistake concerns the vires of legislation. The result is as pernicious as that foreseen by Dickson J. in respect of express legislation. On the other hand, it might also be argued that no constitutional impropriety is committed where a provincial government merely seeks to rely upon general rules of common law.

The approach courts will take to reliance on the common law rule to retain money collected under an *ultra vires* statute has not yet been finally determined. It is possible that the courts will be persuaded by the approach adopted iri respect of municipal bylaws found to be *ultra vires*; we shall discuss these cases later in this Report. On the other hand, in the *Amax Potash* case the plaintiffs successfully recovered the taxes in issue. It does not appear, however, that reliance was placed on the common law rule.

In two British Columbia cases reliance was placed on the general rule. In *Independent Milk Producers Cooperative Association* v. *British Columbia Lower Mainland Dairy Products Board*, the plaintiff had advanced sums to the defendant levied under a Dominion statute later found to be *ultra vires*. The plaintiff sought the return of the money paid in error. Manson J. held:

> The plaintiff paid the tolls imposed under mistake of law. Counsel for the plaintiff submits that the British Columbia Lower Mainland Dairy Products Board was invalidly constituted and therefore without power either to

> demand or to receive any money from anyone and further that the question of estoppel could not arise since no conduct on the part of the plaintiff could have confirmed jurisdiction in the Board last mentioned to receive or retain any money, nor could acquiescence have any effect since jurisdiction could not be conferred by consent. It was contended that the rule that money paid voluntarily with a. full knowledge of the facts is not, as a general rule, recoverable upon the ground that it was paid under a mistake as to the law or as to the legal effect of the circumstances under which it was paid, is not applicable when the receiving person was *ab initio* without authority to receive it. That contention is not borne out by the authorities.

Manson J. relied on two cases dealing with *ultra vires* bylaws passed by a municipality. We shall discuss these cases later in this chapter.

In *Vancouver Growers Ltd*. v. *G.H. Snow Ltd*., the British Columbia Court of Appeal was prepared to state as an absolute rule that payments made under an ultra vires statute are not recoverable. This was stated as a presumption of "voluntariness." Macdonald J.A. held *per* curia:

> Although principles have been established in nany cases dealing with illegal impositions we were not referred to any case arising from a declaration by the courts that an Act of a Legislature was *ultra vires* where there is a division of legislative powers, as in Canada and Australia. No doubt the same principles apply in all cases where one purports to act under an assumed' but nonexistent statutory authority. I would, however, venture to suggest that the courts should not, without the strongest reasons, make it difficult to carry out, through boards and officials, legislation enacted by the provincial or federal Parliament Acts which way sometimes after many years be declared invalid on one or more of many grounds. If payments made pursuant to an invalidated Act are to be regarded as made involuntarily because presumably use parties making the payments were not on equal terms wiun the authority purporting to act under the statute it may be difficult to procure officials willing to assume the necessary risk. A declaration of invalidity may be made after many years of operation and large amounts might be recoverable if it is enough to show in a literal sense that "the payments were made under circumstances which left the party no choice," or that "the plaintiff really had no choice and the parties [i.e., the respondent and appellant] were not on eqdal terms." Every Act for taxation or other purposes, whether valid in fact, or for the time being thought to be valid, compels compliance with its terms under suitable penalties. The payee has no choice and the authorities imposing it are in a superior position. It does not follow, however, that all who comply do so under compulsion, except in the sense that every Act imposes obligations, or that the respective parties in the truest sense are not "on equal terms." It should be assumed that all citizens voluntarily discharge obligations involving payments of money or other duties imposed by statute.

Later in this paper we discriss the concept of "voluntariness." It is sufficient at this poipt to note that the term "voluntary" is notoriously ambiguous. In the *G.H. Snow* case it is apparently used as a shorthand way of stating that recovery should not be allowed because to grant it would be highly inconvenient.

The proper response to be taken by British Columbia courts to payments made under *ultra_vires* legislation cannot be said to have been settled by these cases. First, it remains to be seen whether the constitutional problems highlighted by Dickson J. in the *Amix Potash Ltd*. case will persuade Canadian courts that in a case dealing with unconstitutional legislation the application of the common law rule would be inconsistent with the essential nature of Canadian federalism. Secondly, it is not yet clear to what extent these decisions are affected by the comparatively recent acceptance in Canada of the principle of unjust enrichment. Thirdly, in recent years Canadian courts have created more sophisticated tools to deal with restitutionary cases. In particular, the defence of change of position permits courts to inquire into the merits of a case. It is therefore possible that a Canadian court might be persuaded that defences such as estoppel, compromise or change of position are sufficiently flexible that a blanket presumption of "voluntariness" would be inappropriate in the light of modern jurisprudence.

(iii) Municipal Cases

British Columbia courts initially drew no distinction between *ultra vires* legislation and ultra vires municipal bylaws. In *Colwood Park Association Limited v. Corporation of Oak Bay*, McDonald J. stated the governing principle succinctly as follows:

> It seems to me clear that the case falls exactly within the decision of the Court of Appeal for Ontario, in *Cushen* v. *City of Hamilton*, (1902) 4 O.L.R. 265, relied upon by Mr. Mayers, counsel for the defendant. Mr. Base relies upon several English cases, all of which are dealt with and distinguished by Osler J.A. in the above-mentioned case. The plaintiffs' position is stated in a nutshell by Maclennan J.A. in the same case at p. 270, where, speaking of the plaintiff in that case, his Lordship said:
>
> > The plaintiff knew all the facts, and that the fee was demanded only by reason of the bylaw. He knew that if the bylaw was valid he was bound to pay, and if not that he could refuse.
>
> It follows that the money having been paid voluntarily under a mistake of law, cannot be recovered, even if (and as at present advised I am certainly not prepared to hold) the bylaw were *ultra vires*.

Recent attempts by several municipalities to levy impost fees on developers seeking permission to develop land within the municipality have thrown problems raised by the intersection between ultra vires bylaws and the general rule respecting benefits conferred under a mistake of law into sharp relief. The starting point to a discussion of those recent cases is the judgment of Aikins J.A. in *G. Gordon Foster Developments Ltd* v. *Township of Langley*. The case is special insofar as the plaintiff expressly acknowledged his belief that the bylaw was *ultra vires*. It was held that the plaintiff could not for that reason establish that he made a mistake. Hence his claim for recovery of money paid under the *ultra vires* bylaw depended on establishing an independent head of recovery. The plaintiff was unsuccessful in establishing either that the payment was made under practical compulsion, or that the municipality was not *in pari delicto*. It does not appear that the plaintiff argued either for the application of a special rule respecting payments to municipalities under *ultra vires* bylaws, or that the municipality had been unjustly enriched by the receipt of the money in question. For these reasons, the case cannot be regarded as determinative of the position of a person who has paid money to a municipality under an *ultra vires* bylaw.

The *Foster* case was considered by Bouck J. in the case of *A.J. Severson Inc.* v. *Qualicum Beach*. Bouck J. held that he was bound to follow the Court of Appeal's judgment in the *Foster* case, even though the plaintiff in the *Qualicum Beach* case thought the bylaw was valid, and was acting under a practical compulsion. Bouck J. stated:

> As I read the judgment of the Court of Appeal, the two main reasons for its reversal were:
>
> 1. It found that the plaintiff, Foster, was under no practical compulsion to buy the land for subdivision purposes because it only had an option to purchase and could have allowed this option to lapse. Therefore, the plaintiff did not have to pay the money to the municipality.
>
> 2. The plaintiff was informed by its solicitor that the bylaw was invalid at the tide it paid the $38,500 to the defendant municipality.
>
> Both of these elements are absent on the facts before me. Here, the plaintiff completed the purchase of the land around 12th May, 1976. He did so on the strength of a letter from the approving officer, dated 5th March, 1976, granting tentative approval for subdivision. The resolution was then passed on 4th October, 1976, and when the $60,000 was handed over to the defendant on 10th May, 1977, the plaintiff thought the bylaw was valid.
>
> Based upon *Foster*, it seems to follow that the plaintiff in this action must get back its $60,000. For the reasons given in the latter part of this judgment, I believe such a conclusion does not yield an appropriate result.

This reasoning is somewhat suspect. A decision that a person who makes no mistake cannot recover does not necessarily imply the antithetical proposition that a person who does make a mistake is entitled to recover.

Despite the conclusion that it would be unfair, Bouck J. went on to grant the plaintiff relief. It is instructive to scrutinize his reasons closely. First, he held that the plaintiff had actually made a mistake of fact, and hence was subject to general restitutionary principles, including any applicable defences. Secondly, Bouck J. affirmed that if indeed the mistake was one of fact, the money had been demanded *colors officii*. Both steps may be criticized. One may acknowledge that the distinction between fact and law is difficult. However, it is difficult to see how a mistaken assumption concerning the vires of a bylaw can be characterized as a mistake of fact. Moreover, reliance on the doctrine of *colors officii* in a case where the municipality owed no duty to the plaintiff to perform an act is apparently a novel application of that principle.

Bouck J. went on to hold that the claim for money had and received was based on unjust enrichment. As a general statement of principle, this is practically beyond dispute in Canadian law. However, if extended to cases involving mistakes of law, the implications of this holding are far reaching. If Bouck J. intended to state that the general rule respecting money paid under a mistake of law has been overtaken by the adoption of unjust enrichment in Canada, the point requires elucidation. As we note later in this Report, the doctrine of unjust enrichment is at variance with a general denial of any right to recover benefits conferred under a mistake of law. However, if the general rule is to be overturned on that ground, it will require a more explicit statement of the law. At present, it would appear, that Bouck J.'s conclusion cannot stand with earlier British Columbia authority.

Having held that the claim was governed by unjest enrichment, Bouck J. declined to give effect to a defence of change of position. He held instead that the Foster case bound him to grant recovery. Again, this is clearly too broad a statement. The change of position defence was not even argued in Foster. Moreover, the application of "change of position" on the facts of the *Qualicum Beach* case requires either a determination that the mere expenditure of money constitutes a "change of position" (an option arguably foreclosed by the decision of the Supreme Court of Canada in *Rural Municipality of Storthoaks* v. *Mobil Oil of Canada Ltd*.) or some delineation of the grounds upon which the municipality may be said to have materially changed its position.

Other recent cases amply illustrate the problems posed by both the attempt to apply the general rule and uncertainty concerning the relationship of the doctrine of unjust enrichment to payments made under *ultra vires* bylaws. In *Langco Realty Ltd*. v. *Langley* the same bylaw successfully attacked in the Foster case was in issue. The plaintiff recovered on the ground that the municipality was responsible for the error, and hence the parties were not *in pari delicto*. In *Glidurray Holdings Ltd*. v. *Qualicum Beach* the plaintiff sought to recover impost fees paid under a bylaw similar to that held void in *Foster*. The money had been paid under protest, and that was held effective to preclude.the application of both the geperal rule and the defence of change of position. Melvin L.J.S.C. held:

> Insofar as the defendant may have used the funds (or a like sum in substitution therefor after garnishment) in such circumstances that might suggest it had materially changed its circumstances it must be abundantly clear that any change would have occurred after notice to the defendant of the reservation by the plaintiff of its right to dispute the legality of the demand and of its right to seek recovery thereof by virtue of the payment under protest. In those circumstances, in my opinion, it is not open to the defendant to lay the foundation for opposition to the plaintiff's recovery of the funds in question on the basis of a material change.

However, similar claims have been less sympathetically received in other courts, where defendants have been unable to bring themselves within an exception to the general rule or where a general defence of change of position has been applied. In *Ronell Developments Ltd*. v. *City Of Duncan*, the plaintiff was unable to show that the defendant was at fault, or that he had been subject to "practical compulsion." In *Wilson and Wilson Holdings Ltd*. v. *Surrey*, Hinds J. was prepared to find that the municipality was *prima facie* liable to return funds it had collected on the ground that it was more at fault. He stated:

> But in this case Wilson did not know that the defendant had no legislative authority to require the payment of impost fees and inspection fees and to cause the payment of offsite services. I have no hesitation in concluding that of the two parties here, the defendant must bear the primary responsibility for the occurrence of the mistake of law. Kleyn and other senior officials of the defendant ought to have known that the requirement for the payment of the monies paid by Wilson was not supported by legislative authority. On the basis of this exception to the general rule regarding the repayment of monies paid under a mistake of law, Wilson may be entitled to succeed.

Hinds J. then went on to consider each payment on an individual basis to determine whether "natural justice and equity" required that the plaintiff recover.

From this welter of cases, a number of points are clear. Firstly, the general rule concerning the recovery of benefits conferred under a mistake of law is far from an effective bar to litigation. In appropriate cases, courts are willing to circumvent the general rule. It is, however, also clear that the application of concepts like "practical compulsion" and "*in pari delicto*" are less than satisfactory means of avoiding injustice. There appears to be little uniformity in the way in which judges determine whether there is "practical compulsion," and much turns on facts only marginally connected with the question of whether the municipality has been unjustly enriched. It is also difficult to predict the weight which will be given to a submission that the parties are not *in pari delicto*. If this means no more that the one party is more at fault, then the result in every case should be that the municipality be ordered to return the money it has collected. How can a municipality which passes and enforces an ultra vires bylaw not be at fault? We canvass the problems posed by these exceptions to the general rule later in this Report.

Secondly, British Columbia courts are moving towards a general application of line principle of unjust enrichment to resolve questions arising out of mistakes of law. However, the rational formulation of liability on this basis is hampered by the continued existence of the general rule. In order to arrive at the central question between the parties whether the retention of money paid constitutes an unjust enrichment the courts must first consider questions such as "duress" and "practical compulsion." These concepts, as we note in Chapter IV in discussing exceptions to the general rule, pose formidable problems in their own right. In the context of a scheme under which liability is based on unjust enrichment, such factors negate officiousness, and go some way towards showing that retention of a benefit is unjust. However, they do not represent the *sine_qua non* of recovery, and in the context of an *ultra vires* bylaw, are superfluous. A benefit conferred under an *ultra vires* bylaw is hardly conferred officiously, and the fact of the bylaw being *ultra vires* generally commends itself as a ground for holding the retention of a benefit to be unjust.

In the absence of the general rule, courts would more readily be able to focus on the true issue between the parties - whether it is "just" that money collected by a municipality be retained. "Just" is employed not in its colloquial sense, but rather in the sense that the word is used in the developing law of restitution. A number of points would be in issue were the question posed as purely one of unjust enrichment. The municipality might argue, for example, that where a developer has passed on his costs to purchasers, the benefit it has received is not at his expense." Alternatively, it might be able to establish that the money was paid by the developer in his own self-interest in order to secure a benefit which could be obtained in no other way. Questions of change of position may be assessed to determine the fairness of a benefit being retained in an individual case. The presence of the general rule hampers these kinds of inquiries by requiring consideration of issues only remotely connected to the nature of the enrichment.

Although British Columbia courts in particular are more frequently framing cases dealing with *ultra vires* bylaws in terms of unjust enrichment, there are some indications in recent cases that courts might also be willing to consider imposing a stricter obligation along the lines suggested by Dickson J. in the Amax Potash case in respect of *ultra vires* legislation. In *Kew Proerty Planning & Management Ltd*. v. *Town of Burlinqton*, the plaintiff sought to

recover taxes paid pursuant to an assessment issued by a municipality under statutory authority which had been retroactively repealed. Estey J. held:

> The taxing municipality had no authority after July 23, 1971, to maintain the addition to the collector's roll in respect of the appellant's property theretofor added under the authority of the then existing ss. (1)(a). Faced with such a withdrawal of authority, the municipality should, in my view, have deleted the value so added to the collector's roll, which in turn would have resulted in a recalculation of the tax demand by the municipality against the appellant/ratepayer. By the clearest inference from the detailed, step-bystep procedure outlined in the statute, it was incumbent upon the respondent to notify the appellant of such a deletion from the collector's roll. Notice in this case, however, would have been meaningless because the required recalculation of the tax claim would itself have been notice of the action taken in response to the July, 1971, amendment. Formal matters aside, the retention of the monies by the municipality is a wrongful position, wrongfully maintained throughout the lengthy proceedings. In the simplest terms, the respondent acknowledges that it 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 monies thus obtained from the appellant.

Other recent authority indicates a trend to imposing liability on statutory bodies which misrepresent their authority. In *Inland Feeders Ltd.* v. *Virdi,* the plaintiff company desired to create a commercial cattle feedlot near Kamloops. After receiving permission to subdivide certain land from the Agricultural Land Commission, but before purchasing the land or spending money on its development, assurances were sought from the Regional District that the proposed use was permitted by the applicable zoning. An unequivocal assurance was received from the regional district that it was. On the strength of that assurance the plaintiff expended over $300,000.00. However, after a public controversy arose over the use of the land as a feedlot, a judicial determination of the validity of the use was sought. In May 1979, McEachern C.J.S.C. held that the proposed use was not permitted.

The plaintiff then brought an action seeking an indemnity for the money thrown away in developing the land as a feedlot. Anderson J. rejected the contention that the defendant had acted negligently:

> Virdi, while he misinterpreted the bylaw, acted at all times honestly, in good faith and did not act carelessly or imprudently. Before making any representations he did his best to acquaint himself with all relevant information. He did not, as in many of the other cases cited to me, fail to read the bylaw or reach a conclusion which would be unacceptable to any skilled professional person. In short, the opinion which he expressed, while an incorrect opinion, was one which could well have been made by the most competent of lawyers or Judges.

Nevertheless the Regional District was held liable to make good the plaintiff's loss. Anderson J. stated:

> In my view, the Courts have recognized that, unlike private arrangements made between citizen and citizen, the business relationships between municipal governments and their citizens (including corporate citizens) are such that if positive assurances are given by municipal governments to their citizens, those governments must be required to stand behind such assurances ... It will be a sad day, indeed, if every assurance given by a municipal government or its representatives is to be treated with the utmost suspicion. Surely, it cannot be said that all questions relating to zoning must be argued before the Courts. Such an approach would create needless expense, delay and uncertainty and no project could proceed until all avenues of appeal had been exhausted. Surely, it is better that in the rare cases such as the present that the loss be borne by the community as a whole. It is not as though the fixing of liability on the Regional District in the circumstances of this case will open the way to a flood of litigation.
>
> I point out, as well, that where the plaintiff and the defendants are innocent of wrongdoing that it is probably best that the parties who have actually caused the loss (though innocently) should pay the consequences of their verbal acts.

He concluded:

> I wish to make it clear that the concept which I have sought to develop is not of general application and is subject to strict limits, as follows;
>
> (a) The representation relied upon must be clear and unequivocal and not a mere expression of opinion.
>
> (b) The representations or assurances relied upon must be given in the exercise of "business" or administrative powers and not legislative powers.
>
> (c) A litigant must be able to show that he was ignorant of the matters discussed with him and was trusting the municipal government to give him reliable information upon which he could safely act.

There is nothing in Anderson J.'s judgment which limits it to cases where an indemnity is sought. It would appear, therefore, that a plaintiff from whom a tax or other levy is sought, and who relies upon express (or *quaere* implicit) assurances by a municipality or other taxing authority that a certain levy is payable should be entitled to recover. There seems even less reason to deny relief where the defendant has received a benefit as a result of an unequivocal assurance than there is when the plaintiff seeks a mere indemnity.

On the other hand, Anderson J. was careful to limit the application of the principle delineated in *Virdi* to "business" and "administrative" functions, as opposed to "legislative" functions. It is at least arguable that the imposition of liability on a municipality solely on the ground that it enacted an *ultra vires* bylaw would extend this principle to "legislative" functions.

In *Welbridge Holdings Ltd.* v. *Winnipeg,* the Supreme Court of Canada was unwilling to award damages against a municipality for the improper use of legislative authority. A builder, relying on the validity of a zoning bylaw enacted by Winnipeg, obtained a building permit and commenced construction of an apartment building. When the zoning bylaw was declared invalid, the building permit was revoked. The plaintiff's action for damages in negligence was dismissed. Laskin J. held:

> The defendant is a municipal corporation with a variety of functions, some legislative, some with also at quasi-judicial component (as the *Wiswell* case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasijudicial duty.
>
> Its public character, involving its political and social responsibility to all those who live and work within its territorial limits, distinguishes it, even as respects its exercise of any quasi-judicial function, from the position of a voluntary or statutory body such as a trade union or trade association, which may have quasijudicial and contractual obligations in dealing with its members ... A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level, where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court, albeit it acted on the advice of counsel. It would be incredible to say, in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": *see* Davis, 3 *Administrative Law Treatise*, 1958, at p. 487.
>
> A narrower basis of liability is, however, proposed in the present case, one founded only on the failure to carry out the anterior procedural requirements for the enactment of bylaw No. 177. Although those requirements were held in the *Wiswell* case to be expressions of a quasijudicial function, this did not mean that the hearing to which they were relevant was a step unrelated to the legislative exercise in which the defendant was engaged. In approving what Freedman J.A. said in the *Wiswell* case in the Manitoba Court of Appeal, Hall J. agreed that the enactment of the bylaw was "[not] simply a legislative act": *see* [1965] S.C.R. 512, at p. 520. But that did not import that there was no legislative function involved in the enactment. There clearly was.

The Supreme Court's decision that liability in damages should not flow merely from the invalidity of a bylaw has obvious implications for a restitutionary claim. It suggests, for example, that a liability for the return of funds should not be imposed merely because a bylaw is invalid. Moreover, to the extent that exceptions such as "*in pari delicto*" and "*colors officii*" seek to impose a duty on municipalities to "know the law" and to pass *intra vires* by-laws, they are arguably contrary to Laskin J. 's judgment in the *Welbridge* case. We shall elaborate on the latter point in our discussion of these exceptions to the general rule in Chapter IV of this Report.

Later in this Report we shall specifically address the question of reforming the law respecting claims arising against municipalities under *ultra vires* bylaws. In the current law is difficult and uncertain. Arguably exceptions to the general rule such as colore officii and *in pari delicto* impose too onerous a burden on municipalities.

(b) *Money Paid Under a Mistaken Construction of a Statute At Common Law*

*(i) At Common Law*

It is well established at common law that money paid under a mistaken construction of a statute is not recoverable unless the case falls within an exception to the general rule. In *The Queen* v. *Beaver Lamb & Sheaning Co. Ltd*., the respondent had paid tax on shearling under the mistaken assumption that "shearling" was included within the word "mouton" used in the *Excise Tax Act*. The respondent initially did not pay the tax as part of a scheme to evade his obligations under the Act, and consequently was threatened with prosecution if the tax was not paid. The tax was accordingly paid. However, in a subsequent case it was held that in fact "shearling" was not taxable, and did not fall within the word "mouton." The plaintiff claimed the return of his money. The court rejected the claim as the money was paid under a mistake of law, and held that the plaintiff had failed to bring itself within the exception respecting duress as the taxing authority had merely threatened to exercise its rights under the *Excise Tax Act*. In view of the cases on practical compulsion the latter point seems unduly harsh, and indeed in *The Queen* v. *Premier Mouton Products Inc*., which also dealt with taxes wrongfully levied on "shearling" under the purported authority of the *Excise Tax Act*, the point was not taken, and the plaintiff was successful in recovering the tax paid to avert the threatened enforcement proceedings.

Two recent Supreme Court of Canada decisions affirm the view that a payment made pursuant to the mistaken construction of a statute is not recoverable unless the plaintiff can bring himself within an exception to the general rule. In *George (Porky) Jacobs Enterprises Ltd*. v. *City of Regina*, the city had erred in passing a licensing bylaw by omitting to provide for the payment of f ees on a *per diem* basis. The plaintiff, paying fees on a daily basis, remitted some $8,125 more than was required by the bylaw as actually passed. Hall J. granted recovery either on the basis that the mistake was one of fact, or if one of law, the city was more at fault for the error and hence the plaintiff fell within an exception to the general rule. In like fashion, in *Eadie* v. *Township of Brantford*, recovery of money paid to a municipality under a bylaw later quashed was granted only on the basis that the plaintiff had been acting under compulsion, or alternatively:

> In this (case, the appellant, as a taxpayer and inhabitant of the defendant corporation, was dealing with the clerktreasurer of the corporation and that clerktreasurer was under a duty toward the appellant and other taxpayers of the municipality. When that clerktreasurer 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* with the taxpayer who is required to pay that sum.

Both the *in pari delicto* exception and the "duress" exception create analytical problems of their own considered in Chapter IV of this Report.

(ii) *By Statute*

A number of provincial Acts expressly provide for the repayment of funds paid in error. These Acts contain two kinds of clauses, both of which are usually found in the same taxing statute. The clauses contained in the *Social Service Tax Act* are typical. The first type of clause compels the taxpayer to remit the tax notwithstanding an appeal, and requires the responsible authority to refund any sum found on appeal to have been unproperly levied. Section 16 of the *Social Service Tax Act* provides:

> 16. Neither the giving of a notice of appeal by a person nor delay in the hearing of the appeal shall in any way affect the due date, the interest or penalties or any liability for payment provided under this Act in respect of taxes due and payable or that have been collected on behalf of Her Majesty that are the subject matter of the appeal or delay the collection of the same; but in the event of the estimate of the commissioner being set aside or reduced on appeal, the minister shall refund the amount or excess amount of taxes which have been paid or collected on behalf of Her Majesty, and any additional interest or penalty imposed and paid.

The second type of clause is more relevant to the issue of the recoverability of taxes paid under a mistake of law. Section 39 of the *Social Service Tax Act* is typical, save for its threeyear limitation period. Its relevant provisions follow:

> 39. (1) Where the minister is satisfied, on the certificate of the commissioner as to the facts, that taxes or a portion of them have been paid in error, he shall repay from the consolidated revenue fund the amount of the overpayment to the person entitled.
>
> (2) A repayment shall not be made on an application or claim for a refund made more than 3 years after the payment, or for taxes erroneously paid before June 8, 1976.

Similar provisions contained in other provincial statutes are set out in Appendix B. Some of these Acts require the appropriate minister to make the determination of fact, rather than merely acting on the certificate of the appropriate official. Several of the Acts permit the minister to set off the amount overpaid against any other tax owed by the taxpayer. By way of contrast, the *Income Tax Act*. provides for refunds upon an application in writing received within 4 years of the year end. It should be noted that limitations on the right to recover taxes paid in error might themselves be *ultra vires* if the cause of the overpayment was an ultra vires enactment.

Two points about these sections are immediately apparent. Firstly, they are all framed in a manner which makes the cause of the overpayment irrelevant. For example, section 39 of the *Social Service Tax Act* speaks merely of "error," and there seems little reason to suspect that a court would decline to extend these provisions to error of law. Secondly, there is a mandatory duty on the minister in each case to repay the funds either where he has satisfied himself, or is satisfied by the certificate of the appropriate official, that taxes have been overpaid. It would therefore appear that the consideration of a claim for a refund by the minister could be made the subject of an order for relief in the nature of *mandamus* under the *Judicial Review Procedure Act*. Whether or not such an order could be directed at an official who is obliged to certify facts under the appropriate Act is a moot point. The better view is probably that it could. In those statutes which establish such a procedure, the minister cannot make his own determination in the absence of the requisite certificate.

Similarly, it would appear that the minister and his official would be exercising a quasijudicial statutory power of decision and hence, under the *Judicial Review Procedure Act*, be subject to either an injunction, declaration, relief in the nature of *certiorari*, or a remission to reconsider the matter under section 5 of that Act. An alternative way of proceeding is also available under the *Ombudsman Act*. Section 22 of that Act states, in part:

> 22. (1) Where, after completing an investigation, the Ombudsman believes that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was

(i) contrary to law;

(iv) based in whole or in part on a mistake of law or fact or on irrelevant grounds or consideration;

(b) in doing or omitting an act or in making or tacting on a decision or recommendation, an authority

(iii) was negligent or acted improperly;

the Ombudsman shall report his opinion and the reasons for it to the authority and may make the recommendation he considers appropriate.

(2) Without restricting subsection (1), the Ombudsman may recommend that

(a) a matter be referred to the appropriate authority for appropriate consideration;

(b) an act be remedied;

(c) an omission or delay be rectified;

(d) at decision or recommendation be cancelled or varied;

(e) reasons be given;

(f) a practice, procedure or course of conduct be altered;

(g) an enactment or other rule of law be reconsidered; or

(h) any other steps be taken.

The right to a refund under statutory authority may apply notwithstanding the illegal nature of a payment. In *Bonen & Zen* v. *Millwick Finance Corporation and Colonial Properties Ltd*. the plaintiffs discharged a mortgage after default by payment of a sum which included a bonus which, contrary to section 8 of the *Interest Act*, had the effect of increasing the interest rate on arrears. Section 9 of the Act permitted the plaintiffs to recover the overpayment, and it was held that the fact of the payment having been made voluntarily is no defence when the statute expressly permits recovery, at least where the plaintiff is the person whom the statute is designed to protect.

## B. Contracts

1. ___Generally

We are not concerned in this paper with the general effect of a mistake on contractual liability, is vexing topic concerning which one writer has recently stated:

> The study of mistake in contracts is in its infancy. Not only is there disagreement as to the results of cases that is to be expected even in a mature system of law there is not even a common framework for the discussion of mistake problems. Categories and distinctions that form the very backbone of one writer's theory are dismissed by another as misleading or irrelevant.

This Report is limited to the effect of a mistake of law. It appears to be accepted that as a general rule, a contract will not be voidable for a mistake of law. In fact, in *Solle* v. *Butcher*, in which the English Court of Appeal defined thea equitables jurisdiction of a court to avoid a contract for mistake, Jenkins L.J. dissented on the ground that:

> They knew all the material facts bearing upon the effect of the Rent Restriction Acts on a lease of those premises. But they mutually misapprehended the effect which, in that state of facts, those Acts would have on such a lease. That is a mistake of law of a kind which, so far as I am aware, has never yet been held to afford good ground for rescission. It is a mistake not as to the subjectmatter, nature, or purport of the contract entered into, nor as to any question of private right affecting the basis of the contract entered into (*see Cooper* v. *Phibbs*), but simply a mistake as to the effect of certain public statutes on the contract made, being in all respects precisely the contract the parties intended to make.
>
> The mistaken conclusion, to the effect that on the facts of the case (all relevant facts being known to both parties) the Rent Restriction Acts did not have the effect of making L40 the standard rent of the flat in question was, as it seems to me, equally a mistake of law whether it was due to a failure to appreciate and apply the test of identity or proceeded from an application of that test followed by an erroneous inference or opinion drawn from the facts, to the effect that the flat in question was not in substance the same dwellinghouse as the flat formerly let to Howard Taylor. The application of the test, if it was indeed applied, was merely a step in the reasoning leading from the facts to the conclusion of law.

Denning and Bucknill L.JJ. were able to grant relief by characterizing the mistake as one relating to private rights, and hence treated at least by a court of equity as a question of fact.

> On the defendant's evidence, which the judge preferred, I should have thought there was a good deal to be said for the view that the lease as induced by an innocent material misrepresentation by the plaintiff. It seems to me that the plaintiff was not merely expressing an opinion on the law: he was making an unambiguous statement as to private rights; and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose: *MacKenzie* v. *Royal Bank of Canada* . But it is unnecessary to come to a firm conclusion on this point, because, as Bucknill L.J. has said, there was clearly a common mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any fault of the defendant; and *Cooper* v. *Phibbs* affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.

Waddams notes that in practice courts have often given relief against a mistake of law despite the *prima facie* rule against recovery:

> Many cases have, in practice, given relief for mistake of law both in the form of restitution of money paid and in the form of relief from contractual obligations. Many of the erroneous assumptions justifying relief mentioned in the cases above contained elements at least of mistake of law. One agrees to buy what turns out to be his own property; a man and a woman enter into a separation agreement in the belief that they are legally and validly married to each other; one agrees to sell a house for a certain price in the belief that the person occupying it is a tenant entitled to security of tenure under rent control legislation. All these cases are mistakes of law or at least of mixed fact and law. Similarly, cases where obligations have been excused because of a failure to obtain an anticipated licence or permit to allow performance might equally be explained as cases of mistake of law the parties assuming erroneously that performance was (or would be) legal.

From the cases cited by Waddams, it appears clear that Canadian courts will intervene to adjust relations in a contractual case only when the mistake, if one of law, falls within one of the exceptions to the general rule canvassed later in this Report.

There is at least one Canadian case which analyzes the problems created by mistake of law in contract purely on the basis of unjust enrichment. In *McCarthy Milling Co. Ltd.* v. *Elder Packing Co. Ltd.*, the plaintiff had contracted to sell wheat on the strength of the defendants having represented that the plaintiff was eligible for a subsidy. In fact the plaintiff was ineligible. On at traditional analysis, the court would have been driven to set aside the contract in equity on the ground of a common mistake of law, the parties not being *in pari delicto* because of the defendant's misrepresentation. Instead Osler J. held:

> I find that on the basis of the representations made by the plaintiff's officers, the plaintiff acted reasonably in allowing the amount of the subsidy when negotiating its price with the defendant. Even though the plaintiff might

> have made assurance doubly sure by making specific inquiries from the appropriate Government department, the defendant cannot be heard to complain that the plaintiff accepted the defendant's own representation without further confirmation. Accordingly, the defendant was unjustly enriched by that amount demanded by the Feed Board and paid to it by the plaintiff as repayment of ineligible subsidy received.
>
> The matter cannot be approached as one strictly of contract or of tort, but falls within that principle somewhat vaguely defined as quasi-contract or unjust enrichment.
>
> ... in my view, it would be to permit the defendant unjustifiably to enrich itself if it were permitted to keep the benefit I have found it obtained from the reduced price granted to it on the strength of the compensating subsidy, later denied to and recouped from the plaintiff by the proper authority.

It remains to be seen whether in future this analysis will appeal to other courts in cases where the mistake of law upon which the parties acted in settling a material clause in the contract was not induced by one of the parties to the contract.

2. Compromises

(a) ___*Generally*

It is in the interest of both private individuals and the state that potential litigants be able to settle their differences in a binding fashion without recourse to the courts and the expensive process of litigation. In a compromise of a claim, the consideration passing to the potential defendant is the release by the plaintiff of his claim or his undertaking not to bring an action. In such a case restitution of a benefit passing under the compromise will often be inappropriate whatever the actual writs of the claim, as the defendant has assumed the risk inherent in recognizing the validity of the claim and in valuing it. Conversely, the plaintiff, in return for giving up his lawsuit with all its uncertainties, gets a certain sum.

Compromises may be entered into in four states of mind. We shall examine each category of compromise separately.

(b) ___*The Validity of the Claim is Irrelevant*

The potential defendant may not have turned his mind to the validity of the claim. Where he chooses not to investigate the basis of the right asserted, there seems little reason to interfere with the contract between the parties. This principle was expressed in *Kelly* v. *Solari* by Baron Parke as follows:

> If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact is true or false, the latter is certainly entitled to retain it ...

This statement is restricted to mistakes of fact, as the court was of the view that money paid under a mistake of law was in any event irrecoverable. However if a general right of recovery is extended to benefits conferred under a mistake of law, there seems equally little reason to upset a compromise where the merits of the claim are irrelevant to the payment. In a compromise falling within this category the potential defendant intends to buy the plaintiff's lawsuit, and having done so it is difficult to see why he should be permitted to unilaterally repudiate his contract on the basis of a mistake as to a fact or a point of law whose existence was not material to his decision to compromise the claim.

(c) *The Compromised Claim is Known to be Worthless*

A second category of compromise encompasses those cases where the plaintiff knows full well that his claim is unfounded in fact or law. A potential defendant may accede to such a claim merely to avoid the necessity of litigation. A claim advanced in such a case is regarded as an illegitimate practice, and courts have been willing to upset agreements which appear on their face to be valid compromises where one party knows his claim to be unfounded. In Chapter IV we examine the law respecting the effect of such illegitimate threats, and conclude that under the current law a person may recover any benefit conferred upon another to avoid the reasonably apprehended consequences of an illegitimate threat to interfere with the exercise of his rights. The cases concerning the avoidance of compromises entered into as a result of an illegitimate threat illustrate that similar concerns are relevant when a plaintiff seeks to avoid a compromise. In *Norreys* v. *Zeffert*, Lord Atkinson refused to enforce a compromise concerning the payment of gambling debts. The defendant agreed to pay the debt when the plaintiff threatened to inform the defendant's club of his failure to pay. Lord Atkinson Yield that the threat was a mere "injuring threat" which illustrated the distinction between legitimate and illegitimate business practices, and that the agreement not to inform the club in return for payment of an uncollectable debt did not constitute a valid compromise.

There is authority also for the view that where a person seeking to rely on a compromise has not acted *bona fide* his conduct may be characterized as illegitimate. In *Ward Co*. v. *Wallis*,

> There may also be cases in which, although [the payor] might by investigation learn the state of facts more accurately, he declines to do so; and chooses to pay the money notwithstanding; in that case there can be no doubt that he is ... bound.

the plaintiff made an error in setting out the defendant's indebtedness. The defendant took advantage of that error to pay a lesser sum than was owed, receiving thereby a receipt for the whole amount due. In an action to recover that portion of the sum inadvertently omitted, the defendant pleaded the "compromise." The defence was unsuccessful. Kennedy J. held that although as a general rule a person paying money under a mistake and under pressure of legal process could not recover his money:

87. [1900] 1 Q.B. 675.

88. *Ibid*. at 678, 679. *See also Goff & Jones*, at 179181; *Nixon* v. *Furphy*, (1925) 25 N.S.W. (S.R.) 151; *Re Hooper and Grass Contract*, (1949) V.R. 269.

> ... there must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle ... into force, and that if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle ... may not prevent the defendant from recovering the money back ... I think therefore, that the settlement under legal process was not *bona fide* on his part, and that the plaintiffs are entitled to reopen it.

Entering into a compromise of a claim known to be valueless is a species of fraud,

> It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

and if the potential defendant knowing the claim to the valueless pays off the would-be plaintiff merely to avoid for the moment the greater harm which would ensue from the lawsuit, it would be patently unjust to permit a plaintiff who knew his claim to be valueless to retain the benefit so acquired.

(d) *The Compromised Claim is Doubtful*

A third category of compromise involves *bona fide* claims where the law or facts are uncertain and neither plaintiff nor defendant is able to say with certainty what the legal position is. Where such a case is settled, both parties weigh their chances of success against the benefits accruing under a settlement. In most cases there is little reason to upset such a settlement where the law is later clarified in favour of one or other of the parties. The risk of such an eventuality is subsumed in the compromise arrangement. If the plaintiff was able to hold out for a higher settlement on the basis of a probability in his favour of success at trial, it seems unfair to allow him to renege when that probability becomes a certainty.

In such at case no question of a mistake of law arises. The parties enter into a compromise not because of any mistake, but rather as an alternative to litigating a controversial claim. The mere fact that the claim advanced *bona*

*fide* turns out to have been groundless has been held not to be a ground to interfere with the settlement. This point was established in Callisher v. Bischoffsheim. in which Cockburn C.J. held:

> The authorities clearly establish that if an agreement is made to compromise a disputed claim, f orbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce thie disputed claim Thave or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations *incident* to it. The def endant's contention is unsupported by authority.

This judgment is framed so as to exclude cases where the plaintiff knows he has no *bona fide* claim. Where such knowledge is based on a question of fact, it is relatively easy to impute *mala fides* to a potential idaintiff. However, where the question of bona fides turps on whether the plaintiff knew his case to be groundless at law, obvious problems of proof confront a person who seeks to impugn a compromise. How doubtful must a claim be before knowledge of its being groundless will be imputed to a potential plaintiff? Nevertheless the distinction is useful, as the existence of an illegitimate threat to take legal or illegal action merely to injure in order to extort the payment of money commends itself as a ground for holding an enrichment to be unjust.

(e) *One or Both Parties Act Under a Mistake of Law*

A fourth category of case concerns compromises made under a mistake of law. In the 1824 case of *Naylor* v. *Winch*, Sir John Leach VC held:

> If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a Court of Equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon.

The case was decided on the basis that the claim was doubtful, and the statement that a court of equity would intervene merely because of a mistake is *obiter dicta*.

A recent British Columbia case comes to a similar conclusion without citing *Naylor* v. *Winch*. In *Toronto Dominion Bank* v. *Fortin (No. 2)*, both parties mistakenly assumed that the receiver with whom the plaintiff had contracted possessed the authority to enter into the contract in issue. In fact the receiver had no such authority and the contract was unenforceable. When the plaintiff broke the contract, the receiver threatened to commence an action. In order to avoid litigating the receiver's claim, the plaintiff agreed to a settlement. Upon discovering his error, the plaintiff brought an action to set aside the compromise.

Andrews J. of the British Columbia Supreme Court expressly recognized that:

> The basic rule respecting a compromise agreement is that it cannot be attacked by reason of a common mistake of law provided the claim compromised is a bona fide or "honest" claim, however mistaken the parties are as to its validity. Thus forbearance to sue is said to be good consideration regardless of whether the claim compromised is unfounded and could not be sustained.

However, he went on to state:

> At some point a mistake can be so fundamental that the compromise agreement cannot stand. Such a proposition is set out by S.M. Waddams in the *Law of Contracts* (1977), p. 85. Similarly, G.H. Treitel in the *Law of Contracts*, 4th ed. (1975), p. 60 comments that where the claim is clearly untenable the compromise of it should not be good consideration. This concept of a fundamental mistake was enunciated by the House of Lords in *Bell* v. *LeverBros., Ltd*., [1931] All E.R. Rep. 1 and cited with approval in the following quotation adopted in the judgment of Fenton Atkinson, L.J., in *Magee* v. *Pennine Ins. Co., Ltd*. (1969) 2 All E.R. 891 at p. 896:
>
> > "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided. [And to that has to be added the additional rider] ... the assumption must have been fundamental to the continued validity of the contract, or a foundation essential to its existence."

In the result Andrews J. held that the compromise was voidable in equity even though the error was one of law, and even though the plaintiff had ample opportunity to investigate the receiver's authority.

There are a number of difficulties with the case, not least of which is the concept of a fundamental mistake of law. If the plaintiff made a mistake of law which induced him to settle a claim, then arguably he has made a "fundamental" mistake, whether or not the principle of law involved was simple or complex, settled or unsettled.

Andrews J. also expressed the view that:

> Had they sought legal advice on this point and decided, even if erroneously, that the receiver had the capacity to enter into the agreement of sale, they would be bound by the compromise agreement.

It is difficult to see why this should be so. If the mistake itself is sufficient ground to avoid the compromise, one would suppose erroneous professional advice to make the case for relief stronger and not weaker. The solicitors are available to explain the error and hence make the court's task in determining whether a mistake occurred easier. What difference does it make how the person impugning the compromise came to be mistaken? Aside from cases of fraud or misrepresentation, it is difficult to see why the manner in which the plaintiff came to be mistaken would render the retention of the benefit by the defendant any more just or unjust.

(f) ___*Is Reform Desirable?*

Whether a court should have the power to avoid a compromise for a fundamental mistake of law is a difficult question of policy. It fundamental objection to the avoidance of compromised for mistake either of law or fact not induced by the potential plaintiff is the irrelevance of the potential defendant's state of mind to the potential plaintiff's decision to accept an offer of settlement. Where a potential plaintiff *bona fide* believes himself to have a valid claim, he will in many cases be completely ignorant of the motives which induced the potential defendant to submit, and indeed in subsequent litigation may be hard pressed to disprove his opponent's assertion that the compromise was entered into under a fundamental mistake of law.

It is true that the defence of change of position is available to a defendant in an action to set aside a compromise but the effect of a general rule permitting recovery is to place the onus on the party whose actions were perfectly proper to justify the retention of funds which, under the compromise, both parties intended should be his. The result is to deprive a potential plaintiff of his right to control the action he settled. Should the potential defendant get the benefit of an implied term that the money paid is recoverable if he is mistaken without having to bargain for it?

It is arguable that where a bona fide claim is valueless no consideration of value passes to the potential defendant. That point begs the question. The true consideration offered by a plaintiff is his forbearance to sue, and while

the value of such a right may be doubtful where the claim is worthless, it is at least as valuable as the traditional peppercorn. Such an analysis also ignores the fact that many compromises are under seal, where the absence of consideration is irrelevant. leven where under the current state of the authorities a claim may be worthless, in a compromise the plaintiff abandons his right to seek to persuade a superior court to alter the rule in his favour. While in other contractual cases a mistaken assumption may go to the root of the contract, so that the parties did not (for example) buy and sell what the contract contemplated, in a compromise the root of the agreement is the abandonment of one's day in court: a right concerning which a defendant is seldom in any doubt.

Weighing against the proposition that public policy requires compromises to be upheld is the principle of unjust enrichment. Where a compromised claim is valueless, or a party makes a fundamental adstake of law, the receipt of *notional* consideration in the form of a release of a valueless suit is small compensation. Automatically upholding all compromises without regard to the intent of the parties and their motives could in some cases result in substantial hardship.

We have concluded that the present law adequately balances these competing policies. Cases where compromises have been upset on the ground that a party operated under a mistake of law illustrate that the courts will not avoid a compromise lightly. While the concept of a "fundamental" mistake of law does create analytical problems, the use of that phrase clearly articulates a judicial policy in favour of upholding compromises.

3. Illegal Contracts

A mistaken assumption as to the applicable law may lead parties to a contract to include in their agreement provisions which a court may characterize as "illegal." As a general rude, courts have declined to entertain actions brought to recover benefits conferred under an illegal contract. However, the law respecting the characterization of a contrhct as "illegal" is uncertain. Moreover, the general rule denying relief to parties to illegal contracts is itself subject to exceptions whose uncertain application and ambiguity could lead to injustice.

The scope of an examination of the law respecting illegal contracts is quite broad. In addition, any proposals for reform which we might advance would also extend to cases where parties who have deliberately entered into an illegal contract seek the assistance of a court. For these reasons we propose to deal with illegal contracts in a separate study. However, to the extent that the rules respecting illegal contracts entered into under a mistake of law are different from those governing illegal contracts entered into under a mistake of fact, we see no reason why our recommendation should not apply equally to illegal contracts.

## C. Gifts

As Goff & Jones point out, there is little authority respecting the effect of a mistake of law on a gift. It is clear, however, that where the recipient of a gift induces an error so fundamental that the retention of the benefit conferred would be unjust, he may be ordered to make restitution.

Where the recipient does not by his conduct induce the donor to make the gift in issue, authority is less clear. A settlor who misunderstands the effect of his settlement will be permitted by courts of equity to rescind the settlement and recover the subject matter of the trust, subject to any equitable defences. However, equity has always regarded an error respecting private rights as a mistake of fact, and cases of mistaken settlements fall within that exception. Where there is no equitable relationship between the parties to trigger the application of equitable principles, it has been held that the court will not intervene to set aside a gift made under a mistake of law. In *Re Hatch* a husband voluntarily covenanted to pay his wife certain sums for her maintenance. He misconstrued his obligation, and paid her the sums free of tax. On his death, the husband's executors sought to set off the overpayment against the wife's interest as residuary legatee. Sargent J. held:

> It has been admitted and in my opinion rightly admitted by Mr. Crossman that this point is concluded by *Warren* v. *Warren*, and that the overpayments having been ruled under a mistake of law there is no debt recoverable from the annuitant which would entitle the applicants to deduct the amount overpaid from the future payments of the annuity under the covenant contained in the deed.

In contrast, where the mistake is one of fact, courts have intervened on occasion to set a gift aside. In *Lady Hood of Avalon MacKinnon,* Lord Greene M.R. rescinded an appointment made by Lady Hood to her elder daughter. The appointment was made to put that daughter in a similar position to Lady Hood's younger daughter, Lady Hood having forgotten an earlier appointment in favour of the elder daughter.

The courts have drawn a distinction between a "mistake" and "motive." The leading case is *Morgan* v. *Ashcroft*, in which Lord Greene M.R. held:

> It appears to me that a person who intends to make a voluntary payment and thinks that he is making one kind of voluntary payment whereas upon the true facts he is making another kind of voluntary payment, does not make the payment under a mistake of fact which can be described as fundamental or basic. The essential quality of the payment, namely its voluntary character, is the same in each case. If a father believing that his son has suffered a financial loss, (gives him a sum of money, he surely could not claim repayment if he afterwards discovered that no such loss had occurred; and (to take the analogous case of contract) if instead of giving him money, he entered into a contract with his son, he surely could not claim that the contract was void. To hold the contrary would almost amount to saying that motive and not mistake was the decisive matter.
>
> Upon the true facts the payment was still a voluntary payment; and there is in my opinion no such fundamental or basic distinction between the one voluntary payment and the other that the law can for present purposes differentiate between them and say that there was no intention to make the one because the intention was to make the other.

The distinction is not a happy one. Its incidence is largely a matter of characterization for example, in the hypothetical case outlined by Lord Greene M.R., was the gift given because of the financial loss or because of the relationship? Lord Greene admits that a mistake as to identity will ground a right to recovery, but it is difficult to separate one's attributes from one's identity. Under Lord Greene's formulation the gift made by Lady Hood of Avalon arguably should not have been rescinded. The desire to divide property equally motivated the gift. Although Lady Hood's gift did not result in equal distribution, the gift to the elder daughter was not "mistaken" in the sense that the elder daughter actually received the money. What is the difference between the status of the elder daughter (having received an earlier payment) in the *Lady Hood of Avalon* case and the status of the son (being in financial difficulty) in Lord Greene's example?

This problem arose in acute form in *Rowse* v. *Harris*, where the plaintiff, after going through a ceremony of marriage with the defendant, voluntarily conveyed to her an interest in his lands in joint tenancy. In fact the marriage was void as the defendant wife had not been properly divorced from her previous husband. Spence J. of the Ontario High Court characterized the transfer as voluntary, and dismissed the plaintiff's action to set aside the conveyance on the ground that the plaintiff had not been mistaken as to the identity of the subject matter of the gift or its recipient, and the fact of the defendant's status (or lack of it) as spouse was merely the motive for the gift.

The motive/mistake distinction has some merit in deterring donors who have changed their minds about the wisdom of gifts from seeking to revoke them. However it is still open for Canadian courts (as they have started to do in other areas where mistakes of law are relevant) to analyze the gift cases in terms of unjust enrichment. Such an analysis might lead the courts to conclude that gifts made under a mistake of law should be *prima facie* recoverable, subject to any restitutionary defences.

# CHAPTER III BENEFITS OTHER THAN MONEY CONFERRED UNDER A MISTAKE OF LAW

## A. Chattels Transferred Under a Mistake of Law

A person may transfer chattels to another in the mistaken belief that he is obliged to do so. In the majority of cases that transfer will usually be by way of gift or contract. We have already canvassed the law respecting the effect of mistakes of law on gifts and contracts. The hard case is where one party transfers a chattel to another without an express or implied contract but with the intention to be paid. Courts and academics have struggled with the issues raised by such a case. The difficulty inherent in analyzing the facts and formulating legal rules to govern them highlights the reformulation of restitutionary principles necessitated by the acceptance of unjust enrichment as the basis for recovery. What role does "mistake" in general have to play in a case where a chattel has been transferred under a mistake of law?

It would appear that in an action framed in unjust enrichment to recover a benefit, proof of a mistake has the effect of negating any contention that the chattel was given as a gift, in the transferor's selfinterest, or as a result of officious conduct. "Officiousness" is one of the major limitations on the general right to recover in unjust enrichment. The concept of officiousness is defined in the American Restatement of Restitution as follows:

> Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place.

The word "officiousness" articulates the judicial policy expressed by Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co*.:

> If, for instance, the plaintiff conferred a benefit upon defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit it is highly likely that the courts will say that there is no right of reimbursement ... the fundamental question is whether in the circumstances it was reasonably necessary in the interests of the volunteer or the person for whom the payment was made, or both, that the payment should be made ... If without antecedent request a person assumes an obligation or makes a payment for the benefit of another the law will ... refuse him a right of indemnity. But if he can show that in the particular circumstances there was some necessity for the obligation to be assumed then the law will grant him a right of reimbursement if in all the circumstances ... it is just and reasonable ...
>
> ... liabilities are not to be forced on people behind their backs any more than you can confer a benefit on a man against his will.

In this light it is difficult to defend a refusal to permit a plaintiff to plead a mistake of law to negate officiousness. Where a person believes that the law requires him to confer a benefit, it is hard to characterize his conduct as "interference in the affairs of others not justified by the circumstances." Any defence of either *Bilbie* v. *Lumley* or its possible application to transfers of chattels under a mistake of law must rest on other policy grounds. We examine the justification for the general rule in Chapter V of this Report assuming that the general rule applies, in many cases a plaintiff may be barred from recovering the value of his chattels.

However, even where a plaintiff brings himself within one of the exceptions to the general rule, his right to restitution is not automatic. Unlike money, which is both the measure of value and the medium of exchange, the value of a chattel (or services rendered) is not fixed. A delivery of heating oil, for example, is of little value to a homeowner whose household has been converted to natural gas. The recipient of a chattel may therefore subjectively devalue a benefit by showing that in his particular circumstances the benefit has a value lower than its apparent objective worth. He may even be able to show in the circumstances that the benefit is worthless to him. A defendant may subjectively devalue a benefit by proving that the object is unwanted (and therefore worthless to him),

that he could have got it at a lesser price elsewhere, or that forcing him to pay for the benefit deprived him of some advantage which might accrue had he been able to exercise his freedom to contract with someone else.

It is apparent that merely being able to devalue the benefit is not a complete defence. Although in some cases the defendant nay be able to show that a benefit is worthless, in most cases the subjective evaluation of a benefit should result only in a court departing from an objective standard and substituting as a measure of value the value to the defendant. Moreover, the obvious response to a claim that the chattel was unwanted is to press for its return. If the defendant chooses to keep it, he can hardly plead that it has no value to him. To provide a complete defence, the recipient of a benefit should be able to show that to compel repayment would be inequitable. In our example, the defendant nay be able to do so by showing that all the oil in the tank has leaked away or been stolen.

There are three possible cases where a person who transfers a chattel brider a mistake of law might be able to recover notwithstanding the general rule. Where the defendant specifically requests a benefit, the request alone is adequate to negate officiousness and the fact of the plaintiff acting under a mistake of law is irrelevant. In such a case, the courts nay infer that the parties have entered into a contract, and permit the plaintiff to recover the value of the chattel on a *quantum valebat*. Where recovery is based on an express request, it is unlikely that the courts would permit, the defendant to subjectively devalue the benefit. His request implies an agreement to pay market value.

Similarly, where the defendant had the opportunity to reject the goods, but nevertheless accepts them, courts have yield that he is bound by his free acceptance of the goods to pay for them. In *City Bank of Sydney* v. *McLaughlin*, Griffith C.J. of the High Court of Australia held:

4. *Supra* n. 1 at 409, 410. *See also* Stephenson L.J. at 413:

> "There may be cases where it is obviously unjust that the debtor should be enriched by accepting the benefit, though unasked and even unneeded of a guarantor's payment of his debt without indemnifying his benefactor ..."

Other cases arguably supporting the existence of free acceptance as a ground for holding the retention of a benefit to be unjust are *Lamb* v. *Bunce*, (1815) 4 M. &, S. 275, 105 E.R. 836; *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673 (C.A.) and *Tanenbaum and Downsview Meadows Ltd*. v. *WrightWinston Ltd*., (1965) 49 D.L.R. (2d) 386. *See* Goff & Jones at 15, 388, Birks at (1974) 27 Current Legal Problems 13 at 30. A similar principle has been adopted in obiter dicta in New Zealand. *See Webster* v. *Woolley* (1978) 4 N.Z. Recent Law (n.s.) 39.

> The circumstances may be such that a man is bound by all the rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage from which, if he speaks or acts at once they can extricate themselves, but from which, after a lapse of time, they can no longer escape. Under such circumstances mere inaction is convincing evidence of adoption.

Similarly, in *Owen* v. *Tate* Scarman L.J. held:

> ... the way in which the obligation came to be assumed is a relevant circumstance. If, for instance, the plaintiff has conferred a benefit upon the defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit, it is highly likely that the courts will say that there is no right of indemnity or reimbursement.

This implies that the defendant would have been liable if he had had the opportunity to refuse the preferred benefit.

Where the defendant has freely accepted the goods, he can hardly raise the officiousness of the plaintiff's conduct, since it lay within the defendant's power to prevent the benefit being conferred. Similarly, as in the case of request, it is likely that a defendant would not be able to subjectively devalue the benefit. Having freely accepted the benefit, it is difficult for the defendant to claim either that he did not want it or that it was more advantageous to him to obtain it elsewhere. Such a claim might succeed, however, where the defendant could show that he believed that the acceptance would confer some particular benefit upon him.

Some academics have expressed concern that there may be cases where the plaintiff should recover even where goods cor services were not requested or freely accepted. Goff & Jones argue:

> The principle of free acceptance is generous but it may not be sufficiently generous to meet every case where a plaintiff should be granted restitution for services which he has rendered under mistake ... exceptionally restitution should be granted though the defendant never had the opportunity of rejecting the services. Such may be the case if it can be shown that the defendant has gained a realisable financial benefit or has been saved an inevitable expense, for he has then incontrovertibly benefited from the services rendered. In such circumstances the equities of the plaintiff's claim should be more compelling tlmn the defendant's plea that lie did not request or freely accept services which he is now in no position to return.

The formulation and function of a principle of "incontrovertible benefit" are matters of some academic controversy. There is some doubt, for example, whether the principle should result in recovery even where the behaviour of the plaintiff might be characterized as officious. Two writers have specifically stated that the plaintiff attempting to rely on incontrovertible benefit must not have acted officiously in conferring the benefit, while Goff & Jones do not appear to consider this point crucial.

It would appear that the existence of an incontrovertible benefit (that is to say an inevitable expense or a realized financial benefit) negates an attempt to subjectively devalue a benefit received. Whether the defendant desired the benefit would be irrelevant where he has turned the enhanced value of his own improved asset or the benefit itself into cash. If he has sold the improved asset, the courts would be unlikely to give any effect to a defence that in the circumstances it would be inequitable for him to have to disgorge its value. If the expense is inevitable, it would not be possible to devalue a benefit on the basis that the benefit was unwanted, although the courts would likely be sympathetic to a partial devaluation of the benefit on the ground that the plaintiff could have purchased the necessary item at a price lower than market value.

There is no case which expressly considers the concept of "incontrovertible benefit" and the arguments are largely academic at this point. At least one case has come before the courts where a defendant successfully resisted a claim in respect of an unrequested supply of aluminum siding to a house which was being sold. However, the points raised in this discussion were not canvassed by the court.

It is important to note that on two of these analyses the reason for the transfer of the chattel is irrelevant. There seems little reason to deny recovery to a plaintiff merely because of a mistake of law if the benefit was requested or freely accepted. If the benefit is incontrovertible in the sense of being an inevitable expense and the source of the benefit was irrelevant, the plaintiff's motive may be irrelevant. Conversely, if there is nothing in the conduct of the defendant or the circumstances of the case which brings the defendant within these three concepts, to force him to disgorge to his detriment the value of a benefit he neither wanted nor could refuse merely because the plaintiff made an error would be unfair.

**B. Services Rendered Under a Mistake of Law**

The issues which a court would face in a claim respecting services rendered under a mistake of law are similar to those arising in respect of chattels transferred under such an error. In both cases the main issue turns upon whether on the facts of the case the plaintiff was officious or the defendant can subjectively devalue the benefit. Whatever nay have induced the plaintiff to render the services in issue, if they were neither freely accepted nor requested, ana do not incontrovertibly benefit the defendant, courts have refused to permit recovery even where the mistake was one of fact. As Goff & Jones point out:

> A person who renders services to another, who has neither requested them nor freely accepted them in such circumstances that he knew or ought to have known that they were to be paid for, has generally no right to recover from the recipient remuneration for the work so done or recompense in respect of any benefits, however

> great, conferred thereby. Such a person is in a different position from the payer of money under a mistake. The receipt of money incontrovertibly benefits the recipient. But the receipt of services is not necessarily advantageous, and, unlike money, services, once rendered, cannot be restored. Consequently, it is not enough that the plaintiff should have rendered the services under a mistake; in principle, he must go further and show that the services were requested or freely accepted by the defendant.

This point was succinctly put by Pollock C.B. in *Taylor* v. *Laird*

> ... one cleans another's shoes. What can the other do but put them on?

### C. Land Transferred Under a Mistake of Law

The vast majority of transfers of land under a mistake of law will be by way of contract or gift. In a rare case where a transfer is made which does not fall within these categories it is likely that a court of equity would be quick to characterize the mistake of law as one concerning private rights, and treat it therefore as a mistake of fact justifying rescission of the transaction.

## CHAPTER IV EXCEPTIONS TO THE GENERAL RULE

### A. Generally

It has often been noted that there are so many exceptions to the general rule that money paid under a mistake of law is not recoverable that its practical effect is questionable.

It has been said with much justification that the rule's principal value is to stand as a preamble to its many exceptions. This state of affairs was succinctly criticized by Bryant Smith, an American writer commenting on the application of the general rule, which has been accepted in Texas but rejected in Kentucky:

> It is a striking commentary on the perpetuity of judicial error to find a critic nearly 100 years later still complaining in similar terms that though "the rule is declared to exist in full force, yet so many arbitrary exceptions have been grafted on it that, in fact, nothing remains."
>
> But if the test of a law is in its results, it may be asked what difference does it make whether the courts, as in Kentucky, frankly admit that they correct mistakes of law, or, as in Texas, first deny that they do so in general, then cover up the rule with exceptions, so long as the plaintiff with a meritorious case gets the relief to which in justice he is entitled. The problem, however, is not so simple. In the f irst place, in so far as they are practicable, there is great social value in scientific rules and in consistent and smoothly working legal machinery. The Texas rule exacts for its enforcement the double price of first drawing the difficult distinction between law and fact and then, assuming the mistake is one of law, of drawing the distinction between the general rule and its exceptions.

Various policies underlie the established exceptions to the rule. While the desire to prevent what would otherwise be an unjust enrichments an underlying motive, the basis of most exceptions is usually said to be some other policy.

The recent acceptance of the principle of unjust enrichment iin Canada raises questions concerning the role and effect of the exceptions to the general rule. In particular, it is not clear whether proof that a plaintiff falls within an exception is sufficient in and of itself to vest in the plaintiff a right to recover money paid under a mistake of law, whether or not the defendant has been unjustly enriched. The approach adopted in most cases in which this point has been argued is to require the plaintiff to prove that he falls within an exception to the general rule, and to require

him in addition to show that the defendant has received a benefit at the plaintiff's expense. it is then open to the defendant to establish any restitutionary defences open to him on the facts of the case. In *HydroElectric Commission of the Township of Nepean* v. *Ontario Hydro*, Craig J. stipulated that a mere finding that the parties were not in *pari delicto* was not determinative of the plaintiff's claim. Instead, it was open to the court to have regard to the circumstances in which the claim was made. In the *Nepean* case, Ontario Hydro, a nonprofit body, had spent the money collected illegally to benefit certain of its customers at the expense of others. As Ontario Hydro's only source of funds was its customers as a whole, and in view of the fact that the money itself was not easily recoverable, the trial and appellate courts concluded that the retention of the money by Ontario Hydro was not unjust."

British Columbia courts have also held that recovery of money paid under at mistake of law depends upon a finding that the defendant has been unjustly enriched. In *J.R.S. Holdings Ltd.* v. *Maple Ridge*, Berger J. held:

> If the plaintiffs establish that they were *in pari delicto* or that there was practical compulsion (and I have held that they were not *in pari delicto*), does it follow that they are automatically entitled to the return of their money? think the answer is no. The action for money had and received is not an action on a contract or a notional contract. According to Storthoaks, it is an action for return of money which the defendant has received but which the law says it would be unjust for him to keep.
>
> Actions for return of monies by mistake of fact or of law are actions for money had and received. In either case the question is: is it against conscience that the defendant should be allowed to keep the money (see the recent Working Paper issued by the B.C. Law Reform Commission on Benefits Conferred under a Mistake of Law.) The determination that the parties were not in *pari delicto* does not exhaust the court's function so far as the exercise of its equitable jurisdiction is concerned ...

The correctness of this approach has yet to be considered by either the British Columbia Court of Appeal or the Supreme Court of Canada. If liability is based on unjust enrichment, whether or not the plaintiff falls within an exception should be irrelevant. However, no Canadian court has yet seen fit to abandon entirely the common law rule in favour of a general right of recovery. It would therefore appear that the exceptions to the general rule will continue to be important. In the balance of this chapter, we shall examine a number of exceptions.

## B. Duress

The law has long recognized a right to recover benefits conferred by a party subjected to duress. Where as a result of duress a defendant obtains a benefit, he can hardly plead that the plaintiff's mistake of law caused the transfer.

This is the exception most often relied upon to avoid the general rule. It is often raised by impugning the "voluntariness" of the transaction. Exactly what the courts, mean by "voluntary" is not clear. Bradley Crawford, for example, has expressed the following view:

> At the root of this requirement is, of course, the need for the plaintiff to avoid having his payment characterized as "voluntary" a description of notoriously broad import which can cover cases as widely disparate as *Arding* v. *Buckton* (a gift of home improvements for a hopeful bridetobe) and *Morton Construction Co. Ltd.* v. *City of Hamilton* (coerced "gift" of sidewalks by contractor threatened with boycott by City councillors).

Crawford goes on to isolate five different uses of the word voluntary":

(1) not significantly compelled or coerced; "performed of one's own free will ... not constrained" (shorter O.E.D.) "... implies acquiescence, the absence of pressure inducing payment."

(2) not authorized or requested; *Barish* v. *Biss,* [1925] 3 D.L.R. 738 per Haultain C.J.S. at 73940; *Macclesfield* v. *G.C. Rlwy. Co.*, [1911] 2 K.B. 528 per Farwell L.J. at 539;

(3) actual or imputed gratuitous intent; *Arding* v. *Buckton* ... ; *Quintal* v. *Kerr*, [1960] O.W.N. 147 (C.A.) (plasterer replacing fallen ceiling in hopes of repairing reputation with head contractor at the same time).

(4) intending to close a transaction; "If a person with knowledge of the facts pays money which he is not in law bound to pay and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it." *Maskell* v. *Horner* per Lord Reading C.J.

(5) the pejorative or epithetical usages: in addition to the shades of meaning noted specifically above, one may find numberless others such as "mistake of immaterial fact," "misrepresentation not proved," or "compliance with illegal bargain." As Dawson puts it, 'This word of many meanings carries the burden of saying that in spite of clear enrichment we are helpless or unwilling to act." *(unjust Enrichment (1951)* at 128).

The ambiguity of this concept has led to a great deal of uncertainty in the cases. This is compounded by a conflict in the case law concerning exactly when one's actions are not "voluntary" within the first head isolated by Crawford. The conflict appears to be based on differing views of the ends which the law concerning duress (or compulsion) is designed to achieve.

If the law concerning duress is concerned only with the fact of the transaction not being consensual, then the *sine qua non* must be the suppression of the coerced individual's will. This view is perhaps best expressed by Kerr J. in The Siboen, where it was held that the court must be satisfied as a matter of fact that the consent of the other party was overborne by compulsion so as to deprive him of the "*animus contrahendi*" which the law requires. Kerr J. was of the view that the "true question" was whether or not the agreement in issue could be regarded as "voluntary." Similarly in *Williams* v. *Bayley*, the House of Lords refused to enforce a settlement on the ground that the pressure exerted by the plaintiff bankers had operated upon the defendant to deprive him of his free agency, and to extort from him an arrangement to benefit themselves.

Another line of authority takes a very different view as to what constitutes "duress" or "compulsion." The court concentrates not on the state of mind of the plaintiff, but rather on the defendant's threatened interference with the plaintiff's legal right. The plaintiff is accorded a right at law to recover a benef it conferred in order to avoid the effects of the threatened interference. For example, in *Astley* v. *Reynolds*, the Plaintiff was permitted to recover money paid to a pawnbroker wrongfully withholding goods simply on the ground that the "plaintiff might have such an immediate want of his goods that an action of trover will not do his business." In *Maskell* v. *Horner*, Lord Reading C.J. stated:

> Payment under such pressure establishes that the payment is not made voluntarily to close the transaction. The payment is made for the purpose of averting a threatened evil, and is made, not with the intention of giving up a right, but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.

In *Mason* v. *The AttorneyGeneral* or New South Wales, Dixon C.J. expressed the view that:

> The money was paid over by the plaintiffs to avoid the apprehended consequence of a refusal to submit to authority. It is enough that there were fair and reasonable grounds for apprehending that unless payment were made an unlawful and injurious course will be taken in violation of the plaintiff's actual rights.

It would appear that in an increasing number of cases courts have abandoned the first rationale in favour of the second. It seems clear, for example, that no matter how coercive a threat may be in fact, it will have no legal consequence unless it is a threat which the defendant is not entitled to make. Hence the plaintiff in *Morton Constru-*

*cion* v. *City of Hamilton* was unable to recover the cost of repairing a road surface it had installed even though the city had threatened to refuse to enter into any further contracts with the company unless it did so. The city had every right to decline any tender the plaintiff might make. It is hard to imagine a threat more coercive to a company dependent on the city's good will. In *Peter Kiewit Sons Co*. v. *Eakins Construction Ltd*., the plaintiff was unable to recover for what it claimed were benefits conferred under a threat to call in a bonding company, as that action and the work the plaintiff had been called on to perform were expressly covered by the contract between the parties.

Recent cases have extended the concept of "duress" by dropping any requirement that the plaintiff act under an urgest or pressing necessity. Instead, the courts require only a "practical compulsion."

The issue in a "practical compulsion" case is whether the plaintiff, in the circumstances as he perceived them to be, felt it necessary to submit to the defendant's demand. The application of an exception respecting benefits conferred under a "practical compulsion" to cases in which it is difficult to say that a plaintiff's will was overborne brings into question tests based on the "voluntariness" of a transactionary tests based on "compulsion" or the "overbearing of will" do not accurately reflect the true criteria by which cases of duress are judged. Indeed, in our discussion of benefits conferred under an ultra vires statute or bylaw, we noted a number of cases where on similar facts different conclusions were reached on whether the plaintiff was acting under a "practical compulsion." This uncertainty reflects a certain amount of confusion respecting the principles on which this exception is based.

Canadian cases on "practical compulsion" reflect a trend toward the view that money paid to avert the consequences of an actual or threatened interference with legal rights is recoverable. However, courts continue to frame this concept in terms of "voluntariness" and "compulsion." The issue of what constitutes "practical compulsion" has been before the Supreme Court of Canada six times in recent years. The six cases arguably illustrate the adoption of the broader ground for recovery in duress. Unfortunately, the Court combined its articulation of a broader policy ground with the retention cof terms more appropriate to the view that the law granted relief only when the plaintiff's will was overborne.

In *Knutson* v. *Bourkes Syndicate*, the court formulated a principle consistent with the theory that "compulsion" is a misleading term to describe this exception to the general rule. Kerwin J., for the majority, followed *Maskell* v. *Horner*:

In *Maskell* v. *Horner*, the Court of Appeal determined that a payment under protest made to avoid a distress threatened by a party who can carry the threat into execution is not a voluntary payment and may be recovered if the circumstances justify it in an action for money had and received, as effectively as if the chattels had been in fact seized.

Similarly in *Municipality of St. John* v. *Fraser Bruce Overseas Corp*., Rand J. firmly based the plaintiff's right to recovery on the injustice of permitting the defendant to retain a benefit paid by the plaintiff solely to prevent the defendant's unjustified interference. He stated:

> As representing the United States the contractors were firm in their objection to the taxation, and the municipal authorities, with all the information before them, equally insistent on pressing it. In that state of things, to require either the contractors or the United States Government to take proceedings that might later be obviated, or to await action taken to seize the property, is going beyond what is necessary to rebut the inference of voluntary payment. "Voluntariness" implies acquiescence, the absence of pressure inducing payment. That pressure was present here inducing payment as a temporary means of avoiding rancorous controversy, as well as interference with the prosecution of the work. Nothing in the circumstances of payment makes it unfair to require the municipality to submit to an action for its return.

If "voluntariness," as RandJ. suggests, means mere acquiescence in a payment not induced by unlawful pressure, then it is a misleading term. The implication is that a payment made under unlawful pressure can never be voluntary. The characterization of the payment as "voluntary" is redundant and unnecessary.

In *The Queen* v. *Beaver Lamb & Shearling Co*., a sharp division is apparent between the two approaches to the question of "practical compulsion." In this case the taxpayer had agreed to pay taxes on shearling, which was asserted by the federal government to fall within the word "mouton" iri the *Excise Tax Act*. The taxpayer paid under threat of prosecution for fraudulently withholding the tax. Kerwin C.J. was of the view that the payment was not made under duress as "what the Department did was merely to proceed according to the authority given it by the Act." In other words, the threat used was not unlawful and the defendant could therefore retain the benefit. Ritchie J. denied recovery on the ground that the payment was not merely to "avert a threatened evil" but rather to compromise a claim. Only Taschereau J. was prepared to regard the coercive effect alone as significant. He stated:

> It flows from well regulated principles that this kind of pressure, to which the president of the respondent company was subject, amounts to duress, that it was a direct interference with his personal freedom and that, therefore, the agreement which resulted was not an expression of his free will. He obviously feared imprisonment and the seizure of his bank account and insurance monies for an indefinite period of time.

In *The Queen* v. *Premier Mouton Products*, the issue of the "voluntariness" of a payment again arose for consideration. Although, as Abbot J. (with whom Kerwin C.J. agreed) pointed out in his judgment, the concept of " voluntariness" did not exist under the civil law, Taschereau J. was prepared to hold that the payment was made under duress. However, the conflated the two rationales for the rule:

> The pressure that was exercised is sufficient, I think, to negative the expression of the free will of the respondent's officers, with the result that the alleged agreement to pay the tax has no legal effect and may be avoided. The payment was not made voluntarily to close the transaction ... the payment was made for the purpose of averting the threatened evil, and not with the intention of giving up a right, but with the intention of preserving the right to dispute the legality of the demand.

In fact, the only pressure applied in the *Premier Mouton* case was the threat to take such proceedings to recover the tax as are authorized by the Act. It is difficult to see how this would be coercive: if it is, then any threat to institute civil proceedings to resolve a dispute could be regarded as equally coercive. It is unlikely that the court would not have upset the transaction merely because of the pressure if the tax was properly levied. It seems clear, therefore, that what attracted the court was not the coercion alone, but rather the coercion in support of a nonexistent right coupled with the lack of any genuine compromise of the issue: in other words, a threat to use legal process to levy a tax when neither the process nor tax was authorized by statute.

In *George (Porky) Jacobs Enterprises Ltd*. v. *City of Regina*, the plaintiff paid licence fees on a *per diem* basis even though the city bylaw required only monthly payments. The Supreme Court of Canada dealt with the allegation of duress notwithstanding the conclusion that the plaintiff had acted under a mistake of fact and not law, and hence the payment was *prima facie* recoverable. Hall J. *per curia* held:

> I am also of the opinion that the payments were made under compulsion of urgent and pressing necessity and not voluntarily as claimed 1%, the respondent ...
>
> The learned trial judge found that the per day licence fees were paid under compulsion. With that finding I respectfully agree. It is clear from the evidence that the licence inspectors were firm in telling Jacobs that a per day fee had to be paid if he was to continue the business of promoting wrestling exhibitions in the City of Regina. Believing that the bylaw in force for the time called for a per day fee, Jacobs had no actual alternative but to pay the fee being demanded by the agents of the respondent.

Although Hall J. refers to "urgent and pressing necessity" and not "voluntariness," it is difficult to see how the facts of the case would bring it within either term. Although the necessity arose on a dayto-day basis it was not urgent in that the plaintiff could have applied for a monthly licence in ample time to bring an action for relief. Nor was it involuntary in the sense of his will being overborne, but only in the sense that he made a conscious decision to pay the fee because, in the words used by the House of Lords in *Astley* v. *Reynolds* that was the course which "did his business" best. In fact Jacobs had other alternatives, and the result in this case can only be justified on the basis that the plaintiff was subject to an unlawful interruption of his business: in this case the refusal to grant a licence to which he was entitled.

*Eadie* v. *Township of Brantford* is a particularly difficult case to explain in terms of the plaintiff's will being overborne. *In Eadie*, a municipality acting under a bylaw later declared *ultra vires* refused to permit the plaintiff to sever a part of his land unless he paid severance *fees*, and transferred road, corner and sewer allowances. The plaintiff was hospitalized at the time and in no condition to contest the demand. He had a willing buyer who required the severance, and hence time was of the essence in removing any impediments to the severance. An action to recover both money paid and land transferred to induce the municipality to agree to the severance was successful.

Crawford, in an article discussing the *Eadie* case, noted that:

> As far as one can discern from the reports of the case, there was no question of any legally enforceable compulsion upon Eadie to enter into the "agreement" with the Township. Unlike Bourkes Syndicate, which had contracted to convey a clear title and was being pressed by the advance of the day set for closing, it appears that Eadie's deal with Gibbons was expressly "subject to" the necessary planning permission being obtained. It was highly desirable from Eadie's point of view that he sell the house, but the only true "compulsion" he was under came from his illness and his general circumstances not from the Township or its licencing inspectors ... His property was not imperilled, he was dealt with on the same basis as every other similarly situated resident of the Township, and the major terms of its demands were fixed and spelled out to him well before he fell ill. The Court gives no indication of being aware that it was making this advance in the law. Spence J. for the majority, notes that "practical compulsion" had been accepted as sufficient in the earlier case of *Knutson* v. *Bourkes Syndicate* and that other courses of action had beeh available in that case as well as in the *FraserBrace* and *Jacobs* decisions. But in those cases, as also in *Maskell* v. *Horner* which Spence J. also cites and relies upon, there was a compulsion whether one calls it "practical" or not of tax enforcement sanctions or serious disruption of plaintiff's livelihood. Even Maskell, who strung his "protests" out over 12 years until they descended, in the view of Rowlatt J., to the level of a "joke" or at the best "a grumbling acquiescence" could point to more in the way of compulsion than Eadie, since he had many times been threatened with the closure of his shop and had actually suffered several seizures of goods upon his past defaults in paying market tolls. Eadie's understandable desire to sell his house so that his wife could move in closer to the hospital in more modest accommodation does mark the furthest advance in the relaxing by the courts of the requirement that the payment be made under compulsion of "urgent and pressing necessity."

As Crawford points out, the effect of Eadie is to abandon any requirement for urgent and pressing necessity. Nevertheless a rather artificial concept of "voluntariness" is retained. However Eadie is not difficult to explain in the light of earlier cases stating that the avoidance of a threatened harm is a sufficient ground for recovery. In *Eadie*, Spence J. specifically adverted to the question of what makes a payment "involuntary," and, in words reminiscent of *Astley* v. *Reynolds*, stated:

> It was submitted to counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation; where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff's recovery is not so stringent and that a practical compulsion is alone necessary. In each of the three cases in this Court approving *Maskell* v. *Horner*; which I have cited above, there were other courses available to the plaintiffs but those other courses were time consuming and impractical. Counsel for the respondent said, in the present case, the appellant could have forced a consideration by the Brantford and Suburban Planning Board then appealed from their refusal to grant the severance to the Ontario Municipal Board. That Board, I am convinced, would have felt itself bound by the bylaws of the corporation and the best the appellant could have done was to have appealed to the Court of Appeal from their refusal to

> disallow or vary the order of the Brantford and Suburban Planning Board upon the point of law. It is true that this exact course was taken in *Noble* v. *Brantford and Suburban Planning Board*, which apparently is unreported but where judgment in the Court of Appeal was delivered on February 3, 1964. Such a course, however, would, of necessity, have been so fraught with delays that the sale to Mr. and Mrs. Gibbons would have been lost. In the meantime, the appellant was languishing in hospital. It was at that very time that he had the paramount need of selling the property and establishing his wife into other habitation more suitable to their then circumstances, not months or even years later.

This is a clear approximation of practical compulsion with a choice by the plaintiff to submit to the demand merely because that course is most convenient to him, and to reserve any right of recovery. This interpretation of the case is also suggested by Crawford, who states:

> It may, in fact, be wondered whether this verbal formulation can any longer be accepted as an accurate description of the prerequisites of restitution of compelled payments, or whether, with the present authoritative confirmation of "practical" compulsions, it might be enough for a plaintiff merely to show that he acted reasonably in all the circumstances in meeting the demand when it was made, and bringing action for restitution, as soon thereafter as was practical.

The shift from a definition of "duress" requiring the overbearing of the plaintiff's will, together with an urgent and compelling necessity, to a definition of "duress" which requires only the payment of money pursuant to an illegitimate demand to avoid the harmful effects of a wrongful interference, constitutes a serious incursion into the seeming absoluteness of the general rule. Whenever the defendant asserts a legal right he does not possess, the plaintiff may recover any payment made to temporarily avoid the consequences of an illegitimate threat to enforce that purported right. If this analysis is correct, then to label a payment made under an illegitimate threat as involuntary" is unnecessary. If all illegimate threats render payments "involuntary," the word "involuntary" is a mere label without analytical value.

It is clear that the concept of "illegitimate pressure" extends beyond unlawful threats. A threat may be illegitimate even if it involves some action which might be perfectly proper in another context.

On the other hand, British Columbia courts are not willing to hold a plaintiff to have been practically compelled merely because a demand was "illegitimate." This is particularly so when the plaintiff accedes to a demand for payment of impost fees under an *ultra vires* bylaw in order to induce a municipality to grant a privilege which may properly be refused. In *J.R.S. Holdings* v. *Maple Ridge*, Berger J. stated:

> In the case at bar the developers were not in the position, as was the plaintiff in the *Knutson* case, *supra*, of making payments before they could secure a right to which they were legally entitled. They had no legal right to, subdivision approval. Quite the contrary: the municipality could refuse approval indefinitely if in its opinion such approval would prove adverse to the interests of the community. Nor was there any question, as in the Municipality of St. Johns case, of any imminent property. In the Eadie case it was not merely potential pecuniary loss which constituted practical compulsion, but the real and distressing nature of the human circumstances in which the Eadies found themselves. The Eadie case differs radically from the case at bar.
>
> Can it be said that, because the municipality required payment of the impost fees as a condition of allowing the various housing developments to go ahead, the case is one of practical compulsion? Counsel for the plaintiffs argued that the financial position of the plaintiffs was overextended, and that they had no choice except to pay the impost fees; they could not at that stage decline to go ahead with development, for that would have entailed intolerable losses. The difficulty is this: is the court to look at the balance sheet in every case and decide whether there was practical compulsion? Where is the line to be drawn? Would not the attempt to decide the issue mean in every case secondguessing the developers' business judgment? The plaintiffs claim they had no choice but to go ahead. It must be remembered, however, that in this case subdivision approval was never an assured thing. The plaintiffs knew that if approval was not gained they would have to make some other disposition of the property. They were free to go ahead or back out, even if backing out meant that there would be losses. Risk is inherent in land development. A key element in that risk is gaining requisite municipal approval. Impecuniosity ought not to be considered a factor in recovery. To hold otherwise would be to put a premium on poor business judgment.

> I do not think the plaintiffs have shown that the case at bar was one of practical compulsion.

This approach is consistent with that adopted in this Report. The illegitimate demand in itself does not necessarily result in relief being granted. The plaintiff must show some interference with a legal right, and not merely a miscalculation concerning the desirability of paying the fee levied.

The policy of this exception is clearly to permit a person to conduct his business free from wrongful interference. Where a wrongful interference is threatened, the plaintiff need not weigh the merits of a lawsuit, but rather may avoid the harm which might flow from that interference, and litigate later. So, for example: where a supplier of wrought iron to a contractor refuses to fulfill his contractual obligations unless the contractor agrees to pay a higher price, the contractor need not refuse and risk non-delivery. If the contractor cannot obtain alternative supplies of wrought iron, his credit and reputation may be impaired, and he may himself be liable to damage actions. Instead, it has been held that the contractor may pay the sums demanded, take delivery of the wrought iron, and recover the excess in a later action.

The same rationale may also be framed in terms of unjust enrichment. The retention of a benefit obtained by a wrongful act of the use of illegitimate pressure may be characterized as "unjust." The concept of "voluntariness," in comparison, is at best a very blunt instrument. Focussing on a subjective test, such as "overbearing of the will," ignores the business realities which may prompt a party to accede to a demand which in other circumstances would have been stoutly resisted.

It follows that when a benefit is conferred by a party acting under the pressure of threats of illegitimate action, whether or not the benefit was conferred under a mistake is irrelevant. The cause of the payment is the illegitimate threat or action. The courts focus on the preservation of the status quo and the avoidance of harm. The crucial question is whether the plaintiff intended to settle the issue, whatever the law. In this respect Canadian courts may already have reached the position advocated by Goff & Jones:

> In our view the principle in *Bilbie* v. *Lumley* should only preclude recovery of money which was paid in settlement of an honest claim.

One other unfortunate tendency has been for writers to concentrate on the fact of protest, notwithstanding that the presence or absence of a protest has been repeatedly said to be inconclusive. It seems clear that the fact of protest is relevant only insofar as it is evidence of the defendant's intent not to settle the matter.

### C. Where the Parties are not *In Pari Delicto*

The fact of one party being more at fault and hence responsible for a mistake of law being made has been used in a number of cases as a ground for relief. It has even been suggested that the question of whether the defendant can be said to have a duty to know or communicate the law should be determinative of whether the plaintiff has a right to recover, and that the courts should not hesitate to place such a duty upon statutory boards and authorities.

Fraudulent or innocent misrepresentations of the law constitute the most obvious examples of cases falling within this exception. The principle is set out by Lord Denning in *Kiriri Cotton* v. *Dewani* as follows:

> 55. *Benefit Obtained by Fraud or Misrepresentation.*
>
> A person who has conferred a benefit upon another induced thereto by a mistake of law, is entitled to restitution thereof if his mistake was caused by
>
> (a) reliance upon a fraudulent misrepresentation of law by the other, or
> (b) justifiable reliance upon an innocent misrepresentation of law by the other.

> If there is something more in addition to a mistake of law if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other it being imposed on him specially for the protection of the other then they are not in *pari delicto* and the money can be recovered back ... likewise, if the responsibility for the mistake lies more on the one than the other because he has misled the other when he ought to know better then again they are not *in pari delicto* and the money can be recovered.

Aside from cases involving reprehensible conduct by the party receiving a benefit, courts in Canada have on occasion held that the recipient of a benefit must disgorge it on the ground that he was in breach of a "duty" owed to the transferor of the benefit. In both *Eadie* v. *Township of Brantford and George (Porky) Jacobs Enterprises Ltd. v. Regina* the Supreme Court of Canada was prepared to hold that money paid under a mistake of law was recoverable because one party owed a duty to the other party to know the law. In Eadie, Spence J. held:

> In this case, the appellant, as a taxpayer and in habitant of the defendant corporation, was dealing with the clerktreasurer of the corporation and that clerktreasurer was under a duty toward the appellant and other taxpayers of the municipality. When that clerktreasurer 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* with the taxpayer who is required to pay that sum.

In the *Porky Jacobs* case Hall J. merely relied on English authority.

There are two crucial questions. The first and more obvious concerns the criteria a court will use in determining vaien a person owes a "duty" to another person either not to misrepresent the law, or to know it so as to prevent a benefit being conferred in error. The second concerns the content of the duty.

In Eadie the court was willing to extend the duty to the clerktreasurer of a municipality. It is equally possible to impose sdcti a duty on any other employee of a municipality, and by analogy, on any employee of any governmental body. In fact, in *HydroElectric Commission of Nepean* v. *Ontario Hydro*, it was extended to Ontario Hydro, a Crown corporation. It may also be possible to argue that the duty should also be imposed on anyone in a superior position. In the *Ontario Hydro* case, for example, the duty was imposed on Ontario Hydro because it was primarily responsible for the administration of its own statute. Similarly, in *Kiriri Cotton*, the defendant landlord had the primary duty under the rent control legislation in issue not to charge the bonus collected from the tenant.

Where such a duty is owed, it is not clear in exactly what manner it might be discharged. Where a court holds that a "duty" exists then it seems clear that the defendant will not be permitted to retain the money collected whatever its *bona fide* belief may have been as to whether the demand was proper. For example, in the *Ontario Hydro* case Craig J. held:

> In these circumstances, it is my view that the parties were not *in pari delicto* in that the primary responsibility for the mistake (even though the municipalities and their utilities were consulted through OMEA) was upon Ontario Hydro, and that Ontario Hydro innocently and mistakenly misled Nepean into thinking that these charges were properly authorized.

The inference is that the duty can be discharged only by expressly and accurately advising the person from whom money is demanded of his legal position, and not merely by stating what the recipient of money even *bona fide* believes to be the legal position. Brien McKenna has argued that the duty should be discharged:

> ... by attempting to put the citizen on an equal footing via full and fair disclosure. Thus the statutory, body would be less likely to be in breach of its duty if it fully explained its position and gave consideration to the plaintiff's. (For example, even the most mundane of income tax assessments is accorded at least one level of expeditious appeal.) However, the statutory body should suffer the consequences if it does not make available copies of

> its bylaw and insists its interpretation is correct (as in Jacobs), or if it retains the right to take unilateral action (as in *Pople*). There may be functional reasons why a statutory body must act in this manner. That is acceptable. The argument merely requires that its potential liability be proportional to the power it retains.

However there is no suggestion in either the *Hydro* case or in *Eadie* that the citizen was not privy to all relevant information, or that his case was not fully considered. Even so the defendant was held to be in breach of its duty. Instead the exception as expounded in *Eadie* and *Ontario_Hydro* looks only to the fact of an unauthorized claim having been made, and to the receipt of money by the defendant as a result of its mistaken belief concerning the scope of its authority.

Framed in this manner, the exception imposes a liability very close to that imposed under the law respecting payments demanded *colors officii*. As we noted earlier, under that doctrine courts have refused to permit a defendant to retain money obtained by right of an office occupied by him if the statute creating the office did not authorize its collection. The only difference between the rule respecting payments made *colore officii* and that respecting payments made where the parties are not *in pari delicto* appears to be that under the latter exception the absolute right to repay has been extended to cases where the defendant does not occupy an office and unlike *colors officii*, it has not been confined to errors concerning statutory authority. In both cases, the courts have striven to grant relief where the recipient has, to put it bluntly, obtained an advantage to which he was not entitled. Insofar as the *in pari delicto* exception is concerned with a "duty" to know the law, it is clear that the courts are concerned not only with unjust enrichment but also with controlling public bodies.

Brien McKenna has argued for the elevation of this exception into a general rule governing the recovery of money paid under a mistake of law, at least in respect of statutory bodies. While ingenious, this does pose some analytical problems. The concept of "duty," for example, is nebulous. *Lf,* as McKenna suggests,

> Finally, I would submit that there is a duty on the legislators and administrators of law to ensure the law is intra vires their authority. Breach of this duty should invoke the Kiriri analysis. This type of analysis supports the decisions in *Eadie* and *Pople* where the bylaws were *ultra vires*. It would effectively overrule the decision in *Cushen*, but that does not bother me because is outlined earlier, I consider the compulsion in *Cushen* and *Pople* to be indistinguishable.

We assume that by "the law is ultra vires their authority" McKenna means in respect of administrators that the demand for payment is one not authorized by the administrator's governing statute. every statutory body owes a duty to ensure that its proposed course of potion is *intra vires*; the same concept could be expressed by eliminating "duty" and merely requiring the statutory body to disgorge any benefit received as a result of an *ultra vires* action. Nor is it always clear what McKenna means by an *ultra vires* action. For example, in *Beaver Lamb & Shearling* v. *The Queen*, the taxing authority took the view that shearling" was "reouton" and therefore taxable. That view proved to be incorrect. McKenna suggests that there should be no recovery in such a case:

> ... I would suggest that there is *no* duty in the case where the interpretation is not obviously wrong on the face of the statute and only wrong upon a subsequent determination by a court (i.e., is latent). As indicated above, the issue would have to be a justiciable one and not vexatious. Since the parties would be before a court on an equal footing (i.e., the statutory body's legal argument is not enhanced by virtue of its position as a statutory body), there is no sense in which it can be said that the statutory body is in a superior position that would give rise to a duty to be able to predict the result. Therefore, prior compromises based on an agreed view of the law opposite to the court's should be upheld. Thus if a taxing statute gives preferential treatment to "active" businesses and the Minister presents one view of "active", the taxpayer another, and they compromise, the agreement should be upheld even if the courts subsequently interpret the Act, in a manner favourable to the taxpayer's view.

While no one would argue that a valid compromise should be upset, the effect of there being no duty would, on McKenna's analysis, render that issue superfluous. While the issue whether "shearling" falls within "reouton" was arguable, the effect of a finding that it did not was to remove any statutory authority for the demand. It is hard to see merit in a distinction which allows the statutory body to retain benefits to which it is not entitled merely because it held a bona fide belief concerning its entitlement to them. Such a result is inconsistent with a rationale respecting the protection of citizens from unauthorized governmental actions and with the doctrine of unjust enrichment. Moreover, it is hard to see why McKenna would not characterize a demand for payment of a tax on shearlings

as *ultra vires* and hence subject to his general rule that the statutory body owes an overriding duty to ensure that its actions are *intra vires*.

This general exception has a potentially wide and uncertain ambit. The general test of "responsibility for a mistake" combined with the apparent rejection of the defence of *bona fide* belief in the right to make the impugned demand constitute a serious incursion into the apparent absoluteness of the rule denying recovery of money paid under mistake of law.

Moreover, it might fairly be argued that insofar as the courts impose liability on a municipality solely on the ground that it has collected money under an *ultra vires* bylaw, the approach taken to the *in pari delicto* exception in recent cases is inconsistent with the decision of the Supreme Court of Canada in *Welbridge Holdings Ltd*. v. *Winnipeg*. We quoted extensively from this case earlier in this Report. Laskin J. *per curia* held that i municipality owed no duty of care to persons who might rely on a bylaw to ensure that it was validly passed. Hence Winnipeg was not liable to a developer in negligence for the costs of a partially built apartment building which could not be completed save under an *ultra vires* zoning bylaw.

Laskin J.'s judgment goes beyond negligence alone. Instead Laskin J. stated that a municipality acting *bona fide* should not be characterized as being at fault merely because it had enacted an *ultra vires* bylaw. It is true that where money is paid under a bylaw, the municipality is ni a different position than it occupies when sued for damages, and we do not mean to suggest that in general a municipality which has been unjustly enriched should not reimburse a citizen who paid in mistaken reliance on the validity of a bylaw. However, if every municipality is regarded as being at fault, and hence not "in pari delicto" simply because the bylaw it enacted was *ultra vires*, then it is possible that municipal authorities might be inhibited in the exercise of their official duties. It is at least arguable that municipalities should be able to exercise their authority as free from the fear of a strict liability to repay money paid by mistake as they are free from the fear that the passing of an invalid bylaw will itself render the municipality liable for damages in tort. The policy which underlies the Supreme Court of Canada's judgment in *Welbridge* arguably applies with equal force to restitutionary claims.

### D. Mistake as to Private Rights

This exception was established in *Cooper* v. *Phibbs*. The plaintiff sought ta set aside a lease of fishing rights entered into under the mistaken belief that the defendant rather than the plaintiff was, by virtue of a deed and private Act of Parliament, the owner of use rights. In fact, on the true construction of the deed and the Act, the plaintiff was the owner. In response to the argument that equity should not relieve against a mistake of law, Lord Westbury held:

> It is said "*Ignorantia iuris haud excusat*"; but in that maxim the word "*ius*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*ius*" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.

P.H. Winfield has expressed the view that:

> The boundary between 'general law' and 'private right' in *Cooper* v. *Phibbs* is necessarily a vague one, but it is possible to make it somewhat clearer by studying its practical application in other decisions.

As examples of its "practical application" Winfield cites *Earl Beauchamp* v. *Winn* (mistaken construction of a deed), *Allcard* v. *Walker* (mistaken interpretation of postnuptial settlement as including certain property), *Daniell* v. *Sinclair* (mortgage account reopened due to mistake as to interest rate), and *Hickman* v. *Berens* (compromise set aside as one party thought it related to matters not in fact dealt with).

It would appear therefore that a mistake of law is sufficient ground to trigger any equitable remedy. It is not proposed to examine the substance of these remedies, as they are beyond the scope of this paper. Winfield observes:

> There was no mistake of fact ... The only mistake made was a mistake as to the law, or that mistake of conduct to which all of us are prone, of doing as others do and chancing the law.

> ... there are various forms of relief against mistake which may be sought in Equity, cancellation of an instrument, repayment of money, simple rectification of an instrument, rectification of a contract with specific performance of the amended contract, resistance of specific performance. We need not pursue these here, for our main problem is the nature of mistake of law rather than detailed examination of the remedies for it; but we venture to add to these remedies a tracing order, for one may infer from *Sinclair* v. *Brougham* that a tracing order is nonetheless available because there has been a mistake of law.

Although the distinction seems well founded in equity, its status at common law is more uncertain. To the extent that a mistake as to private rights is regarded as a mistake of fact, it will be effective to ground a right to recover. *Cooper* v. *Phibbs* has been cited as authority for the view that a mistake as to private rights will be regarded at common law as a mistake of fact. Winfield concludes on the basis of dicta in two cases that the distinction is relevant at common law:

> It is submitted, therefore, that the distinction between mistake as to general rules of law and mistake as to private rights exists at Common Law as well as in Equity, though at Common Law mistake as to private rights is reckoned as mistake of fact; that, however, is merely a matter of nomenclature.

Nevertheless, it seems fair to say that the relevance of the distinction in a common law action is still arguable.

### E. Money Received bv Those with a Duty to be Honest

Courts are prepared to hold certain individuals to a higher degree of honesty and fair dealing than other defendants. In *Ex parte James* it was held:

> ... [the] court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.

In fact, in ordering repayment by a trustee in bankruptcy as an officer of the court, the court imposed a higher standard of honesty than that required of other people.

It is clear that when a defendant falls within a class of persons which owes such a higher "duty" the nature of the plaintiff's mistake is irrelevant. In *DeCarnac, ex parte Simmonds*, Lord Esher held:

> If money had, by a mistake of law, come into the hands of an officer of a Court of Common Law, the court would order him to repay it so soon as the mistake was discovered. Of course, as between the litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But we cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the court would, when the mistake was discovered, order him to repay it.

In view of the absolute nature of the obligation to repay funds some courts have been reluctant to create new classes of individuals subject to a duty to be honest. Goff & Jones point out:

> In *Re Wigzell* [1921] 2 K.B. 836 the Court of Appeal held that the interpretation of particular sections of the *Bankruptcy Act* may (and did in this instance) put a case outside the rule. Lord Sterndale M.R. and Scrutton L.J. accepted the rule but evinced no enthusiasm for it, for they thought ethical terms like 'honourable', 'highminded', 'honest', must necessarily be interpreted according to the personal equation of the particular judge trying the case. The objection does not seem to be well founded. Judges are often called upon to interpret terms with a strong ethical tincture in them; e.g., 'reasonable'. They frequently have precedents to guide them and, even if there is no precedent, one can rely on the English bench to give the term a sound interpretation. Like other terms, the construction of 'dishonourable' must vary according to circumstances. Thus P. 0. Lawrence J. in *Re London County Commercial Reinsurance Office, Ltd*. [1922] 2 Ch. 67 refused to apply the principle under discussion to a claim against the liquidator of a company for the payment of policies which were void by statute.

> It is not surprising that some judges have treated with reserve a principle which gives the court a "discretionary jurisdiction to disregard legal right ... wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice," and have said that it should be "applied with the greatest caution."

Canadian courts, however, have not been slow to create new classes. The duty has been extended to solicitors receiving money in that capacity, receivermanagers, and trustees in bankruptcy. It has even been suggested that such an obligation rests on municipal officials. In *Eadie* v. *Township of Brantford*, Spence J. stated:

> The learned County Court Judge relied, *inter alia*, upon the exception that money paid to such person as a Court officer under a mistake of law may be recovered. He was of the view that money was paid to the respondent corporation on the insistence of its clerktreasurer, whose position he equated to that of a highlyplaced civil servant in a government department or an officer of the Court, and it was highly inequitable, if not dishonest, for the respondent corporation to insist on the retention and that, therefore, they should be repaid. There is much to be said in support of such a view.

There are two major problems with the defining of special classes subject to an obligation to be "fair" or "honest." The first derives from the absence in the reported cases of any criteria to be applied in determining either whether an individual falls within such a class or whether a new class should be created. Secondly, it is difficult to see why the standards of "fairness" and "honesty" imposed on such individuals should not be applied universally. Should the common law sanction less than the highest standards of honesty and fairness in any defendant?

### F. Payments by Executors, Trustees and Personal Representatives

It is well established that a trustee or personal representative may setoff any overpayment made to a beneficiary under a mistake of law against future payments due to that beneficiary. There is, however, no authority to which a trustee can point to buttress a claim for recovery from a beneficiary overpaid under a mistake of law in the absence of any setoff. It is:

> ... generally assumed that at law such a claim must fail because "the rule that the mistake ... must be a mistake of fact is ... of completely general application." In equity there is no reported example of a successful action by a trustee or personal representative against a wrongly paid recipient.

If the lack of authority is merely a reflection of the seeming absoluteness of the general rule, in view of the wide ambit of the exceptions to the general rule such an action is a distinct possibility.

It is, however, all established that a beneficiary may exercise both proprietary and *in personam* claims against a volunteer overpaid as a result of an executor's error of law committed in the course of administering an estate. The beneficiaries in *Re Diplock* were successful in recovering funds paid to innocent volunteers who had received money from executors, who mistakenly believed that a disposition in a will for "charitable or benevolent" purposes created a charitable trust. In fact the disposition was void due to the inclusion of "benevolent" purposes. The intestate successors were permitted to seek both *in personam* and *in rem* remedies. There seems little reason why such rights should not be extended to any *cestui que trust*.

### G. Where a Statute Permits Recovery

A number of provincial statutes expressly permitting recovery are set out in Appendix B. It would appear that the thrust of these statutes is administrative, and that their intention is to permit the minister to repay overpaid taxes *ex gratia* or by way of settlement of a claim. These statutes have been canvassed earlier in this Report.

### H. Where One Party Assumes the Risk of a Mistake

It is clear that restitution will be denied where the plaintiff expressly or implicitly took the risk that he might not receive the advantage which he anticipated receiving in consideration for or as a result of conferring the benefit. Hence in *Jennings* v. *Chapman*, the plaintiff was unable to recover the cost of leasehold improvements laid out in the mistaken expectation that he would be able to sublease part of the premises to the defendants. The Court of Appeal took the view that as the plaintiff had taken the risk that permission to sublease might not be granted, he should also bear the risk that his investment would be useless.

The principle is succinctly put in the American Restatement of Restitution as follows:

> 11. ASSUMPTION OF RISK OF MISTAKE. COMPROMISE.
>
> (1) A person is not entitled to rescind a transaction with another if, by way of compromise or otherwise, he agreed with the other to assume, or intended to assume, the risk of a mistake for which otherwise he would be entitled to rescission and consequent restitution.
>
> (2) A person is entitled to rescind a transaction with another because of a mistake if the parties have so agreed, although otherwise he would not be entitled to rescission.

A compromise is the usual means of adjusting the risk of acting upon a mistake of law. Parties may also expressly contract out of the general rule. As Goff & Jones note.

> The payer may protect his position by exacting from the payee an undertaking that, in the event of the payment proving to be not legally due, it shall be repaid.

## I. Mistake of Foreign Law

Mistakes of foreign law are regarded as mistakes of fact, and hence money paid under an error respecting foreign law is *prima facie* recoverable.

> 46. *Satisfaction of NonExistent Obligation. When Restitution Granted.*
>
> A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty so to do, is entitled to restitution
> as though the mistake were one of fact if:
>
> (a) the benefit was conferred by a State or subdivision thereof, or
>
> (b) the benefit was received on behalf of a court which has control over its disposition, or
>
> (c) the mistake was as to the law of a State in which the transferor neither resided nor did business, except a mistake of law in the payment of taxes, or
>
> (d) the mistake was as to the validity of a judgment subsequently reversed.

The ambit of this exception is rendered somewhat uncertain by *Weir* v. *Lohr and Allstate Insurance Co. of Canada* in which Tritschler C.J.Q.B. held:

> In my view, to apply the foreign state, foreign tax, foreign revenue rule as between sister provinces of Canada is what Mr. Castel calls an excellent illustration of the evils of mechanical jurisprudence.
>
> In Manitoba the province of Saskatchewan is not to be regarded as at foreign state. Her Majesty in the Right of the province of Saskatchewan is not a foreign sovereign in Her Majesty's Court of Queen's Bench for Manitoba.

On the interprovincial level Lord Mansfield's rule should be rejected.

> Whether a mistake concerning another province's law would still be regarded as a mistake of "foreign" law for the purposes of a restitutionary claim is therefore a moot point.

## J. Public Monies Disbursed Without Legal Authority

It is well established that any payment out of a government fund may be recovered whether or not disbursed under a mistake of law if there was no legal authority for the payment. The principle was stated by Viscount Haldane in *Auckland Harbour Board* v. *The King* as follows:

> No money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and ultra vires and may be recovered, by the Government if it can ... be traced.

This case was followed in *R.* v. *Toronto Terminals Railway Co.*, where O'Connor J. of the Exchequer Court of Canada accepted counsel's argument that:

> The claim of the Crown is put forward on a second basis that whether there was a mistake or not, the payment of any taxes in excess of the liability under the Lease was not authorized by Parliament within the meaning of Section 22 of the *Consolidated Revenue and Audit Act*, 1931, and was, therefore, illegal and that the Crown is entitled to recover the same ...
>
> Parliament provided funds to make lawful payments, i.e., payments authorized by the Lease. That authority cannot be widened by the Department. It would require an orderincouncil, or what was referred to in the evidence as a specific appropriation to a particular purpose. Mr. Pickup's contention in this respect is, in my opinion, sound and the principle laid down in *Auckland Harbour Board* v. *The King*, which he cites in support of his contention is applicable.

The principle was said by Viscount Haldane to be:

> ... a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand.

In fact, the *Constitution Act* of British Columbia expressly provides:

> 5. No part of the revenue of the Province shall be issued from the treasury, except by warrant of the Lieutenant Governor.

Supply Bills usually contain prohibitions concerning the unauthorized expenditure of money. *Supply Act No. 2* of 1980 provides:

*Application and accounting*

> 2. (1) No sum out of the supply shall be issued or applied to any purpose or activity other than those described in the votes in the main estimates, or in excess of the estimate of expenditures in them, and the due application of all money expended under the authority of this Act shall be accounted for to Her Majesty.
>
> (2) Money allocated in a vote to a particular activity or standard object of expenditure may, with the approval of Treasury Board, be paid and applied for any other activity or standard object of expenditure that is within the general purposes of the vote.

It would appear that the Crown's unqualified right to recover funds paid out under a mistaken interpretation of a statute, warrant, act or orderincouncil forms an exception to the general rule. In fact, this right is so broad that one Australian judge has held that the recipient cannot plead change of position or estoppel as a defence. In The *Commonwealth* v. *Burns*, Newton J. held that the recipient's defence of estoppel could not succeed as:

> ... [a] party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says he shall not do.

In a recent Report, we examined the substance of this right. We concluded that it was functionally analogous to an action to recover money paid under a mistake of fact. We recommended that the Crown should continue to have; *prima facie* right to recover public money disbursed in error, but that the recipient of funds so paid should have the right to raise any defence which would be available on the facts of the case if the Crown's claim had been brought to recover money paid under a mistake of fact. This recommendation was introduced as section 67 of Bill 27, the *Financial Administration Act*, in June of 1981. Section 67 provides:

> Defences to action for recovery of public money
>
> 67. (1) Mere public money is paid to a person by the government
>
> (a) in excess of the authority conferred by an enactment
> (b) without the authority of an enactment, or
> (c) contrary to an enactment,
>
> and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may, subject to subsection (2), rely on any matter of fact or law, including estoppel, which would constitute a defence in a proceeding brought to recover the payment as if it had been made under a mistake.
>
> (2) Subsection (1) does not enable a person to rely on a defence that a payment made by the government was made under a mistake of law, and the right of the government to recover the money paid by it is not impaired by reason only that the payment was made under a mistake of law.

# CHAPTER V REFORM

## A. Money Paid Under a Mistake of Law

### 1. Generally

Our examination of the current law concerning the recovery of money paid under a mistake of law suggests that the general rule is not in harmony with the Canadian law of restitution and does not result in equal justice in like cases. We have concluded that the general rule should be abrogated. In arriving at this conclusion, we have considered the following matters:

(a) *The General Rule Cannot be Supported on Policy Grounds*

A great deal of criticism has been directed at *Bilbie* v. *Lumley* and particularly at Lord Ellenborough's statement that:

> ... every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. it would be urged in almost every case.

It has been suggested, for example, that:

> ... it does in truth, seem that if one paying must be presumed in all cases to do so with a full knowledge of his liability, it is only fair to presume also that the payee received it with a full knowledge that he had no right

> to accept, the consequence of which would be that, if he knew a gratuity was not intended, his acceptance would constitute legal fraud.

In view of the mass of case law and statutes with which both lawyers and laymen must deal, such a presumption is undoubtedly absurd. One of the major drawbacks to focussing on its absurdity has been to mask the policy considerations underlying the general rule. Bryant Smith suggests:

> To ridicule the factual basis for the presumption of knowledge by such statements, for example, as "How absurd the maxim" that "every one is presumed to know the law" (Wm. P. Roger, (1908) 7 Mich. L. Rev. 3) or "God forbid that it should be imagined that an attorney, or a counsel or even a judge is bound to know all the law" (Abbott, C.J.) *Montriou* v. *Jefferys*, 2 Car. & P. 113, 116, 172, Eng. Rep. 51 (1825), as "Contrary to common sense," 706, 719, 135 Eng. Rep. 1124 (1846), or "It would be very hard upon the profession if the law was so certain that everybody knew it" (Lord Mansfied, *Jones* v. *Randall*, Cow . 38, 98 Eng. Rep. 954 (1774), quoted (1908) 7 Mich. L. Rev. 3, and so on, though not entirely irrelevant, is largely beside the point. The question is not whether it is reasonable to expect a man actually to know the law, but whether considerations of policy compel us to treat him as if he did.

A rule that ignorance of the law is no excuse may be desirable in a case concerning sanctions imposed on those whose behaviour is criminal. In such a case a prohibited act is often an evil in itself. Where the safety and welfare of the public is in issue, the very purpose of the criminal law would be stultified if a defendant could raise ignorance of the law as a defence. However, such a rationale has no application where the question in issue involves only the adjustment of private rights *inter partes*. What policies require a court in a civil case to treat a plaintiff as if he knew the law?

There is a paucity of judicial discussion of the policy behind the general rule. Although Lord Ellenborough foresaw the consequences if the general rule were not maintained, he unfortunately did not elaborate. It is difficult to see what undesirable results would ensue.

The objection advanced to Lord Ellenborough that mistake of law would be "urged in every case" is unsatisfactory in that it confuses the right to plead a cause of action with the right to succeed. One could argue with equal plausibility that there should be no right to recover benefits conferred under duress, as it is equally possible to plead duress in every case. Even though due to the complexity of modern law mistakes of law are more likely to occur, responsible counsel would not plead such a mistake without some basis in fact. In any event, at most this amounts to a "floodgates" argument. It may be doubted whether courts will be swamped with mistake of law cases: at least there is no indication that courts in Kentucky or Connecticut (which have rejected the general rule in favour of a general right to recover payments made under a mistake of law) have been swamped, and there are very few reported cases from New Zealand following the passing of the *Judicature Amendment Act* of 1958 reversing the general rule.

To the extent that Lord Ellenborough's objection is directed to the possibility of an increase in the judicial workload if the general rule is abrogated, we are not persuaded that the rule constitutes such an absolute bar against recovery that a plaintiff who now desires to raise a mistake of law as an issue in a lawsuit cannot do so. In fact, since a plaintiff must now bring himself within one of the exceptions to the general rule to succeed, it is arguable that reversing the general rule will reduce the court's workload by eliminating the need for evidence to be led and legal argument to be addressed to the issue of whether the plaintiff is within an exception to the general rule. In any event, one might equally argue that a great deal of court time would be saved by abolishing any cause of action arising out of a motor vehicle accident. The real question is whether an individual's claim to recoup the value of a benefit conferred upon a defendant where its retention would be unjust should be subordinated to administrative convenience.

Although a presumption that everyone knows the law may be generally inappropriate, R.J. Sutton has demonstrated that in its historical context, and on the facts of *Bilbie* v. *Lumley*, the presumption may be justified. He notes:

> It is apparent that Lord Ellenborough was referring to the ordinary expectations of the commercial world. One party to a commercial arrangement might claim that the other was liable. He would present the proofs of his claim, concealing nothing he knew that was relevant to the transaction. If the other acceded to the claim it would be most unjust to allow him to recall the payment merely because of his own error of law.
>
> Lord Ellenborough's pronouncement, however, could not be looked upon as one of law. It was a matter of practice, an application of the famous principle, laid down by Lord Mansfield, that such claims were governed by "equity and good conscience." In the typical mercantile situation where money was claimed to be due under a commercial arrangement and was paid, then normally it would not be fair to order repayment solely on the ground of the payer's error of law.
>
> Even if commercial necessity in the 19th century required that payment following a demand not be recoverable, it is questionable whether the certainty which such a rule seeks to achieve is purchased at too high a price in modern times when the law governing business transactions is not only more complex than formerly, but also is being altered at an accelerating pace. As we noted elsewhere in this paper, courts have on occasion been willing to upset a compromise of an issue on the ground that a party to the compromise was under a fundamental mistake of law. It seems an odd result that a mere payment consequent upon a demand should receive greater protection than an outright compromise. Moreover, in view of the many exceptions to the rule, its efficacy in bringing about certainty is questionable.
>
> R.J. Sutton suggests as an alternate rationale that a person who pays money under a mistake of law should be regarded as voluntarily assuming the risk that in point of law there was no obligation to pay the sum in issue. It is true that the courts often speak of a payment having been made "voluntarily," but that ambiguous concept is used in the cases in senses other than that of "assumption of risk." If by "voluntarily" Sutton means the risk of making a mistake has been expressly assumed for consideration by one party, courts are reluctant to grant relief from such a bargain merely because in fact the party assuming the risk was mistaken. A party seeking relief must show himself to have been fundamentally mistaken concerning a point crucial to the formation of the contract. However, where there is no conscious adjustment of risk, as where a party's research leads him believe a claim to be valid, there seems little reason to deem a payor acting in error to have "voluntarily assumed a risk" which he never knew existed.

It has been argued that:

> Virtually, the rule declares that one is compelled to proceed at his own risk on questions of law. When applied to conduct invading social or private rights, such a risk is correctly imposed; ignorance of the existence of rights can offer little recompense for their violation. But when neither private nor social rights have been invaded by a transaction, the reasons for compelling a party to ascertain the law at his own peril are less apparent. Rules of law can no more be presumed to be matters of common knowledge than equally technical deductions from facts: both involve fields of special learning.

An arbitrary presumption that persons who pay money under an error of law voluntarily assume the risk of being wrong amounts to no more than a dogmatic assertion that there should be no recovery.

One commentator has argued that a proper ground for excluding recovery for money paid under mistake of law is the difficulty of proving that the plaintiff made a mistake:

> Yet rules of law must be working rules. In many instances of alleged mistake of law must ask the jury to discover a man's past motives and the degree of certainty with which he previously regarded the legal significance of

> a specific set of facts; and this practically on his own testimony. The difficulty of the task and the inability of a jury to cope with it may well result in denying relief in all cases by a rule of thumb, which works less injustice in the long run than the more abstractly just, but less workable, rule granting relief.

It is tempting to dismiss this objection on the ground that there is no evidence that British Columbia courts and juries are incapable of dealing with difficult questions of proof. Moreover, even admitting that in some cases proof that a mistake was made will be difficult, this is no ground for denying relief in all cases, including those where the mistake is easy to prove, or even admitted by both parties. There may be cases where proof of a claim rests entirely on the plaintiff's own testimony, but that possibility is open in almost every kind of claim. What of a claim for trespass to land where the owner of the land is the only witness? In many cases there will be adequate evidence to corroborate the plaintiff. Where such evidence does not exist, the plaintiff's task of proving his mistake will not be an easy one. It is unlikely that judges and juries would not be alive to the possibility that a plaintiff might seek to recover his funds by dishonestly asserting an error of law.

We are not convinced that the policy grounds advanced in support of the general rule are sufficiently strong to warrant its retention. Up to this point in our discussion of the policy considerations underlying the general rule, we have been concerned with what are essentially practical questions. Our conclusion is that the abrogation of the general rule will not result in the opening of the floodgates of litigation, or in undue complexity or uncertainty. In fact, it may even be argued that reversing the general rule will simplify a court's task. No longer will courts be called upon to determine whether the plaintiff can bring himself within some illdefined exception to the rule.

Aside from the practical effect of abrogating the general rule, some questions may be raised on a theoretical level. If the rule were abrogated, the court could be faced with the very difficult task of determining the exact nature of a "mistake of law." It has been argued:

> In one sense all law is merely a prophecy as to what a court will rule on a particular set of facts. One who realizes this and investigates before making payment may make himself more certain as to the outcome of his guess. But that alone will not make it any less a guess. Too often what is said to be a mistake of law is really a misjudgment as to the expediency of risking the outcome of a lawsuit.

Where a lawsuit is actually being threatened and a compromise is reached, a miscalculation of the possibility of success will not in most cases be a ground for upsetting the compromise. However, the prophetic powers of a potential defendant may also be strained in cases where no litigation is threatened, no compromise is sought, and the only issue is whether to accede to a request for payment. In such a case, a "mistake of law" may occur in a number of ways.

The parties may not be aware of a case on point or of a statutory provision governing the issue. A party may be aware of a relevant case or statute, but discover on the basis of a case decided after the money has been paid that his assumption concerning its applicability to the relevant facts as erroneous. The first example would probably be characterized as a mistake of law; the second creates difficulties. The mistakes lies in the application of the law and not in any ignorance of what the law is. It is likely that the misapplication of a known rule will be regarded as a mistake of law.

The question of whether reliance on a case later overruled constitutes at "mistake of law" is a difficult one. In the United States courts have been very sensitive to problems arising out of the overruling of cases settling issues of law. Although as a general rule, the overruling of a judgment has both prospective and retrospective effect, American courts have asserted a jurisdiction to define and declare the effect of an overruling decision, including whether it shall operate retrospectively, prospectively, or both. In *Cipriano* v. *Houma*, the Supreme Court of the United States held:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity ... Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under the state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization.

In the absence of a similar jurisdiction in Canada, British Columbia courts may be faced with the question of the effect of a judgment overruling earlier authority. We do not, however, consider this problem insuperable. The effect of a leading case itself being overruled will depend to a large extent on the agreement between the parties relying on the overruled judgment, as well as their subjective intent. If neither factor is important the issue facing the court when one party alleges a mistake is one of policy. We are reluctant to attempt to define a policy in the absence of any factual context. Moreover, this problem is largely the product of the jurisprudential fiction that a decision overruling a previous case does not change the law, but merely states that the law has always been. Where this fiction could work an injustice, it is open to Canadian courts to abandon it.

Overruling *Havana* [1961] A.C. 1007 involves that the law must be deemed always to have been as my noble and learned friends now declare it. This may affect the vires of some Rules of Court; but beyond this there has been, so far as I can see, no consideration of what consequences the retrospective alteration of the law (for, let us face it, that is the reality) may have. I would be more ready to go along with my noble and learned friends if the decision had prospective effect only. One of the several reasons why radical law reform is in general more appropriately carried out by Parliament is that a statute can (and usually does) operate prospectively. I venture once again to plead that consideration should be given to the various forms of prospective overruling such as obtain in some other common law systems.

It is also possible that diligent research discloses no British Columbia case or statute on point. If the potential defendant (perhaps in reliance upon a decision of a court of another jurisdiction) makes a payment upon an assumption as to what the British Columbia court will declare to be the law, and that assumption later proves erroneous, it is arguable that he was not mistaken. At the time the payment was made the potential defendant knew that the law was in doubt, and merely chose the wrong alternative.

The whole vexing question of when one can be said to act under a "mistake" also arises in cases of a mistake of fact. There is little to suggest that the issues arising in mistake of law cases are so qualitatively different from those arising in mistake of fact cases as to justify refusing to even consider granting relief rather than facing them. We do not find the difficulties inherent in defining "mistake of law" to be an insuperable obstacle to reform. While we recognize that the formulation of a definition of "mistake of law" is not an easy task, we feel that the problem lies in the subtleties of the concept of "mistake." In respect of attempts to synthesize rules to govern mistakes, Professor Corbin has stated:

> Cases involving mistake are difficult of classification because of the number and variety of factors to be considered. These factors are found in many combinations. The citation of authorities for a rule stated in general terms is made perilous by this fact. It is equally perilous, and it may be positively harmful, to construct any rule of law, unless it is so limited as to be applicable in a particular combination of many factors. If this exact combination does not recur, what we really have is merely one precedent, not a rule.

We share Professor Corbin's doubts. Every case must turn on its own facts. For example, the issue of the effect of a court reversing a case relied upon by the parties arose in *Re Kelly*. In that case a Credit Union, relying on a decision of an Ontario court, paid out money it held to a bankrupt's account to a trustee in bankruptcy. That decision was reversed by the Ontario Court of Appeal within several days of the payment. Saunders J. of the Supreme Court of Ontario in Bankruptcy held that the plaintiff had made a mistake of law, and that the trustee, as an officer of the court, was a person with a duty to be honest. The plaintiff's claim succeeded. In so holding, Saunders J. took a number of factors into account:

> Bearing in mind that this Court has equitable jurisdiction, that the trustee is an officer of the Court, that the trustee based his request for funds from the Credit Union on the judgment of Cory, J., which turned out to be in-

> correct, that the decision of the Court of Appeal followed the payment by the Credit Union by a matter of days and that the Credit Union acted promptly in requesting repayment, I am of the opinion that the principle set out in the frequently quoted passage of James, L.J., in *Ex parte James* applies to this motion.

This case reinforces our view that it would be unwise to attempt to prescribe a result for all cases where a party pleads a mistake. In *Re Kelly* it was open to Saunders J. to take all the facts of the case into account in deciding whether to grant the plaintiff relief. We believe that this flexibility is desirable.

Another ground sometimes advanced in support, of the general rule is the difficulty of being able to establish whether the payment was motivated by the mistake or by some other factor. This usually takes the form of a test for the kind of mistake which should ground relief. In mistake of fact cases a number of tests have been suggested: that the error had to concern a fact which, if true, would make the payor legally liable to make the payment, or a fact which made the payor morally obliged, or a "fundamental" fact, that the mistake destroyed the intent of the payor, or even merely that the mistake caused the payment. Not surprisingly (in view of the general rule) the applicability of these tests to mistake of law cases has not been canvassed by the courts. It may be that all the tests add very little to the idea that the mistake must have caused the payment.

> From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) if a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact. (2) His claim may, however, fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principle on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorized to discharge the debt; or (c) the payee has changed his position !in good faith, or is deemed in law to have done so.

*See also* Goode, *The Bank's Right to Recover Money on a Stopped Cheque*, (1981) 97 L.Q. Rev. 254. In any event the confusion surrounding the issue of whether a mistake motivated a payment in mistake of fact cases indicates that the courts in mistake of law cases will not be faced with any new problems. The ambiguity inherent in the concept of "mistake" is not a strong argument in favour of the continued existence of the general rule.

On balance, we feel that the policies advanced to support the general rule are outweighed by the rule's undoubted potential to bring about unjust results. While the abrogation of the rule could create some new problems which the current law avoids, we are not convinced that the dire consequences predicted by Lord Ellenborough in *Bilbie* v. *Lumley* will in fact ensue.

(b) *The General Rule is Not in Harmony with the Law of Restitution*

Earlier in this Report we canvassed the cases establishing the principle of unjust enrichment as part of Canadian law. In our discussion of the current law we noted several cases in which courts depart from the traditional analysis of mistake of law problems to frame judgments in terms of unjust enrichment. These cases illustrate the analytical problem which arises when a court is called upon to enforce an arbitrary rule notwithstanding that the result is to permit the defendant to be unjustly enriched. Not surprisingly, the desire to escape from the excessively rigid confines of the general rule has resulted in the formulation of a number of uncertain and illdefined exceptions which collectively have the effect of depriving the general rule of the certainty supposed to be its main attraction. Bryant Smith has commented that:

> The court must first decide whether the mistake was one of law or fact, a question of law difficult to determine. If it turns out to be a mistake of law, the court, observing that in general there is no relief from such mistakes, notes, however, that there are many exceptions. If, therefore, the court is impressed with the justice or the equity or the hardship or the substantial merits of the plaintiff's situation, as indeed it is likely to be in any case where the defendant is about to be unjustly enriched at the expense of a plaintiff whose only fault is that he has been mistaken in a matter of law on which in most cases the defendant himself either had a guilty conscience or was no better informed, the court begins to look into the circumstances for some feature that will take the plaintiff's case out of the rule and classify it as an exception.

It was established by the Supreme Court of Canada in the case of *Storthoaks Rural Municipality* v. *Mobil Oil* that the basis of an action for money had and received is unjust enrichment. It is the unjust enrichment which attracts the right of recovery, and not merely the mistake. Put another way, the existence of a mistake is not the *sine qua non* of recovery. Rather the mistake negates any inference that the money was received as a gift, or that the initial conferral of the benefit was officious. Viewed in this light there is little reason to distinguish mistakes of fact and law. Both are equally effective to negate the inference of gift or officious conferral of a benefit which might otherwise arise.

(c) *The Current Law is Uncertain and Inconsistently Applied*

In earlier chapters, we outlined the general rule and its exceptions. Although the general rule is easy to state, its exceptions are not. We are not convinced that the application of the general rule leads to certainty or simplicity. The elaborate overlay of exceptions to the general rule makes it difficult for counsel to predict how a court will analyze the issues in a case. A good example of the difficulties which may be encountered in applying the current law is the case of a benefit conferred on a municipality under a mistake of law. If it is alleged that the plaintiff is not *in parle delicto* with the municipality, it is necessary to explore a number of issues which are arguably irrelevant to the issue of whether the municipality has been unjustly enriched.

Counsel might, for example, be required to lead evidence to support arguments that the defendant had a duty to know the law and that the duty had not been discharged. Since, as we have noted in Chapter IV, both the scope and content of that duty are not settled, the result will be to prolong the trial. Counsel is forced to address issues which arise solely because in order to avoid the general rule, the court must be able to bring the plaintiff within an exception. Instead of addressing itself directly to the issue of whether as between the parties the retention of the benefit is unjust, the court must determine complex issues respecting the fashion in which the municipality carries on business. The problems facing both counsel and the court in such a case are exacerbated where a number of exceptions are pleaded in the alternative, and in our view are amply illustrated by the cages dealing with *ultra vires* municipal bylaws discussed earlier in this Report.

The result is unnecessary complexity, both in the law and in the manner in which a case must be presented to the court. The large number of recent Supreme Court of Canada cases is an indication of the problems encountered by courts and practitioners in defining and applying the law as it now stands.

Another goal is internal consistency. Should courts be obliged to resort to tenuous devices in order to do justice? Where money paid under a mistake of fact is recoverable, but not money paid under a mistake of law, there is an obvious temptation to characterize the mistake as one of fact in order to do justice between the parties. This has seldom been done more explicitly than in *A.J. Seversen Inc.* v. *Corporation of Qualicum Beach* where Bouck J. held:

> ... no exact answer can be discovered in the law reports as to the distinction between law and fact.
>
> Because it seems to me that there is a small opening to suggest that the relationship here was based upon a mistake of fact, and because I think the result is more just than if it is held to be a mistake of law, I propose to advance the proposition that this was money paid under a mistake of fact.

The difficulty of distinguishing between fact and law is widely acknowledged. Winfield states:

> It is a commonplace that, whereas mistake of fact is in some circumstances a ground for relieving the party who is mistaken from a legal obligation, mistake of law is in general no excuse. But when we ask what is the distinction between 'law' and 'fact' in this connexion, no exact answer is discoverable in the law reports. The reason for this is that the intrinsic difficulty of laying down any hard and fast line separating the two ideas is so great as to make the task a practical impossibility. 'There is not', said Jessel M.R. in *Eaglesfield* v. *Marquis of*

> *Londonderry*, a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the firstborn son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas. It is not less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of 10,000 pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve a knowledge of law. The subsequent history of the case afforded a practical illustration of the difficulty of distinguishing a mistake of law from one of fact, for while Jessel M.R. held that in the circumstances of the case (the details of which do not concern us here) the mistake was one of fact, the Court of Appeal reversed his decision on the ground that it was a mistake of law.

Canadian Commentators have expressed similar views. In a recent annotation, J. Swan stated.

> Any inquiry into whether a mistake is one of law or fact is bound to be both difficult and arbitrary. This is because the categories of "fact" or "law" do not correspond to anything in the real world.

When both critics and courts openly acknowledge the use of technical devices and arbitrary distinctions to evade a general rule, the resulting damage is not only the unfair results which may ensue where the law is unevenly applied, but also a weakening of the inherent authority of the common law. As Bryant Smith has noted in comparing the law of Texas, which adopts the general rule, with that of Kentucky and Connecticut, which do not:

> Even if the results were the same, therefore, the simpler process by which they are reached in Connecticut and Kentucky is much to be preferred to the more devious ways with us. But the confusion in our law is only the lesser of the two major evils that have taken root in Lord Ellenborough's unfortunate decision. The greater of those evils is that the results in Texas are not always the same and that though relief is given more often than denied, grave injustice is sometimes done in obedience to the conventional doctrine, particularly so in the case of money paid under mistake of law. So long as the courts manage on some ground or other to relieve the victim, their statements that in general such relief will be denied carry perhaps no great weight, but where the court denies the relief and at the same time puts either the whole or a part of the responsibility on the rule, the decision deserves to be taken more seriously. Where the court puts or may put its decision on more than one ground, as is so often the case, it is the practice of critics to strike out or disregard the grounds they disapprove and shift the whole responsibility to other grounds which they consider sound. It is doubtful how far one is privileged thus to disregard mistake of law when it is used by the court as either an alternative or cumulative or make weight reason for a particular decision, but, putting such cases to one side and dismissing also from consideration the cases where the court gives relief under an exception while professing faith in the general rule, there still remain enough cases refusing to correct mistakes merely because they are mistakes of law to show that, contrary to frequent statements that in actual operative effect the rule is gone, it is still applied as a rule of substance.

Apart from inconsistent results arising from the complexity of the law, the characterization of mistakes as of fact or law, the definition of exceptions, and whether the mistake is pleaded in aid of a legal or equitable remedy, a layman may well feel that justice has not been done when he cannot recover funds paid under a mistake of law. Assume, for example, that a bank incorrectly bills two customers X and Y for charges on their credit cards. X pays the bill thinking he had made a purchase, but without making extensive inquiries. Y ascertains that he made no such purchase, but pays the bill under the mistaken impression that he is obliged to under the *Bank Act*. Under the current law, unless the court succeeds in torturing Y's case into an exception, X will recover his money, and Y will not. Y may justifiably feel that the results are inconsistent for his position is arguably better than X's, since he paid only because he thought he had a legal obligation, while X paid without addressing his mind to the question. Moreover as against both X and Y the Bank was not in fact entitled to the money, and undoubtedly it would seem hard to Y that the bank could keep his money merely because he made a different kind of mistake.

2. Money Paid Pursuant to Contracts Entered into under a Mistake of Law

We are also of the view that any reform should extend to cases where benefits are conferred under a contract which a party seeks to avoid for mistake of law. In such a case there is no true consensus between the parties. There seems little reason to prevent courts from considering the effect of a mistake of law in deciding whether or not one party was under such a fundamental mistake that the basis of the contract is destroyed.

This conclusion is supported by recent developments in New Zealand, where the *Contractual Mistakes Act 1977* was recently enacted. Its intent was to provide a more flexible range of remedies when a party to a contract alleges that he entered into the agreement under a mistake. Its efficacy in that respect has been the subject of some controversy in New Zealand. The Contracts and Commercial Law Reform Committee, on whose report the *Contractual Mistakes Act* was based, expressed the following view;

> Relief for mistake has occasionally been refused, in the decided cases, because the error has been one of "opinion", "expression" of the terms of the contract, or of "law." At the same time, counter examples could also be given where, on other occasions, courts have given relief for what on proper analysis could be said to be an error of "opinion," "expression" or "law." We do not believe that any arbitrary restriction should be placed upon the ambit of any proposed reform, and recommend that these types of mistake be included. At the same time, we recognise that such mistakes will generally be more difficult to bring within the tests which have to be satisfied before relief can be granted.

This recommendation was implemented in the *Contractual Mistakes Act, 1977*, section 2(1) of which defines "mistake" as a "mistake, whether of law or fact." It would appear that the balance of the Act makes no distinction between mistakes of fact or law. All of the remedies contemplated by the Act may therefore be invoked by a plaintiff who entered into a contract under a mistake of law.

### B. Transfer of Benefits Other than Money

The common law. concerning the transfer of land or chattels, or the rendering of services under a mistake of law, is in a state of flux. It would appear that in respect of restitutionary claims for chattels, land or services the fact of a mistake of law having been made may not be a bar to recovery. Instead it is open to Canadian courts to grant relief if the benefit was requested, freely accepted, or perhaps if the benefit was incontrovertible.

We have noted earlier in this Report that if the basis of the plaintiff's claim is unjust enrichment, the significance of a mistake must be to negate officiousness on the part of the plaintiff. A mistake of law is as effective to negate officiousness in a transfer of land or chattels, or the rendering of services as it is in a case involving the payment of money. To the extent that under the current law relief would be denied in respect of chattels, land or services merely because the plaintiff made an error of law, we have concluded that reforming legislation should extend to all claims for relief regardless of the nature of the benefit conferred, or the nature of the action brought to recover the benefit.

### C. Reform

#### 1. Generally

Although some courts have taken tentative steps to reexamine the issues arising where a benefit is conferred under a mistake of law in light of the principle of unjust enrichment, the whole structure of exceptions surrounding the general rule is so elaborate and uncertain that in our view the most efficient vehicle for reform is legislation.

But to return to the suggestion, if putting mistakes of law "on an equal footing" with mistakes of fact means merely that instead of *binding* the courts to treat law and fact alike they shall be *privileged* to do so, freed of the dogma, and privileged even beyond the exceptions to examine each case on its merits, the suggestion takes on another complexion. In Kentucky and in Connecticut, where the courts got off to an earlier start on this sounder position, the results have been far better both in justice and in legal theory than in Texas, and Texas, it is assumed, is a fair example of the states where the legislatures have not intervened. But if this is the meaning of the suggestion, the question occurs Whether there might really to be any need for such legislative authority. To the usual objections to judicial legislation one answer is that the rule that denies relief is itself a judge-made law. If the courts, acting inadvertently or negligently, or through misinformation and without examination of the authorities, can lay down new rules which on reflection they admit are bad, shall they disclaim the power to restore the old rules that originally in like

excess of authority, they discarded? And granted that ordinarily they would disclaim such power, that the mere fact that they have inadvertently changed the law does not set them free deliberately to do so, that to judge as well as to other human beings the last 125 years of practice, even though founded in error, is more authoritative than the 125 years that preceded them granted all these propositions, it may still be urged that the matter of relief from mistake presents a special case. Since the interests at stake are fortuitous or accidental the stare decisis argument has little force. That judgemade law is retroactive is also answered largely by the same reasons. People do not make their plans or build their expectations on prospective mistakes. Moreover, impressed by the cloud over its birth and critical of the injustice of its application, have not the courts laid for themselves a predicate for further encroachments, in the extensive inroads they have already made on the territory which in terms the rule originally claimed for its own? The chaotic state of the exceptions which they have already blocked out, it must be confessed, is not very encouraging, but a predicate nevertheless.

## 2. Reform in other Jurisdictions

### (a) *New Zealand*

In 1958 the *Judicature Amendment Act, 1958* was enacted in New Zealand. The text of the act may be found in Appendix C. The principal amendment reads:

> 94A. Recovery of payments made under mistake of law
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> (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court, whether in an action or other proceeding or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.
>
> (2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

Section 94A(l) imposes a major pre-condition to the granting of relief from a transaction entered into under a mistake of law. The plaintiff must show that relief could have been granted had the mistake been wholly one of fact. There are a number of grounds upon which relief may be refused in an action based on a mistake of fact. The defendant, for example, may negate one of the elements of unjust enrichment. He may prove that he did not receive a "benefit," or that it was not conferred at the plaintiff's expense. Alternatively, he may show that a restitutionary defence is available. The plaintiff's conduct may have been officious, or in his own selfinterest" The defendant may have materially changed his position, or the plaintiff may have compromised the claim. If the defendant can show that a claim based on a mistake of fact would have failed for one of those reasons, then under section 94A(l) relief could not be granted, and the plaintiff's claim would fail. The wording of section 94A(l) is therefore carefully drafted to ensure the incorporation into mistake of law cases of those restitutionary principles which the common law has developed to deal with mistakes generally.

Section 94A(l) goes on to state that relief is not to be denied "by reason only that the mistake is one of law." This wording has the effect of reversing the general rule under which relief could be denied for precisely that reason. At the same time, this wording preserves any other defences to an action based on mistake of law which might be open on the facts of the case. It should be noted, however, that section 94A(l) does not require a court to grant relief merely because relief would have been granted had the mistake been one of fact. Rather, relief is not to be denied *by reason only* that the mistake is one of law. Accordingly, it is open to the court to decline to grant relief having due regard to the actual character of the mistake. The court need not ignore the fact that a case turns on a mistake of law. Instead it may take that into account in determining whether it is appropriate to grant relief in the circumstances of the case.

This approach has been criticized by D.L. Lange. In commenting upon similar New York legislation (discussed later in this report) he stated:

> ... the essential disadvantage of the New York provision is the fact that it does not do away with the mistake of law and mistake of fact distinction. It brings reform no closer to the Rabin contemporary view as articulated by Marean: first, "that the true basis for a recovery lies in the principle of unjust enrichment" and second, that "the enrichment is no less unjust where the mistake is one of law" that it is where the mistake is one of fact. Instead of doing away with one distinction, the reform provision has compounded the matter such that the court is now obliged to follow a twostage procedure. First, the court must decide whether the mistake is a mistake of law or a mistake of fact, and second, if it is decided that the mistake is a mistake of law, the court then must decide whether it is one of the "appropriate cases" within the area of mistake of law that justifies recovery. This new artificiality will either create a further "hairsplitting" distinction to get the case to fit into that "appropriate" area of mistake of law, or it will be ignored altogether and the old trick of arguing that the mistake of law is in fact a mistake of fact will be used to arrive at the same conclusion.

We do not entirely agree with this analysis. It is implicit in the New Zealand reform that there will be certain mistake of law cases in which it is not appropriate that relief be granted. However, we see no reason for the court first to make a distinction between fact and law. That distinction will only be relevant where a defendant attempts to show that a particular mistake is of such a character that relief should be denied. That contention may or may not involve a submission that the fact of the mistake being one of law should lead to specific consequences, and we see no reason to foreclose such an argument *in limine*. Lange's criticism amounts to no more than an assertion that not every plaintiff who relies on a mistake of law will be successful. It is equally true under the current law that courts must assess whether a particular mistake of fact should lead to recovery, and one might as easily criticize the New Zealand legislation on the ground that it did not relieve the courts of the task of determining, to paraphrase Lange, whether the case is one of the "appropriate cases" within the area of mistake of fact that justifies recovery.

Lange concludes that the courts should be directed to consider the principle of unjust enrichment in determining whether relief should be granted. As we noted earlier in this Report, Canadian courts have adopted such a principle as the foundation of a restitutionary action. In *Rural Municipality of Storthoaks* v. *Mobil Oil* the Supreme Court of Canada expressly held that an action for money had and received is based on unjust enrichment. Hence in Canada, a reference to similar rules governing mistakes of fact not only has the effect of incorporating the law respecting unjust enrichment, but also serves to guide judges and counsel towards a potentially applicable body of law.

The effect of the New Zealand legislation has also been analyzed by R.J. Sutton in his essay *Mistake of Law - Lifting the Lid of Pandora' s Box*. He isolates six " principal objections" to the wording of section 94A, five of which merit consideration in this context. The sixth relates to the adoption of a defence of change of position, which we shall discuss later in this report. It should be noted, however, that notwithstanding these "objections" Sutton concludes that:

> In so far as the criticisms relate to the textual inadequacies of the section, these are of a minor nature, and can be solved by judicial wisdom or legislative amendment as the section develops in practice ... whatever the ultimate assessment of the legislation as a whole, the new approach to mistake will do one valuable thing it will place the problems of mistake into an entirely different light. This will in turn lead to a deeper understanding of the difficulties lying in the path of a court which tries to put the claims of justice above the needs of the common course of human business and its own ease of decision.

The first objection raised by Sutton is that the legislation does not point to a solution to the problem of when there is a "mistake" and when a payment may be said to be "voluntary." We are not convinced that this objection is of great weight. We have earlier noted the ambiguity of the concept of "voluntariness." It is a label rather than an analytical tool. As the Canadian law of restitution develops the various factors which are said to make a payment "voluntary" become better defined. The concepts of "gift," "selfinterest," "compromise" and "officiousness" are examples of restitutionary principles with an independent life. A court considering reforming legislation similar to that of New Zealand would be in a position to consider the application of these common law principles. We are not convinced that the common law is inadequate to determine such issues without legislative guidance.

As Sutton notes, save for section 94A(2), the New Zealand legislation does not attempt to define "mistake." Far from being a defect, we consider this to be wise. The question of when a person can be said to be mistaken is as much a question of philosophy as of law. We have pointed out some of the difficulties inherent in deciding when a party has in fact made a "mistake" of law. These difficulties are best handled on a case by case basis where the court may consider alternatives in a factual context. We are also not convinced that the problem is one of substance. The same issues may arise in mistake of fact cases. The lack of any authority on point in mistake of fact cases indicates that the problem Sutton foresees may be more academic than practical.

Section 94A(2) of the New Zealand *Judicature Amendment Act* prevents a court from granting relief when a payment is made under a common misunderstanding of the law. We have considered, and have rejected, proposing the enactment of a provision similar to this section. The enactment of section 94A(2) appears to have as its motive the exclusion of cases where New Zealand courts either decline to follow a leading case, or pronounce upon an issue in doubt at the time a payment was made. The effect is the same as if "mistake" had been defined so as to exclude cases where the parties fail to predict changes in the law, or the manner in which courts will determine previously unresolved issues.

Section 94A(2) will apply for the most part where the law is unsettled. It is well established that in such a case the parties may validly compromise a claim. If the claim is compromised on the basis that it is doubtful, courts would be unwilling in most cases to upset the compromise merely because the legal position of the parties has crystallized. Where the law was settled and has been altered, we have already expressed the view that it is preferable to permit courts to approach the issues involved flexibly. It is our tentative view that the burden placed thereby on the courts is not unduly onerous, and is more conducive to fair results.

Section 94A(2) also presents formidable problems of definition and proof. The New Zealand legislation gives no hint of how "common understanding" is to be defined, much less proved. The use of the word "common" implies that a certain interpretation of the relevant legal rule is prevalent among a certain class of individuals whose affairs are touched by that rule. How is that class of individuals to be defined in each case? In a dispute over the imposition of a tax, whose "common understanding" is important the taxpayer's or the taxing authority's? If the former, how is it to be ascertained and proved? If the views of both taxpayer and authority are relevant, What if they differ?

Although section 94A(2) has never been considered in a New Zealand court, an identical provision in the Western Australian *Law Reform (Property, Perpetuities and Succession) Act* (discussed later in this Report) was considered in *Bell Bros Pty. Ltd*. v. *Shire of SerpentineJarrahdale*. In that case, the plaintiff claimed the return of money paid to acquire a licence to quarry gravel and stone. The bylaw authorizing that charge was held to be *ultra vires*, and the plaintiff immediately brought his action, claiming duress and mistake.

Both claims were dismissed. Negus J. Ineld that the claim, as it was based on a mutual mistake of law, failed as the "common understanding of the law" was that the bylaw was valid. He defined "common understanding" as follows:

> The words "commonly understood" have never been explained in any court. In my opinion, they mean "that which would appear to the ordinary individual."
>
> I should say that most ordinary individuals who found it necessary to read and understand the bylaws as the years went by would have presumed that they were validly made, particularly if they considered who made and approved them.

The test suggested by Negus J. is a novel one, and raises at least as many questions as it answers. Does an “ordinary person” mean ordinary layman, ordinary solicitor, ordinary municipal employee, or ordinary quarry operator? Moreover, if every ordinary person understands bylaws or statutes to be valid merely because they have been

enacted, the effect of 94A(2) would be to exclude completely any claim for relief based on an *ultra vires* statute. We do not think this result to be desirable, particularly in light of the developing jurisprudence in Canada concerning *ultra vires* municipal bylaws. In recent cases, British Columbia courts have approached restitutionary claims in a flexible fashion, and in the majority of cases have been able to grant relief from the consequences of a mistake of law respecting the vires of a bylaw, when appropriate.

On appeal, the Full Court of Western Australia proposed a different test. Hale J. stated *per curia*:

> In the context of this section I think that "understood" is apt to cover everything from a positive and reasoned belief to a tacit assumption, but it must involve a state of mind, and its existence or otherwise must always raise a pure question of fact. The action was tried on an agreed statement of facts and the only reference therein to anybody's state of mind is that until the judgment in *Marsh's Case* the plaintiff and the defendant believed that cl. 7 of the bylaw was valid: i.e. they laboured under a common mistake. But the "common" understanding mentioned in the section is clearly of wider import than the same word in the phrase "common mistake." If Parliament had meant that there should be no liability if (no matter what anybody else thought) the payor and payee were mistaken as to the law, Parliament would certainly have said so in simple language. The section predicates some generality of understanding beyond that of the parties to the action. Now there can be no understanding about a subject unless the mind has been in some degree directed to that subject, and the class in which the understanding must be looked for is of necessity limited to persons who for some reason or another have at least to some extent adverted to the subject. The class will be wide or narrow according to the subject in question: by way of example, the validity of a receipt duty which affects every wageearner in the state involves a much wider class than would in local bylaw which affects only a few people in a small district. Without attempting an exhaustive definition, I think that in the present case the class may reasonably be said to comprise (i) those concerned with the making of this bylaw or other bylaws in similar terms, (ii) those who have been asked or expect to be asked to pay under this or a similar bylaw, and (iii) persons such as lawyers who have been asked to advise on the validity of such a bylaw. Initially that class must be very small, although with the passage of time it could swell to include scores or hundred of persons. There is no evidence that any other local authority ever made a bylaw in terms similar to cl. 7 of this bylaw; attention can, therefore, be paid only to the established facts relating to this particular bylaw.

Because no evidence had been led to show the "understanding" of the class, the court presumed from the fact that the bylaw was passed that the common understanding of the relevant class was that the bylaw was valid. The plaintiff had led no evidence sufficient to induce the court to construct a wider class or to reach a different conclusion respecting the class as it had been defined. In view of the fact that the case had been argued on an agreed statement of facts, to is omission is not surprising. The court did not venture any opinion as to what evidence the plaintiff might have led to satisfy it that the common understanding was otherwise than it had been presumed to be.

In the High Court of Australia, the plaintiff's claim succeeded on the ground that the shire council had obtained the money *colors officii*. It was not therefore necessary for the High Court of Australia to consider the interpretation of "common understanding" advanced by either court.

Even where a "common understanding" can be shown, the practical consequences of excluding relief are undesirable. It seems odd that a defendant who has been unjustly enriched by a plaintiff operating under a common misunderstanding of the law could raise as a defence that he has also been enriched by many other persons acting under a similar error. It is even stranger that a defendant could successfully raise as a defence to a claim the fact that many other people who did not enrich the defendant thought at one time that the person seeking to recover the mistaken payment was compelled by law to pay the defendant. We conceive the main issue to be whether as between a plaintiff and a defendant in a particular case the benefit conferred is an unjust enrichment. It is true that where a large number of individuals have mistakenly paid the defendant, considering each. case on an individual basis could lead to some hardship being imposed on a defendant. However, that hardship is common to all defendants against whom a number of plaintiffs may take judgment. Should the law prevent the families of passengers killed in an ac-

cident involving a large aircraft from bringing an action merely because the families of many other passengers wish to bring similar actions?

Section 94A(2) is aimed at closing the "floodgates of litigation" which might be opened if every overruling of a case or change in jurisprudence gave rise to restitutionary claims. However, the protection offered in section 94A(2) goes far beyond what is required. Should the possibility that a defendant would be liable to compensate numerous plaintiffs. In one case be justification for denying relief where only a small class is affected by a mistake of law? We have concluded that courts have ample tools for limiting recovery. The plaintiff must prove that the defendant was unjustly enriched, and that no restitutionary defence applies. Moreover, his claim may be subject to particular defences which will carry a special weight when the defendant may be liable to a large number of plaintiffs. Where a plaintiff and defendant both know that the bylaw or authority under which use defendant purports to act is one of general application, it is likely that courts will be more receptive to defences such as a mutual intent that a transaction be terminated, or a defence similar to the equitable defence of laches.

Sutton's second objection is that the legislation stops short of reforming the law respecting money paid under mistake generally. In Canada the recovery of money paid under mistake is firmly entrenched in unjust enrichment, and it is not therefore necessary to codify any guiding principles. Moreover, this Report does not contain an indepth consideration of the common law rules respecting the remedies available to a plaintiff who seeks to recover a benefit conferred under a mistake. We have restricted our inquiries to the issue of whether there is an longer any justification for treating mistakes of law differently from mistakes of fact. The relatively narrow focus of this report is in part a recognition that the thorny issues which would be involved in a larger project concerning the legal effect of mistakes deserve independent and detailed study.

Sutton's third objection is that the New Zealand legislation does not explicitly abrogate the general rule in respect of the conferral of benefits other than money. We have already expressed the view that reforming legislation should extend to all claims for reliefy regardless of the naturd of the benefit conferred or the manner in which it was transferred.

Sutton's fourth objection arises out of the *Judicature Amendment Act's* failure to define "common understanding" of the law. We have already concluded that an attempt to define "mistake of law" would not be appropriate in British Columbia legislation, and that in particular an imitation of the plaintiff's right to recover based on a"common understanding" of the law at the time the benefit was conferred is undesirable.

Sutton's fifth objection is that:

> When formulating rules for recovery under error of law, the courts have a policy decision to make: whether the rules should depend upon the Courts' objective view of the risk, or the ‘parties' own subjective view, or a fault basis. The duty of the legislature is to give guidance on such questions of policy, and it has completely failed to do so.

In New Zealand it would appear that courts have not as yet adopted unjust enrichment as a guiding principle. In Canada the courts have formulated a policy of preventing unjust enrichment as the foundation for judicial intervention. While such legislative guidance may be appropriate in New Zealand, in Canada it could constitute a fetter on the rapidly developing jurisprudence in restitution. We agree with one commentator, who opined that the better approach to follow is to:

> remove the handicap of the distinction between mistakes of fact and law without attempting the almost impossible task of laying down the cases in which relief against a mistake of law should and should not be recoverable.

On the whole section 94A(l) provides a generally workable model for legislative reform. If it were adopted it is apparent that some modification of its express terms would be desirable to take account of some of the points we have discussed.

Section 94B of the *New Zealand Act* provides:

> Relief, whether under section 94A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so, altered his position in reliance on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

This section is designed to incorporate into New Zealand law a defence of "change of position." This defence would apply where, on the strength of receiving a payment to which he *bona fide* believed himself to be entitled, the recipient spends the funds in such a way that it would be inequitable to compel him to repay them. Where money is paid under a mistake, it is often the case that both parties to a transaction are innocent. Neither intends to give or take any more than that to which he is entitled. If the law did not recognize such a defence, the result might very well be to punish an innocent defendant by making him bear the entire brunt of the error.

Nevertheless, at common law the defence was fairly circumscribed, and in England no general defence of change of position is yet recognized. However, the essential element of a change of position is recognized in other contexts. It is said to be an element of an estoppel, although in that context the question of what will constitute a material "change of position" has also been narrowly circumscribed. The mere fact that money has been paid away will not constitute a material change cof position for the purposes of founding an estoppel. However, where it can be shown that as a result of the payment, money was expended on purchasing an asset which at the time repayment is sought is valueless, the defendant has been held to have materially changed his position. In *Holt* v. *Markham* the defendant, an exR.A.F. officer, received remuneration in excess of that to which he was entitled. He invested the funds in a company which was bankrupt at the time repayment was requested, and was held on that ground to have materially changed his position, such that the plaintiff as estopped from recovering the overpayment.

In Canada a general restitutionary defence of change of position is recognized. In *Rural Municipality of Storthoaks* v. *Mobil Oil*, the respondent continued to make payments required under a lease on the mistaken assumption that it was still in effect. In fact, the lease had been surrendered. The respondent, on discovering the error, brought an action to recover the payments as money paid under a mistake of fact, and was successful. On its appeal to the Supreme Court of Canada, the municipality argued that it had changed its position. While the court, *per* Martland J., expressed the view that the defence was a proper one, on the facts of the case it could not be applied. Martland J. held:

> In my opinion it should be open to the Municipality to seek to avoid the obligation to repay the monies it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money. Accordingly I have reviewed the evidence to ascertain whether there was such a change of circumstances. The evidence of Mrs. Gauthier, the secretarytreasurer of the Municipalty, was that the monies received from Mobil were put in the general account along with tax monies to pay general everyday expenses. There is 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 monies were received. The mere fact that the monies were spent does not, by itself, furnish an answer to the claim for repayment. if the Municipality is required to refund the monies to Mobil it will be in the position of having had the use of the monies, over a period of time, without any obligation to pay interest.

As formulated by the Supreme Court of Canada, the defence of change of position requires reliance on the receipt, and a detriment to the party receiving the money and resisting its return. Criticism has been directed at both

these elements of the defence, and particularly at the requirement that the eventual expenditure of the money be detrimental to the defendant. As one of our correspondents noted:

> In principle [the defence of change of position] is available in Canada after the decision in *Storthoaks* ... However, the question whether the defence is adequate is less easy to answer and depends on its scope as defined by the Supreme Court. Martland J. said that it must be established that the recipient had materially changed its circumstances as a result of the receipt of the money and that this was not established on the facts because there was no evidence of any specific projects being undertaken or specific financial commitments made *because of the receipt* of the payments. The defence will not, therefore, be easily established (Goff and Jones, p. 546). Its narrowness may be acceptable in cases of mistake of fact, especially if the mistake has to be as to "liability" because the recipient ought to know the state of his accounts. However, once the basis for recovery is wider and *Barclays Bank* v. *Simms*, (1979) All E.R. 522 1 and *Saronic Shipping* v. *Huron*, (1979) 1 Lloyd's Rep. 341, 362366 suggest that the test may be one of causation rather than seriousness of the mistake there are problems with change of position as formulated by Goff and Jones and Martland J. For if there is nothing in the factual circumstances to put the recipient on notice that he may not be entitled to the payment or that it was caused by a mistake he may well increase his standard of living in ways that do not constitute the defence of change of position or which, if they do, are very difficult to prove. Many examples could be adduced: eating steak rather than minced meat, having a suit made by a tailor rather than buying it off the peg and buying the most expensive theatre tickets rather than those in the back stalls. This is a particularly acute problem in a case where at series of payments (such as those in Storthoaks) is made because, as Abbott C.J. said in *Skyring* v. *Greenwood* (1825) 4 B. & C. 281, a man's living expenses are tailored to his income: "Every prudent man accommodates his expenses to what he supposes to be his income." It is possible that in cases of mistake of fact a balancing of the equities of the two parties might nevertheless favour recovery. However, in cases of mistake of law it is arguable that considerations of finality of transactions should be given a greater role and that reliance of the sort in the examples above should be protected.

Although the defence of change of position was fairly narrowly defined by Martland J., it may be doubted whether Canadian courts are willing to read his words as literally as critics of the *Storthoaks* case have suggested they might. As a general proposition, Canadian courts have affirmed that expenditure alone will not establish the defence. There must be something in addition to the mere expenditure. However, the courts have not restricted that "something extra" to the purchase cof assets or services which are not beneficial to the defendant at the time repayment of money is claimed.

In particular, courts have been sensitive to the problems posed by public bodies which receive money to which they are not entitled. For example, in *HydroElectric Commission of the Township of Nepean* v. *Ontario Hydro* the appellant Commission sought to recover money paid to Ontario Hydro under a scheme whereby the cost of providing power to municipalities was adjusted to benefit municipalities which had by reason of their long standing as customers paid off their share of Ontario Hydro's capital expenditure. The Commission successfully established at trial both that Ontario Hydro had no authority to implement such a scheme and that the money paid by the Commission was *prima facie* recoverable, even though paid under a mistake of law, because the parties were not *in pari delicto*. Nevertheless recovery was denied. At trial, Craig J. denied relief on the ground that to do so would be inequitable. On the facts of the case, the money had been expended pursuant to a statutory duty to supply power, and the plaintiff at all times was aware that Ontario Hydro would be crediting other municipalities by virtue of receiving the payment. Moreover, Craig J. noted that Ontario Hydro would probably experience difficulty in recovering the sums so credited, since they were paid under a mistake of law. Accordingly, a judgment in favour of the Commission would be passed on to all Hydro's customers, including those who had already been overcharged.

Craig J.'s conclusion that these factors, combined with the actual expenditure of the overpaid levy, constituted a change of position was affirmed by the Ontario Court of Appeal. MacKinnon A.C.J.0. stated:

> ... counsel for the Commission relied on the judgment of the Supreme Court of Canada in *Rural Municipality of Storthoaks* v. *Mobil Oil Canada, Ltd*., [1976] 2 S.C.R. 147, 55 D.L.R. (3d) 1, [1975] 4 W.W.R. 591. This was a case of monies paid under a mistake of fact, but counsel submitted that the principles applicable for an order for the recovery of monies paid under a mistake of law are the same as those applicable for an order for the recovery

> of monies paid under a mistake of fact, once it is established that the parties were not *in pari delicto* the former case. Accepting that proposition for the purpose of considering the argument it does not preclude, in our view, the trial judge considering on the facts that it would be inequitable to order restitution or repayment. Mr. Justice Martland, speaking for the court in *Storthoaks*, made this plain. lie stated that it was open to the defendant. Municipality there to seek to avoid repayment if it could establish that it had materially changed its circumstances as a result of the receipt of the money. He pointed out that the municipality had not altered its position in any way because of the monies received and that if it was required to refund the monies to the payor it would be in the position of having had the use of the monies over a period of time without any obligation to pay interest.
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> In the instant case, as indeed counsel for the Commission pointed out in Hydro's appeal, Hydro's obligation is to supply power at cost. It is not a profitmaking nor profitseeking operation. As the trial judge pointed out, Hydro was not "enriched" by these exactions and it did not have the use of the monies as did the municipality in *Storthoaks*. Mr. Justice Martland further considered whether the municipality had incurred a detriment by being allegedly deprived of an opportunity, to seek a new lessee. While holding thatit had not suffered such detriment he obviously considered it to be an appropriate consideration under the circumstances of that case. He concluded that, having considered these matters, the municipality had not so altered its position as a result of the receipt of the payments that it would be "inequitable" to require it to repay the monies. He then went on to consider as a final and clearly separate defence the question whether the facts raised an estoppel. In our view 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 bodies. By cannot say that the trial judge was in error in concluding, to use the word used by Mr. Justice Martland, that it would be "inequitable" to order Hydro to repay the monies paid to it under the mistake of law.

In considering whether there has been a change of position, Canadian courts appear to be following the Ontario Court of Appeal's lead in not restricting the defence to cases where money is expended in purchasing an asset or service. Martland J.'s statement in the *Storthoaks* case that the expenditure of money alone will not establish the defence, unless the defendant undertakes "special projects" or "special financial commitments," has been extended in the *Nepean* case to encompass a variation of a spending pattern. Ontario Hydro did not receive the money, formulate a plan and spend it. Rather, Hydro calculated the amount of income it could expect, and then made plans for its expenditure. Its position is therefore closely analogous to that of the recipient in our buys steak instead of minced meat, tailored suits instead of suits off the rack, and expensive tickets rather than cheap ones. Both the recipient in our example and Ontario Hydro have expended money on the basis that a certain stream of income would continue.

The *Nepean* case is currently under appeal to the Supreme Court of Canada. If it is affirmed, courts in Canada may rely on it to extend the defence of change of position to cases where detrimental reliance on receipt of money is not reflected in specific projects or expenditures. The defence has been so extended in certain American jurisdictions, and such a development would bring Canadian law closer to that which applies in the United States.

The recent judgment of Hinds J. in *Wilson* v. *Surrey* illustrates the flexible nature of the defence of change of position as it is developing in Canadian law. In this case, Surrey had purported to impose upon a developer by resolution an obligation to contribute to the cost of servicing land comprised in a new subdivision. Hinds J. held that the imposition of such a requirement was *ultra vires* the municipality and that *prima facie* the municipality was obliged to return the improper imposts because it was in breach of its duty to know the law, and hence was more responsible for the plaintiff's error. However, that did not end the matter. Following the *Nepean* case, Hinds J. held that it was open to him to assess the equities between the parties. He held:

> It is therefore necessary to consider the surrounding circumstances in order to determine whether the defendant is obliged by the ties of natural justice and equity to refund the monies to Wilson. The underlying basis for the imposition of impost fees was to cause a developer of a residential subdivision, and ultimately the purchasers of lots in a subdivision, to contribute to the excessive costs to the defendant of providing services such as parks and playgrounds, drainage facilities, arterial highways, main trunks and supply facilities for a waterworks system for the residents of a new subdivision. The defendant ascertained the average costs of such services for lots in any new subdivision within the municipality and apportioned those costs rateably to all new lots. It was not discriminatory to Wilson visavis any other residential subdivision developer. If the defendant did not obtain

funds by, way of impost fees from the developers of new residential subdivisions, it would have to acquire funds from all taxpayers in the municipality to provide the services required by the residents of the new subdivision.

With respect to the four per cent inspection fees, the underlying basis was, once again, to cause the developers of new subdivisions, and ultimately the residents of thenew subdivisions, to pay the cost of inspection services made by the defendant with reference to any new subdivision. It was attempting to impose the costs for such services upon the developer (or ultimately the purchasers of the lots), for whose benefit such costs were incurred, rather than foisting the costs upon the general ratepayers.

A municipality is not incorporated for the purpose of carrying on its operations at a profit. Its purpose is to provide and administer services of a wide range to residents within its area. It obtains funds to provide and administer those services from a number of sources, including taxes on lands, improvements and machinery, licence fees, and grants and subsidies from senior governments. In any given year its revenue may or may not, exceed its expenses. If its revenue exceeds its expenses, it constitutes a surplus, not a profit. The defendant has no prof it out of which it can repay Wilson; any repayment to Wilson would have to be borne by the general ratepayers of Use defendant, as a result of which those general ratepayers would be obliged to pay the share of the residents of Wilson's subdivision for services provided for them.

In view of the foregoing I consider that it was equitable that Wilson was required to contribute to the services covered by the impost fees and to pay the four per cent inspection fees attributable to his subdivision. The ties of natural justice and equity favour the retention of those amounts by the defendant.

It may fairly be argued that cases such as *Nepean* and *Wilson* v. *Surrey* are based on a misreading of use Supreme Court of Canada's decision in the *Storthoaks* case. Although the Supreme Court of Canada was concerned in that case with the equities *inter partes*, it is clear that the defendant had to bring himself within the defence of change of position. In recent cases, courts have not framed their judgments in such terms, and instead have concentrated on whether permitting the plaintiff to assert his legal right to repayment would be "inequitable," in the sense that it would cause hardship. One might well imagine that any defendant called upon to pay a large judgment solely out of income might feel some hardship, and it is difficult to see why recovery would be inequitable for that reason alone. The question posed in Storthoaks is whether there is something in addition to the mere liability to repay which makes it more appropriate that the plaintiff, rather than the defendant, bear the loss. In focusing on the former question, Canadian courts have abandoned the relatively narrow confines of change of position for the open range of "natural justice and equity." It is not yet clear what limits will be placed on that inquiry in future cases.

We have concluded that we should not recommend the enactment of a provision similar to section 94B of the *New Zealand Act*. Its adoption could have the undesirable effect of crystallizing the defence of change of position and fettering its development at common law. In particular, we are concerned that insofar as section 94B requires that the change of position be "in reliance on the validity of the payment," its enactment in British Columbia might restrain our courts from adopting a flexible approach to cases such as *Wilson* v. *Surrey*, in which a municipality is faced with a potentially large number of claims arising out of an *ultra vires* bylaw.

We recognize that section 94B is framed in a broad fashion. Under its terms, a court is empowered to deny relief "wholly or in part," "having regard to all possible implications," if to grant relief would be inequitable. Nevertheless, we think that the experience with section 94B in New Zealand buttresses our conclusion.

The leading case in New Zealand is *Thomas* v. *Houston Corbett & Co. Ltd*. In that case, the appellant and respondents were victims of a rogue named Cook, an employee of the respondent solicitors. The appellant invested L400 with Cook, who converted the money to his own use. When the appellant requested the return of his money, Cook fraudulently induced the respondents to pay L1381 into the appellant's bank account. The appellant, relying on Cook's representation that some L840 was

due to the othdr investors, drew a cheque in Cook's favour for that amount. When the respondents discovered the fraud, an action was brought to recover the L1381 as money paid to the appellant under a mistake of fact. The main issue before the Court of Appeal was whether the appellant could rely on section 94B.

If this situation had arisen in British Columbia, it is probable that the appellant could have successfully resisted the respondents' claim in respect of the L840 cheque drawn in Cook's favour. There is little dispute on the facts of the case that the money was paid out of his account only because it had been received by him to someone else's use. The result would have been a judgment in favour of the respondents for L541, being the amount remaining after Cook had converted the money to his use.

However the New Zealand court took the view that section 94B gave a court the power to apportion loss between the parties. Rather than being the essence of the defence, the fact that the appellant had changed his position in reliance upon the receipt of the funds was regarded only as a ground for apportioning the loss without regard to the change of position. North P. held that the loss should be apportioned 2/3 to the appellant and 1/3 to the respondents, notwithstanding that the respondents were more at fault. He stated:

> Mr. Chilwell advanced a number of circumstances which he contended justified the court exercising its discretion against the appellant. Cook, to outward appearances, was the trusted servant of the respondent firm and the appellant was quite entitled, in my opinion, to deal with him on that basis. In result, both the appellant and the respondent firm were deceived by Cook but, in my opinion, Mr. Houston must accept the greater responsibility for he was in a far better position to judge the character of Cook than was the appellant. It is said that Cook was living on an extravagant scale and that the appellant should have drawn deductions from these circumstances. I fail to see why he should. For all he knew Cook or his wife might have been possessed of private means. Mr. Houston, on the other hand, was in a position at all times to have questioned Cook as to his mode of living. Mr. Houston, as a solicitor, knowing that Cook was carrying out legal work which from time to time involved the withdrawal of money from the firm's trust account, in my opinion should have investigated more closely than he apparently did his clerk's mode of living. I see nothing in the point that the appellant entered into a somewhat unusual transaction. That would have much more relevance if the appellant had been an experienced businessman but the whole of the evidence, including 'his frank answers to questions, has satisfied me that he was an unsophisticated young man with little or no knowledge of the kind of transactions which were carried out by legal firms. I do not doubt for one moment that Mr. Houston is a meticulous and competent lawyer but the facts in this case, in my opinion, show that the equities are pronouncedly in the appellant's favour.
>
> In all the circumstances, then, I think that it would be inequitable to grant relief in full to the respondent firm and I am accordingly of opinion that the appellant should not be required to repay the full sum of L840. Balancing the equities I would allow the appellant to retain the sum of L560. For these treasons I would allow the appeal and vary the judgment in the court below by substituting for the sum of L1381 13s. 3d. the sum of L821 13s. 3d. I am further of opinion that the costs in the court below should be reduced accordingly.

Turner J. agreed with that interpretation, but thought initially that the parties should bear the loss equally:

> "It has long been a principle of equity," say the learned editors of *Snell's Principles of Equity*, 26th ed. 40, in a passage discussing the maxims of equity, "that in the absence of sufficient reasons for any other basis of division, those who are entitled to property should have the certainty and fairness of equal division ... and in my view these words are equally applicable to the apportionment of losses. But the conclusion to which I would myself have come on the facts has not entirely commended itself to my brethren, and in deference to their views, which attribute to the respondents the greater share of the responsibility for this disaster, I am willing to reconsider *my* own apportionment of the proportions in which the losses for it should fall. Such a process of reconciliation has led to my giving my agreement to the proportions of twothirds and onethird favoured by the President in the judgment which he has just delivered.

Section 94B, so interpreted, clearly goes far beyond what is required to give effect to a change of position defence. We do not necessarily quarrel with the idea of apportioning losses inflicted on innocent parties by a rogue. However, we are of the view that proposing sych a solution in the context of this Report is not warranted.

In short, we see twin dangers in enacting a provision like section 94B. First, the fact that the change of position defence is crystallized in legislative form may impair its development in the law of restitution. Secondly, the New Zealand formulation apparently goes a good deal beyond what is required to redress any problems arising out of an innocent party materially changing his position. The unorthodox approach taken by the New Zealand Court of Appeal amply bears out our contention that it would be undesirable to attempt to codify this developing restitutionary defence.

(b) ___*Western Australia*

In 1962 Western Australia enacted the *Law Reform Property, Perpetuities and Succession) Act*. The terms of sections 23 and 24 of that act are virtually identical to the *New Zealand Act*, with the sole exception of section 24(2), which provides:

> (2) Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

In British Columbia all three trial courts already have jurisdiction to suspend execution, or to order payment of at judgment or instalment. The *Supreme Court Act*, for example, provides in section 42:

> 42. Where an order has been obtained for a sum of money, the sum shall be payable immediately unless the court orders otherwise. The court may provide that an order is payable by instalments or may suspend execution for the tide it considers proper.

It is beyond the scope of this Report to make any recommendation concerning the powers which a court should exercise in regulating the fashion in which its judgments are to be enforced. We therefore make no recommendation concerning any power to discharge, vary or suspend judgment.

(c) ___*New York*

Section 3005 of the New York Civil Code was added in 1942 pursuant to the recommendation of the Law Revision Commission of the State of New York. It provides:

> When relief against a mistake is sought in an action or by way of defence or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact.

The approach adopted is not identical to that of New Zealand and Western Australia. Under section 3005 relief is not to be denied "merely because the mistake is one of law", while in New Zealand and Western Australia relief is to be granted where it would be if it were a mistake of fact. The New Zealand and Western Australian legislation expressly direct courts to consider rules respecting mistakes of fact. The only restrictions on the right to recover in the New Zealand and Western Australian statutes are those generally applicable to all restitution cases, and the reference to "mistakes of fact" serves to incorporate those rules. In contrast, the New York formulation invites the creation of separate rules governing mistakes of law, rather than creating a uniform method of dealing with mistakes.

New York courts have not been bold in their interpretation of section 3005. In the leading case of *Mercury Machine Importing Corp*. v. *City of New York* the New York Court of Appeals held that the section:

> ... is not drafted in such manner as to place mistakes of law in all respects upon a parity with mistakes of fact ... It removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact.

The court in that case denied recovery of taxes paid under a statute assumed constitutional and later found to be *ultra vires*.

Although the practical effect of the New York provision is the same as that of *the New Zealand Act*, we see no need to invite the creation of separate rules respecting benefits conferred under a mistake cif law. The cautious response of New York courts to this provision indicates that the New Zealand legislation is preferable.

(d) *California*

The State of California adopted the "Field Code" in 1872. This was a draft code for the state of New York (prepared *inter alia* by D.D. Field). It was presented to the New York Legislature in 1865, and was never adopted by that state. The Field Code was, however, adopted by Montana (1895), North Dakota (1887), South Dakota (1919) and Oklahoma (1910) in addition to California. The provision of the Field Code relevant to this report is that defining "mistake" in such a way as to encompass certain mistakes of law.

The California Civil Code, for example, provides in section 1578:

> MISTAKE OF LAW. Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
>
> 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
>
> 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

The organization of the Field Code lends credence to the decisions of a North Dakota court in *Chrysler Light & Power Co*. v. *City of Belfield* and of a California court in *Wingerter* v. *San Francisco* that this definition of "mistake" is restricted to contractual, and not restitutionary, cases. Even in the context of contractual cases it has been held that the section applies only to "involuntary" payments. In Oklahoma, it has been held that the Field Code merely codifies the rule in *Bilbie* v. *Lumley*. In fact, Goff & Jones conclude:

> In the result, the decisions of these 'exceptional' American jurisdictions differ little from those of their more conservative neighbours.

We are not convinced that the adoption of legislation similar to the Field Code would be an effective means of reform.

3. Other Options for Reform

(a) *Extend the "Private Rights" Exception to All Cases*

Some of the injustices which might arise because of the common law rule denying recovery of benefits conferred under a mistake of law could be cured by permitting courts in common law actions to regard a mistake respecting private rights as a mistake of fact. Legislation could be enacted putting it beyond doubt that the exception in *Cooper* v. *Phibbs* applies at both law and equity. This is at best only a partial solution to the problem. It leaves

intact the general rule and its elaborate overlay of exceptions. We have already concluded that the general rule is itself in need of reform and hence reject this option.

(b) ___*Extend the "In Pari Delicto" Exception*

Brien McKenna, in his article *Mistake of Law Between Statutory Bodies and Private Concerns*, has suggested that (at least in respect of statutory bodies) a duty should be imposed to know the law. Earlier in this paper we have set out our concern that both the content of such a duty and the persons upon whom it is to be imposed are uncertain. Moreover, like the previous option, this leaves the current law basically intact. For that reason we feel it to be an inappropriate response to the need for reform.

4. Recommendation

We have concluded that legislation based on section 94A of the New Zealand *Judicature Amendment Act* should be adopted in British Columbia. Such an approach goes no further than is necessary to bring the position in respect of payments made under a mistake of law into line with general restitutionary principles.

On the basis of our review of the options for reform and the current law, it is our conclusion that reforming legislation should incorporate the following features:

(i) it should apply to all forms of relief sought.

(ii) it should apply to transfers of all forms of property.

(iii) it should not attempt to define "mistake of law."

(iv) it should not attempt to define any guiding policy.

In our Working Paper, we proposed an amendment to the *Law and Equity Act* framed in terms of "benefit" conferred under a mistake. We have been persuaded by our correspondents that it would be undesirable to so limit the reform. The term "benefit" is not yet well defined, and could for that reason cause confusion. It is arguable, for example, that in an action to avoid an executory contract on the ground that it was executed under a mistake of law no "benefit" has been enjoyed by either party to the contract.

Our proposal was also criticized on the ground that it did not clarify the relationship between mistakes of law and mistakes of fact. Our proposal, and the New Zealand legislation on which it is based, did not require courts to treat mistakes of fact and law on an identical basis. The court was not obliged to ignore the character of the mistake, and could, if it appeared desirable, formulate different rules to govern mistakes of law. However, in doing so, the New Zealand legislation and our proposal obliged the courts to have regard to the jurisprudence concerning a mistake of fact. As a result, the proposal set out in the Working Paper had two aims: Irceversing the rule in *Bilbie* v. *Lumley*, and directing courts to the law of restitution as a source of principles to assist in resolving problems posed by a mistake of law.

In response to these criticisms, we have drafted a recommendation which more clearly sets out these two goals.

The Commission recommends that:

*1. The* Law and Equity Act *be amended by the addition of a provision comparable to the following:*

*Mistake of Law*

*(a) Relief from the consequences of a mistake shall not be denied by reason only that the mistake is one of law or mixed fact and law.*

*(b) When relief is claimed from the consequences of a mistake of law or mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact.*

5. The Limitation Act

The *Limitation Act* of British Columbia provides that any action not specifically provided for in that Act may not be brought after the expiration of six years after the date on which the right to do so first arose. *Prima facie*, this limitation period would govern most claims for relief from the consequences of a mistake of law. However, the *Limitation Act* specifically provides that in certain circumstances the running of time will be postponed. Section 6 provides, in part:

> (3) The running of time with respect to the limitation periods fixed by this Act for an action ...
>
> (f) for relief from the consequences of a mistake ...
>
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and ...
>
> (j) person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.
>
> (4) For the purpose of subsection (3),
>
> (a) "appropriate advice," in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;
>
> (b) "facts" include
>
> (i) the existence of a duty owed to the plaintiff by the defendant; and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff;
>
> (c) where a person claims through a predececessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;
>
> (d) where a question arises as to the knowledge or means of knowledge of at deceased person, the court may have regard to the conduct and statements of the deceased person.
>
> (5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

Under section 6, the right to claim relief from the consequences of a mistake of law is not extinguished by effluxion of time unless the person seeking restitution was aware that his mistake was of such a character that relief could be granted, and that it was reasonable to seek such relief. The practical effect of section 6 is that a defendant who has received a benefit under a mistake, whether of fact or law, may be called upon to make restitution more than six years after he received the benefit. Section 6 does not, however, impair the defendant's right to raise any defences which might otherwise apply.

We have considered whether there is anything in the nature of a mistake of law which renders such a result unfair, and whether section 6 should be restricted to mistakes of fact. Restricting section 6 to mistakes of fact would preserve the arbitrary distinction between mistakes of fact and law. Moreover, to the extent that the plaintiff's claim is based on unjust enrichment, there is little reason to distinguish between mistakes of fact and law. Both are equally effective to negate officiousness, as well as to provide a reasonable excuse for not bringing an action within the period specified in the *Limitation Act*.

If a special rule is to be created for mistake of law, it must be justified on practical grounds. We see no reason to reduce the sixyear limitation period or to exempt mistakes of law from the ambit of section 6. It would be overstating the effect of the general rule to affirm that it is an absolute bar to any action respecting a mistake of law, and to the extent that such claims may currently be brought under the present law, section 6 would already apply. Moreover, the defences available to the defendant in a restitutionary claim change of position, estoppel, "just and equitable" and, in certain cases, laches, are particularly sensitive to the passage of time, and it would be erroneous to equate the right to bring an action for relief fram the consequences of a mistake of law with success in its prosecution.

We note in particular that the burden of proving that the running of time is postponed rests on the person claiming the benefit of section 6. We think that burden will likely be fairly difficult to discharge. In fact, section 6 has the practical effect of imposing a duty to seek legal advice, because in estimating whether the running of time should be postponed, the plaintiff will be treated as if he had actually obtained such advice. We are also not persuaded that the practical consequences of applying section 6 to mistakes of law are pernicious or that the tools available to judges to limit recovery in appropriate cases are inadequate to prevent injustice. We adhere to our general conclusion that the problems posed by mistakes of law are best handled on a casebycase basis, and reject any general rule designed to limit the availability of relief without reference to the merits of a claim.

## 6. The Position of Municipalities

Earlier in this Report we focussed upon the rules governing the recovery of benefits conferred upon a municipality pursuant to an *ultra vires* bylaw. We concluded that the law was difficult and uncertain. To the extent that our first proposal applies to claims which may arise where money is paid or some other benefit is conferred under a mistake of law, much of this confusion will be eliminated. When our first proposal is enacted, municipalities will be placed in the same position as private citizens. The tendency of the current law, however, is to place a more onerous duty on a municipality, which may be held liable solely on the ground that it enacted an ultra vires bylaw. Under our proposal, a municipality will *prima facie* be liable only if it has been unjustly enriched.

Some of our correspondents expressed doubts concerning the wisdom of abrogating the general rule in the manner we have proposed, insofar as it concerns the liability of municipalities to reimburse those who have paid money pursuant to *ultra vires* bylaws. Some thought our proposal went too far, and others did not think it went far enough. One of our correspondents wrote:

> There is good reason from a restitutional viewpoint for the existence of the general rule against recovery where the party forcing payment is not in *pari delicto* with the payor. In a democratic society where govern-

> ment is supposedly the servant and not the master, and individual rights still count, it is inconsistent and repugnant for us to have government able to recover monies paid by mistake out of the consolidated general revenue fund to the taxpayer and another law imposing a general rule of nonrecovery for monies paid by mistake into the fund ... In short, governments and officials functioning under statutory authority are "big boys." The public interest cannot be protected by shielding their illegal activities and allowing private citizens' funds to be retained, except under very special circumstances. Nor does the theoretical distinction between mistake of fact and law make any sense. To the layman reading *George Porky Jacobs* v. *City. of Regina and Eadie. Township of Brantford*, the ratio is clear: illegally extracted monies by an official or a government body are recoverable.

Others among our correspondents were concerned that the abrogation of the general rule could place municipalities in an unenviable position:

> We have recently had a good example in Toronto. A Division Court ruled at the end of last week that, despite the common understanding to the contrary for many years, the *Municipal Act* did not technically bestow upon the city or any municipality in Ontario the power to levy fines upon the owners of cars unlawfully parked. Now I have paid many parking fines in my life in this city. In doing so, I did not in any real sense make a mistake of law. Citizens probably pay parking fines out of a very complex mixture of motivations, all of which should be irrelevant to the question whether the fines are returnable following a significant clarification of the law and reversal of public opinion such as we have just experienced in this case. Yet how will the justice of the claims for repayment of six years of parking fines be assessed without judicial inquiry? How can class actions sensibly determine such an issue? Surely the old policy that declared such payments 'be irrecoverable had a lot of merit.

This second line of argument leads to a conclusion that a special rule protecting public authorities would be a more appropriate response to the open-ended liability which might ensue in certain cases if the recovery of money collected pursuant to an *ultra vires* bylaw were generally permitted. However, we are not convinced that such a rule would be an appropriate response to this problem. It would perpetuate the injustice which can occur under the current law where a municipality or other public authority can relyupon the general rule to justify the retention of a benefit to which it should not be entitled. Arguably, such special protection would encourage municipalities to enact *ultra vires* bylaws. At the very least, the removal of any sanction where money is collected under an *ultra vires* bylaw would have the effect of rewarding a municipality which acts beyond its powers.

We can see merit in the arguments advanced by both sides to the debate to which the recent spate of cases dealing with *ultra vires* bylaws has given rise. On the one hand, a person dealing with a unnicipality should be entitled to conduct his business without interference in the form of unauthorized and illegal imposts. It is true that any bylaw or resolution may be challenged in court, but in many cases it is impractical to do so, either because the municipality's goodwill is crucial to the success of a project, or merely because most parties dealing with a nunicipality trust it to act in a lawful fashion. On the other hand, in general municipalities aci in good faith, and endeavour to assist parties without imposing unwarranted or inequitable burdens. Many dealings with municipalities may properly be characterized as cooperative undertakings. Moreover, we are concerned that imposing too burdensome an obligation on municipalities could deter them from the proper exercise of their legislative authority in what is believed to be the public interest. In cases involving *ultra vires* bylaws, we have concluded that a person who wishes to challenge the basis on which a municipality acts should do so expeditiously.

We are also persuaded that in the majority of cases involving *ultra vires* municipal bylaws, an analysis in terms of a "mistake" is not realistic. In the majority of cases, imposts levied under a bylaw are assumed to be lawful, and we see no reason to compel a person dealing with a municipality to assume otherwise. In fact, the person paying the impost rately directs his mind to the validity of its imposition, and it is artificial in such a circumstance to insist that the payor be "mistaken." Moreover, as the *Foster* case illustrates, analyzing the case as one of "mistake" puts a person faced with an *ultra vires* bylaw in an unenviable position. If he has received advice that a bylaw is invalid, he will not be said to be "mistaken," and recovery will be denied for that reason. The payor might preserve his rights by paying under "protest," but a protest implies knowledge of the bylaw's invalidity, and moreover, we are advised that municipalities in general refuse to accept payments made under "protest." The result is that recovery

will be denied unless the plaintiff can show "practical compulsion," that the parties were not "*in parli delicto,*" or that the payments were demanded "*colors officii*."

We have concluded that it is appropriate to recognize the problems facing both individuals and municipalities where money is sought by a municipality under an *ultra vires* bylaw by recasting into a new form a municipality's *prima facie* obligation to repay money received pursuant to a mistake of fact or law. We have concluded that a municipality should be liable to refund any money or return any property it has received under an ultra vires bylaw solely on the ground that the municipality had no authority to enact the bylaw. Courts are currently moving towards such a solution by extending the exceptions of *colors officii, in pari delicto* and duress, and by imposing "duties to be honest."

At the same time, we are sensitive to the problems of municipalities who, as a result of a *bona fide* error, have exceeded their jurisdiction. In many cases the unauthorized impost is levied in order to raise funds which are in effect spent for the benefit of the persons from whom they are levied. In other cases, municipalities have unilaterally changed their position, or it might otherwise be unjust to compel them to reimburse the plaintiff. We have therefore concluded that the plaintiff's *prima facie* right should not be unqualified, and the municipality should be permitted to raise whatever defences would be available had the money been paid under a mistake of fact.

Several of our correspondents expressed concern that the abrogation of the general rule could expose municipalities to many claims concerning past transactions based on ultra vires bylaws. This raises two issues. The first is that imposing liability on municipalities could result in the reopening of transactions which both parties might reasonably expect to be closed, having regard to the current law. This is a general question oi transition between the current law and the law as represented in the recommendations contained in this Report. We deal with this question later in this Report.

The second issue relates to the fairly generous sixyear limitation period provided by the *Limitation Act*, together with the possibility that, to the extent a claim is based on a mistake, the running of time may be postponed by section 6 of that Act. We have concluded that in general no special limitation period should be formulated in respect of mistakes of law. However, in the context of our proposed *prima facie* right to recover money paid pursuant to an *ultra vires* bylaw, we think it proper that a special limitation period should govern this right of recovery.

We are persuaded that some onus to act expeditiously should be placed on a person who alleges a bylaw is invalid and who seeks restitution of money paid or other property transferred under it. A municipality acting in good faith may change its position in ways which would not be adequate to constitute a defence of change of position, but which nevertheless impose some hardship on a municipality if the money must be repaid. Moreover, a municipality may, on the strength of its bylaw, impose obligations on a number of persons, all of whom would be in a position to claim reimbursement if the bylaw is struck down. We therefore think that claims based on the illegality of a bylaw should be forfeited if allowed to become stale. At the same time, it is necessary to have regard to the practical realities which may force some parties with valid claims to await an opportune time to launch an action. Balancing these competing claims, we have concluded that a twoyear limitation period is fair. This limitation period would not be subject to the "tolling" provisions of section 6, provided the limitation period is not set out in the *Limitation Act*.

Both the *Municipal Act* and the *Vancouver Charter* currently set out preconditions for bringing an action based on an *ultra vires* bylaw. Section 318 of the *Municipal Act* provides, for example, that an action in respect of anything "done under" an "illegal bylaw" is not to be brought until one month after a bylaw has been "set aside." The procedure to "set aside" a bylaw is wholly statutory, and section 316 of the *Municipal Act* prohibits a court from setting aside a bylaw unless an application to do so is heard within two months of the bylaw's adoption. The law respecting section 318 is complex and unsettled. We have relegated a detailed discussion of section 318 to Appendix E and set out our principal conclusions below.

It would appear that section 318 could, in conjunction with sections 314 and 316, have the effect of barring any claim based on an *ultra vires* bylaw which is not set aside within two months of its adoption the twomonth limitation period in which a bylaw must be set aside is an unreasonable and arbitrary time limit in the context of an action brought to recover a benefit conferred under an *ultra vires* bylaw. The provision for a month's notice of the action may be a useful safeguard for a municipality in a case involving a right to damages, in that the municipality might reenact the *ultra vires* bylaw in a proper form, or seek to mitigate the harm its illegal action has caused. However, it serves no useful function where the municipality is obliged to return a benefit it has received by the unlawful exercise of its powers.

We have concluded that section 318 of the *Municipal Act* should not apply to claims for the return of money or other benefits paid under an *ultra vires* bylaw. It will often be impossible to comply with its terms. A plaintiff may not even be aware that the bylaw has been passed, or of its applicability to his business until long after the twomonth period within which the application to set aside the bylaw must be heard has expired. Even if a plaintiff was aware of the bylaw, it is unreasonable to expect him to challenge the bylaw solely to preserve his right to claim the return of money paid under it at some future date. Moreover, the essence of the claim is the plaintiff's mistaken assumption concerning the vires of the bylaw, and it is likely that most plaintiffs who presume a bylaw to be valid if called upon to pay money under it would presume it to be valid if called upon to address that issue when it is enacted.

However appropriate the protection afforded a municipality in section 318 in a claim for damages, the position of a municipality which exacts money under an *ultra vires* bylaw is substantially different. Section 318 does not insulate a bylaw from attack. The plaintiff may always bring an action for a declaration. Once the bylaw is declared invalid, it seems unfair to let the municipality retain money it has collected, but not spent, merely because the bylaw was not quashed in the right fashion. The receipt of money *prima facie* enriches a municipality, and it lies within the municipality's own legislative and administrative responsibilities to determine when and whether money should be levied fran a citizen. Where it chooses to do so in an illegal fashion, the unfairness of denying the plaintiff a right to recover merely because the bylaw has not been set aside under section 313 of the *Municipal Act* is manifest.

Other provisions of the *Municipal Act* and of the *Vancouver Charter* also provide for preconditions to relief. Section 294(1) of the *Vancouver Charter* provides, for example, for at sixmonth limitation period for claims against the city in respect of the "unlawful doing of anything" which the city might lawfully have done "if acting in the manner prescribed by law." A similar provision may be found in the *Municipal Act* as section 754. We do not think that these limitation periods area objectionable. As Hinds J. pointed out in *Wilson* v. *Surrey*, these sections apply only to bar claims based on technical infringements of the relevant Act or procedures for a municipality. We are of the view that a person who seeks to take technical objections to bylaws should do so expeditiously.

The Commission recommends:

2. *That the* Municipal Act *and the* Vancouver Charter *be amended to provide that:*

   *(a) a person who has paid money, transferred property, or conferred a benefit upon, a municipality [city] pursuant to an ultra vires bylaw, order, resolution or regulation of that municipality [city] is entitled, subject to 2(b) and 2(c), to the return of the money, property, or benefit so paid, transferred, or conferred;*

   *(b) in a claim brought pursuant to Recommendation 2(a), the municipality [city] may rely on any defence which would apply had the payment been made under a mistake of fact;*

(c) *any claim against a municipality [city] in respect of money paid, property transferred, or a benefit conferred pursuant to an ultra vires bylaw, order, resolution or regulation of that municipality [city] is extinguished after the expiration of two years after the date on which the payment, transfer or benefit was made or conferred.*

*3. That the* Municipal Act *be amended to provide that:*

(a) *an action may be brought pursuant to recommendation 1 notwithstanding that the bylaw, order, resolution or regulation:*

(i) *has not been set aside pursuant to section 313 or otherwise, and*

(ii) *notice has not been given to the municipality concerning the action.*

(b) *an action pursuant to recommendation 1 shall be brought against the municipality alone, and not against the person acting under the bylaw, order, resolution or regulation.*

We think it important to note that Recommendations 2 and 3 are intended to put municipalities in a better position than they would occupy under either the current law or under our first proposal. We are aware that the result is to confer some advantage upon municipalities at the expense of potential plaintiffs. We think that result is justified in view of the practical problems faced by municipalities. In particular, we think that the twoyear limitation period strikes an appropriate compromise between the interests of municipalities and those with whom they deal.

We would also like to stress that Recommendations 2 and 3 are severable. They depend upon our estimation of the problems facing municipalities. If it is a thought that we have been oversolicitous of their position, simply omitting to enact Recommendations 2 and 3 would place municipalities in the same position as private citizens.

If the latter course is taken, we think that specific provisions should be enacted to put it beyond doubt that section 318 does not apply to restitutionary claims for the recovery of benefits conferred under an *ultra vires* bylaw. As we noted earlier, section 3.18 is an arbitrary and unfair limitation on claims brought as a result of reliance on an *ultra vires* bylaw.

7. ___Transition

In our Working Paper, we noted that our first recommendation had the effect of reversing a common law rule of some antiquity. In particular, we were concerned with the possible effect on compromises of claims if our proposal operated retroactively. Although in the main we are of the view that the law of restitution and the available defences are adequate to prevent jinjustice, on a purely practical basis we think it undesirable to open up the possibility of claims being advanced in respect of transactions which both plaintiff and defendant might reasonably regard as having been closed. It might also be argued that as a general "cause of action" in respect of mistakes of law does not exist at present, implementation of our recommendation will lead to the creation of "causes of action" that "arise" on the date of implementation. Under this argument, it would be possible to bring an action for up to six years (and perhaps longer) after legislation implementing our recommendation is brought into force, no matter when the mistake occurred. We are anxious to foreclose this argument. Similar concerns are relevant to the application of our second and third recommendations. We have concluded that their application should be limited in a similar fashion.

The Commission recommends that:

4. (a) *Nothing in Recommendation 1 should permit a claims for relief from the consequences of a mistake of law to be brought in respect of a mistake occurring before the legislation implementing that recommendation comes into force, save to the extent that relief was available prior to that date.*

(b) *Nothing in Recomendations 2 and 3 should permit a claim to be brought in respect of money paid, property transferred or a benefit conferred pursuant to an ultra vires bylaw before the legislation implementing those recommendations comes into force, save to the extent that relief was available prior to that date.*

8. *Application of the Recommendations*

The effect of our recommendations, When implemented, would be to abrogate the common law rule in favour of the general rules governing restitutionary counts. In view of several comments we received raising questions concerning the operation of our recommendations, we think it appropriate to work through a riumber of hypothetical cases to illustrate the manner in which our recommendations would apply.

*Example 1*

> A receives a credit card statement from his bank. He knows he did not make the purchases outlined in the statement, but pays in the mistaken belief that the *Bank Act* obliges him to.

A has made a mistake of law, and brings an action for money had and received. Under our proposal, the bank would no longer be able to resist the claim solely on the ground that A made a mistake of law. Instead, regard must had to the principles governing similar claims based on mistakes of fact. If he had made an error of fact, A's claim would be based on unjust enrichment. On this bare set of facts, the conferral if the benefit was not officious, and *prima facie* the bank would be unjustly enriched if the money were not repaid. A is therefore *prima facie* entitled to the return of his money. However, had the mistake been one of fact, some argument might have been raised whether the mistake was sufficiently "fundamental." Three points would arise if the bank advanced such an argument in this case. A might argue that the "fundamental" test either should not apply in Canada, or that it is no longer good law since Robert Goff J.'s decision in *Barclay's Bar Ltd*. v. *W.J. Simms Son & Cooke (Southern) Ltd*., which established that the true test is merely whether the mistake caused the payment. A might also argue that the "fundamental" test should not apply to mistakes of law. Thirdly, A might argue that his mistake was "fundamental." Assuming that the bank has no other defence, A would probably win.

*Example 2*

> A is B's fiancee. B has guaranteed C's debt. C's creditor, D requests B to pay C's outstanding balance. A knows that D has prejudiced B's rights by releasing a chattel mortgage in his favour over C's automobile, but does not know that this would absolve B from liability under the guarantee. A pays D in order to save B from being sued by D. A discovers the guarantee was not enforceable and desires the return of his money.

In this case, there are two possible defendants D and C. A may wish to bring an action to recover the money paid against either party. Since D cannot merely plead A's mistake of law, the main issue in an action against D would be whether A may be characterized as a selfserving intermeddler. It is well established that the retention of a benefit conferred upon a defendant as a result of officious conduct is not unjust. In *Owen* v. *Tate* relief was denied on that very ground on analogous facts. A paid the money to save B the trouble of a lawsuit, and C's creditor may very well argue that he got exactly what he paid for. Alternatively, D may argue that A paid the money as part of a compromise of D's claim, and that since he acted in good faith, the compromise should not be upset.

In a claim brought against C, C may argue that no benefit was conferred upon him by A. This argument will turn on whether C's liability has been properly discharged by A's payment. A may counter with the contention that, notwithstanding the lack of any express assignment by B, he should be regarded as being subrogated to B's rights under the guarantee, and that its unenforceability does not concern C.

*Example 3*

> In an effort to keep municipal taxes low, the municipality of Suburbia passes a bylaw, commonly understood to be valid, which requires payment of a flat fee of $50,000 to secure permission to develop land in Suburbia. A developer successfully contends that the bylaw is *ultra vires*. Learning of this decision, Big Construction Co. brings an action in money had and received to recover $50,000 paid under the bylaw to receive requisite permission.

Under our recommendation l(a) and 2(a), the municipality could not merely plead "mistake of law." Big Construction Co. is *prima facie* entitled to the return of its money under recommendation 2, provided the action was brought within the twoyear limitation period (recommendation 2(c)). However, Suburbia may raise a number of defences (recommendation 2 (b)). It might allege, for example, that the money paid was not at the plaintiff's expense, since the extra cost was passed on to the eventual purchaser of homes built by Big Construction Co., which cannot therefore show that it has suffered any detriment. Suburbia might also show that it materially changed its position by installing services on the plaintiff's land, or alternatively might be able to establish that being forced to repay the uoney would be neither "fair or just" within the broad ambit given those words by recent British Columbia authority. Lastly, Suburbia might assert a counterclaim on its own behalf on the ground that it has improved the plaintiff's property under the mistaken impression that it was entitled to retain the plaintiff's payment.

*Example 4*

> A and B are governed by legislation which they both believe forbids the sale of gasoline at prices in excess of 35cts per litre. In fact, the, legislation does not regulate the sale of gasoline. A seeks to avoid a contract with B to supply gasoline for two years at 35cts/litre.

Under our proposal B will not be able to resist A's claim solely on the ground that the parties made a mutual mistake of law. Rather B will have to address the more difficult issue of the correctness of the decision of the English Court of Appeal in *Solle* v. *Butcher*, in which it was held that in certain cases a court of equity may avoid a contract entered into under a mistake. Is a contract entered into under a fundamental mistake voidable?

The discussion of problems raised by these examples is not intended to be exhaustive, and undoubtedly different analyses of these issues might be advanced. However, we think that it is clear that the abrogation of the general rule respecting mistake of law will not result in the courts being without guidance on the principles which should govern restitutionary claims. Rather the removal of the artificial bar on recovery will have the effect of permitting judges to apply the general law of restitution in an open and forthright manner.

# CHAPTER VI RECOMMENDATIONS

## A. Summary of Recommendations

The recommendations made in this Report are as follows:

1. *The* Law and Equity Act *be amended by the addition of a provision comparable to the following:*

*Mistake of Law*

(a) *Relief from the consequences of a mistake shall not be denied by reason only that the mistake is one of law or mixed fact and law.*

(b) *When relief is claimed from the consequences of a mistake of law or mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact.*

2. *That the* Municipal Act *and the* Vancouver Charter *be amended to provide that:*

(a) *a person who has paid money, transferred property, or conferred a benefit to or upon a municipality [city] pursuant to an ultra vires bylaw, order, resolution or regulation of that municipality [city] is entitled, subject to 2(b) and 2(c), to the return of the money, property, or benefit so paid, transferred, or conferred;*

(b) *in a claim brought pursuant to Recommendation 2(a), the municipality [city] may rely on any defence which would apply had the payment been made, the property transferred or the benefit conferred under a mistake of fact;*

(c) *any claim against a municipality [city] in respect of money paid, property transferred, or a benefit conferred pursuant to an ultra vires bylaw, order, resolution or regulation of that municipality [city] is extinguished after the expiration of two years after the date on which the payment, transfer or benefit was made or conferred.*

3. *That the* Municipal Act *be amended to provide that:*

(a) *a claim may be brought pursuant to re.commendation 2 notwithstanding that the bylaw, order, resolution or regulation:*

(i) *has not been set aside pursuant to section 313 or otherwise, and*

(ii) *notice has not been given to the municipality concerning the action.*

(b) *a claim pursuant to recommendation 2 shall be brought against the municipality alone, and not against the person acting under the bylaw, order, resolution or regulation.*

4. (a) *Nothing in Recommendation 1 should permit a claim for relief from the consequences of a mistake of law to be brought in respect of a mistake occurring before the legislation implementing that recommendation comes into force, save to the extent that relief was available prior to that date.*

(b) *Nothing in Recomendations 2 and 3 should permit a claim to be brought in respect of money paid, property transferred or a benefit conferred pursuant to an ultra vires bylaw, before the legislation implementing those recommendations comes into force, save to the extent that relief was available prior to that date.*

We have concluded that the implementation of these recommendations will place the law respecting benefits conferred under a mistake of law on a rational and reasonably predictable footing. The current law has long been a source of dissatisfaction.

## B. Acknowledgements

The preparation of this Report would have been impossible without the dedicated work and exhaustive scholarship of Mr. Fred Hansford, Assistant Counsel to the Commission. Mr. Hansford was responsible for the research involved in this project, for the preparation of the Working Paper which preceded this Report, and for the preparation of this Report. We wish here to record our considerable inddbtedness to him.

We would also like to acknowledge the invaluable assistance we have received from our correspondents. Their extensive reviews of the proposals contained in our Working Paper contributed substantially to the development of our Final Report.

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