AN EXAMINATION OF MISTAKEN PAYMENTS: HYDRO ELECTRIC COMMISSION OF TOWNSHIP OF NEPEAN v. ONTARIO HYDRO

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> . . . the distinction between mistakes of fact and mistake of law originated in the year 1802. . . . there are good reasons for disregarding the distinction as a mere notion originating in a dictum incomprehensible to the greatest minds, having no support in reason, producing hopeless confusion and incapable of practical application.[1]

On March 2nd 1982, the Supreme Court of Canada[2] by a narrow three to two majority rendered a decision which has profound implications for the law relating to payments made pursuant to a mistake of law.

The facts of the case can be briefly stated. Ontario Hydro was a body empowered by statute to levy certain fees on user municipalities for the amount of power supplied to them. Specifically, section 76 of the Power Corporation Act[3] provided that the price payable for power by any municipal corporation would be the "cost to the corporation . . . [Ontario Hydro] . . . of supplying and delivering power to the municipal corporation. . . .". That cost included a proportionate share of Ontario Hydro's overhead expenses including insurance, depreciation and so forth. Because Ontario Hydro's capital works were financed through borrowing, the legislation allowed the defendant corporation to establish a "sinking fund" into which user municipalities would make annual payments for a period of 40 years in order to cover the cost of the capital works.

By the 1950's, the original user municipalities had fulfilled their 40 year payment obligation and Ontario Hydro felt that some credit mechanism should be available to recognize their contribution, in contrast to that of newer municipalities which entered the system without having contributed to the earlier capital works. Ontario Hydro took it upon itself to award older municipalities a "return on equity" credit, which it financed by the imposition of a "cost of return" charge to those municipalities that had not yet contributed to the sinking fund for 40 years. It was held at trial, on appeal, and in the Supreme Court of Canada that such "cost of return" charges were not authorized by section 76 and were therefore *ultra vires*. The plaintiff municipality brought an action to recover $921,463 which it had paid on the basis of the *ultra vires* billing scheme between the years 1966 and 1973. Ontario Hydro counterclaimed for $359,512 which it alleged to be owing by the municipality for the period 1974 to 1978.

Dickson J. who, with Laskin C.J.C., dissented in the Supreme Court of Canada decision, summarized the matter by saying:[4]

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1. R. R. Foulke, "Mistake in the Formation and Performance of a Contract" (1911) 11 *Colum. L. Rev. 229 at 320.*
2. *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro* (1982) 132 D.L.R. (3d) 193.
3. Power Corporation Act, R.S.O. 1980, c.384, s.76.
4. *Supra* n. 2 at 195.

> [T]he demand for payment was not authorized by the Act governing the operations of Ontario Hydro. Nepean was under no legal, moral or other obligation to make the payments. The Ontario Court of Appeal agreed. The Members of this Court hold the same view. Ontario Hydro exacted the payments by mistake and Nepean paid by mistake. Nepean wants its money back. It would seem to be a simple case. To the layman, the issue would be a clear one. Nepean should succeed. Good conscience and plain honesty would require Ontario Hydro to repay. To the lawyer trying to follow confused and contradictory authority the matter is not that simple. Two Courts, applying what they conceive to be the law, have denied Nepean recovery.

The origin of the mistake of law rule is well documented in the literature[5] and it is not the purpose of this paper to examine the rule in great historical detail. However, the comments of Lord Ellenborough in 1802 in *Bilbie* v. *Lumley*[6] are generally considered to stand as the original enunciation of the principle that money paid under the influence of a mistake of law is not recoverable. In dismissing an underwriter's action for money had and received, Lord Ellenborough stated that:[7]

> every man must be taken to be cognizant 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.

The rule that a payment made under a mistake of law, as opposed to a payment made under a mistake of fact, is irrecoverable, has often been criticized by the courts and by legal scholars as incorrect in principle and as requiring an untenable distinction. Unfortunately, courts have refused a direct assault on the mistake of law doctrine itself, and judicial attempts to avoid the rule have used collateral means. As a consequence of this approach, an extensive body of exceptions to the *Bilbie* principle have arisen.

The application of the mistake of law rule depends on an ability to distinguish a mistake of law from a mistake of fact. One writer[8] contends that this distinction "has never been clearly defined", and "given the state of the law in this area, seeking a definition in the cases may easily lead into darkness and despair".[9] On occasion the courts have seized upon this distinction and characterized seemingly obvious mistakes of law as mistakes of fact in order to avoid the rigours of the *Bilbie* principle.[10]

The courts have subdivided the general area of mistake of law into general rights and private rights.[11] As one commentator explains:[12]

> a mistake concerning a private right of ownership, or the relative and respective rights of the parties is a matter of fact and therefore the mutual mistake of the parties in relation to such matters would permit the court to exercise its jurisdiction to set aside a contract for common mistake.

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5. *See*, for example, Goff and Jones, *The Law of Restitution* (1966); *also* Knutson, "Mistake of Law Payments in Canada: A Mistaken Principle", 10 *Man. L.J.* 24.
6. (1802) 102 E.R. 448.
7. *Id.* at 449-50.
8. McTurnan, "An Approach to Common Mistake in English Law" (1963) 41 *Can. B. Rev.* 1.
9. *Id.* at 32.
10. *See*, for example, *George (Porky) Jacobs Enterprises Ltd.* v. *City of Regina* (1964) 44 D.L.R. (2d) 179 (S.C.C.).
11. *Cooper* v. *Phibbs* (1867) 16 L.T. 678.
12. Needham, "Mistaken Payments: A New Look at an Old Theme" (1978) 12 *U.B.C. Law Rev.* 159.

In their zeal to restrict the comprehensiveness of the mistake of law doctrine, courts have also refused to apply the rule against recovery where the payment has been fraudulently induced,[13] or where money has been mistakenly paid to an officer of the court or to a person acting *colore officii*.[14]

Perhaps the most significant circumvention of the mistake of law rule is the defence of compulsion. When a payor is able to show that he has been compelled to make a payment to the payee, he will be able to recover that amount even though the mistake might be characterized as one of law. This result may be the expression of the general principle that payments which are made involuntarily are recoverable. Unfortunately, a great deal of uncertainty surrounds the notion of "compulsion". It is clear that the mere demand of money under the authority of law by someone who has mistaken the scope of legislation does not make a payment involuntary. Even if such an assessment later turns out to be *ultra vires*, a payor who yields to the demand will find the defence of compulsion unavailable.[15]

Recent cases seem to point to a broader and more flexible notion of compulsion than in previous cases. In *Eadie* v. *Township of Brantford*,[16] the plaintiff owned a parcel of land which, because of a prolonged illness and period of hospitalization, he desired to sell. In order to effect a sale, Mr. Eadie was required to obtain subdivision approval from the municipality. On several earlier occasions the plaintiff had made inquiries regarding subdivision and had decided that a $400 per lot severance fee as well as various land concessions which he would be required to make to the municipality were unreasonable. Subsequent to his illness and hospitalization, Mr. Eadie became apprehensive about his wife living alone on the property and he decided that he must effect subdivision and sale at the earliest convenience. In spite of his objections to the imposed conditions, Eadie consented because of his urgent need to sell the property. Over a year later when the bylaw was declared *ultra vires*, Eadie sought to recover his $800 severance fee and the surrendered property. The Supreme Court of Canada allowed recovery and stated that Eadie was under a 'practical compulsion' when making the payment arising out of an 'urgent and pressing necessity'.[17] It was argued by counsel for the municipality that in order to allow recovery for money paid under a mistake of law on the basis of compulsion, the plaintiff must have been faced with a situation where there was no alternative available to him. Spence J. disagreed with this contention and stated that a practical compulsion alone was necessary. Although other courses of appeal were open to Eadie, such avenues would[18]

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13. *Fowler* v. *Township of Spallumcheen* [1930] 3 W.W.R. 12 (B.C. Co.Ct.).
14. *Re Kelly* (1980) 27 O.R. (2d) 478 (Ont. S.C.).
15. *See Cushen* v. *City of Hamilton* (1902) 4 O.L.R. 265 (Ont. C.A.) for a very narrow interpretation of the compulsion defence.
16. (1967) 63 D.L.R. (2d) 561 (S.C.C.).
17. *Id.* at 570.
18. *Id.* at 572.

> . . . of necessity have been so fraught with delays that the sale . . . 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 circumstances.

The characteristic feature of the compulsion defence has been for the payor to say that notwithstanding the absence of his consent, he was obliged to pay in order to deflect some wrongfully applied pressure.[19] It should be noted that *Eadie* goes somewhat further because the plaintiff was not directly compelled to enter the agreement with the municipality. Although it was highly desirable for Eadie to sell his house, the only real 'compulsion' could be said to arise from the circumstances of the plaintiff's illness and not from any actions of the municipality.

One final major exception to the mistake of law rule emanates from the judgment of the Privy Council in *Kiriri Cotton Co. Ltd.* v. *Dewani.*[20] The case dealt with two private parties whose landlord-tenant relationship was subject to the provisions of a Uganda Rent Restriction Ordinance. In consideration of obtaining a lease from the respondents, the appellants contracted to pay a premium of 10,000 shillings. At the time of demand and payment neither party realized such demand to be illegal as contrary to the statutory provisions. In allowing recovery, Lord Denning stated that even if a contract had been executed, the payor was entitled to recovery of the money, provided that he was not *in pari delicto* with the payee. Here the parties could not be said to be on an equal footing because the Rent Restriction Ordinance was passed with the object of protecting the tenant and the duty of observing the law was placed by that legislation on the shoulders of the landlord:[21]

> The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. 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 — they are not *in pari delicto* and the money can be recovered.

The Supreme Court of Canada has recognized this *in pari delicto* exception[22] and it appears that this exception is advanced in almost all mistaken payment cases in Canada. This author believes that the willingness of courts to utilize the *in pari delicto* exception with increasing frequency to award recovery further evidences a judicial distaste for the mistake of law rule. It is against this background that *Ontario Hydro* must be considered.

In its pleadings, Nepean alleged that it was compelled to make payments to the defendant corporation, and that Ontario Hydro had the obligation to administer the Power Corporation Act thereby being primarily liable for the mistaken payments. In the alternative, Nepean argued for restitutionary recovery on the basis of the corporation's unjust enrichment. Because the Court of Appeal delivered a short oral judg-

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19. *Maskell* v. *Horner* (1915) 3 K.B. 106.
20. (1960) A.C. 192.
21. *Id.* at 204.
22. *See*, for example, *Eadie* v. *Township of Brantford*, *supra* n. 16; *George (Porky) Jacobs Enterpises Ltd.* v. *City of Regina*, *supra* n. 10.

ment and saw fit not to disturb the findings of the lower court, it is important to analyze the judgment at trial. It was held at trial[23] that Ontario Hydro exacted from Nepean payments to which it had no right by virtue of a billing scheme not authorized by statute. Craig J. determined that the mistaken payments were made "voluntarily" in the sense that no compulsion could be said to have existed. Secondly, while the parties were held not to be *in pari delicto*, the primary obligation and responsibility to observe the requirements of the legislation resting with Ontario Hydro, recovery was denied to the plaintiff for the reason that Ontario Hydro did not receive any benefit or beneficial interest. The billing scheme provided that all 'return on equity' credits were financed directly by 'cost of return' charges so that the defendant corporation retained nothing for its own benefit. As a creature of statute, Ontario Hydro was specifically required to be a non-profit corporation whose existence was premised on providing power to the municipalities at the lowest possible cost. All amounts received under the impugned scheme by Ontario Hydro were passed onto the older municipalities in the form of lower power bills.

On the alternate pleading of restitution, Craig J. determined the matter on the equities and concluded against recovery for three reasons. First, Ontario Hydro would be unable to recover the amounts paid out to the older municipalities, in order to satisfy a judgment. Secondly, Nepean had ample opportunity to investigate its legal rights in the first few years of the new billing scheme rather than wait eight years to bring an action. Finally, Ontario Hydro could not really be said to have received a benefit, for all of the reasons discussed above.

The majority of the Supreme Court of Canada in a judgment delivered by Estey J.[24] upheld the decision of both lower Courts. Estey J. concluded that the billing scheme adopted by Ontario Hydro was *ultra vires* and, consequently, that a mutual mistake of law had occurred. He then proceeded to review the law of payments made under a mistake of law. Throughout the majority judgment in *Ontario Hydro* there is a noticeable failure to acknowledge either the pervasive criticisms of legal scholars regarding the *Bilbie* principle or the judicial trend of creating exceptions to the mistake of law rule where such a bar to recovery appears inconvenient and unjust. The majority judgment merely restricts and redefines the previously recognized escape routes from the general rule.

The majority of the Supreme Court of Canada was reluctant to accede to the proposition that Nepean had been compelled to make the requested payments to Ontario Hydro. The invalid billing scheme had been adopted in 1966 and immediately became the subject of much discussion and debate between the parties. Nepean, however, saw fit not to commence an action for eight years. Furthermore, Nepean had protested the payments several times prior to bringing an action and had never availed itself of the statutory appeal procedure contained in the legislation. Finally, Nepean had discontinued making the invalid payments months before the court action and yet it had suffered no detriment of any sort.

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23. (1978) 92 D.L.R. (3d) 481 (Ont. High Ct.).

24. *Supra* n. 2 at 219.

With respect, it is submitted that Estey J. dealt with the *in pari delicto* rule in a very unsatisfactory manner. It appears that it was the intention of the majority to completely preclude the *in pari delicto* rule from applying to this type of action. Estey J. stated that on the facts no underlying contract existed between Nepean and Ontario Hydro, so that the situation in *Kiriri Cotton* was clearly distinguishable. As well, Estey J. was of the opinion that the Power Corporation Act, unlike the rent control legislation in *Kiriri*, could not be said to have been passed for the benefit of user municipalities. After pointing out the factual difficulties of applying the *in pari delicto* exception from *Kiriri*, Estey J. proceeded to discuss the right to recover money paid under illegal transactions.

His Lordship suggested three situations where the right to recover money paid under illegal transactions could arise. First, offences prohibited by statute, or what Estey J. believes are truly illegal or criminal acts, were contrasted with the second situation, actions which are void and without legal consequences such as gaming contracts. Thirdly, Estey J. made it quite clear that actions taken by statutory bodies which are *ultra vires* cannot be considered to be illegal in the first sense. Undoubtedly *Kiriri* falls into the category of the offences under statutes proscribing certain conduct. Estey J. stated that:[25]

> [the] principles of law pertaining to the rights of parties to illegal transactions has no application [here] because these relate to transactions contrary to public policy or prohibited by statute . . . such is of course not the case here. We are concerned with unauthorized acts and mutual mistake with respect thereto . . . Any exception to the general rule barring recovery of monies paid in an illegal transaction when the parties are not in *pari delicto* does not apply here because neither party has committed a delict . . . this cannot be classified as an illegal transaction as neither party has offended any prohibition in law.

Plaintiff's counsel had raised the Supreme Court of Canada decision in *Eadie* as a precedent favourable to its position. His Lordship opted to clarify the meaning of the *Eadie* decision. Estey J. stated that there has been an unfortunate tendency to mingle the doctrines of mutual mistake and compulsion in the courts. Estey J. believed that Eadie was allowed recovery on the basis of compulsion alone and that "the presence of mistake of law in the parties to the transaction was superfluous as the entitlement to recovery arose on the findings of payment under practical compulsion."[26] By implication from the comments of His Lordship, Mr. Eadie would not have been allowed recovery on the basis of mistake of law by itself. This writer respectfully disagrees with the comments of Estey J. because they fail to recognize the underlying rationale of the compulsion exception. There is no reason to infer from the fact of payment alone that a payor has voluntarily submitted to the demand. Whether a payment is made under a mistake of fact or law does not alter the essential element of voluntariness. Furthermore, in *Eadie* the parties to the contract were clearly operating under a mistake of law as to the ambit of the municipal bylaw. It appears that Spence J. was correct in entitling Eadie to recovery on the basis of money "paid under compulsion and in mutual mistake of law."[27]

25. *Supra* n. 2 at 239.
26. *Supra* n. 2 at 241.
27. *Supra* n. 19 at 573.

The Supreme Court of Canada decision in *Ontario Hydro* is a very disappointing one. Once again, the Court has felt obliged to skirt around the real issues at stake in the principle of payments made under a mistake of law rather than provide guidance and direction in this contentious and much criticized area of law. The decision is based on factually restricted interpretations of exceptions and alternative constructions of issues which clearly do not lie at the heart of the matter.

In 1954 the Supreme Court of Canada[28] recognized the independent nature of the principles of restitution as they are based on the general notion of unjust enrichment in Canada. One writer points out that the unjust enrichment principle[29]

> . . . cannot be regarded as a rule of law, for the law does not allow recovery in all cases . . . It is best regarded as an organizing principle which both explains and expresses the goal of a large area of law in much the same way as the neighbor principle in the law of negligence.

If the harsh orthodox mistake of law doctrine is capable of survival in Canadian courts, it will have to deal with the formidable common sense attractions of the principle of unjust enrichment. When a person mistakenly pays money to someone who has no right to receive it, the payee has been unjustly enriched at the payor's expense and should be required to return the money, unless there is some reason by virtue of the equities between the parties why this result cannot obtain.

As Fridman points out:[30]

> the law is enforcing the idea of preventing unjust enrichment and negating the alleged rationales for the doctrine of not allowing recovery where there has been a payment made under a mistake of law. Clearly the law, in its present state, is confused and ambivalent.

Dickson J., writing the dissenting opinion on behalf of himself and Laskin C.J.C. in *Ontario Hydro*, recognized the difficult state of the law and undertook a broad examination of the mistake of law doctrine. Most of Mr. Justice Dickson's judgment was an assessment of the validity of the distinction between mistake of fact and mistake of law. In an innovative decision, Dickson J. canvassed the opinion of a broad spectrum of textbook writers and other legal scholars and arrived at several important conclusions. First, Dickson J. decided that the mistake of law rule developed partly "due to its coincidence with the beginning of a period of rigidity in contract law",[31] and has become firmly rooted as a result of the more modern justification of stability in contractual and commercial transactions. Furthermore, upon tracing the origins of the mistake of law rule, Dickson J. concluded that the maxim *ignorantia lex non excusat* enunciated in *Bilbie* had the effect of imposing a principle of criminal or public law upon the area of contract law. As a consequence, Dickson J. stated:[32]

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28. *Deglman* v. *Guaranty Trust Co and Constantinea* (1954) 3 D.L.R. 785 (S.C.C.).
29. Percy, "Restitution" (1979) 2 LESA lectures 97 at 101.
30. Fridman, *Restitution* (1982) 164 at 169.
31. *Supra* n. 2 at 203.
32. *Supra* n. 2 at 204.

> there is a distinction to be drawn between illegal contracts and contracts entered into under mistake of law. The public policy issues are not the same and the application of an essentially punitive maxim should not preclude the Court from giving redress.

Pointing out that certainty and stability in contractual relations cannot be the sole overriding principle guiding the Courts, Dickson extracted a classic quotation from English authority to illustrate that:[33]

> . . . 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.

Dickson J. also concluded, on the basis of the authority of textbook writers and other commentators, that the distinction between mistake of fact and mistake of law ought to be eliminated and that the "question of mistake of law should be seen as just one more category in the general law of unjust enrichment."[34] According to Mr. Justice Dickson's view, if a defendant has been unjustly enriched at the expense of the plaintiff, then he should *prima facie* be forced to disgorge the benefit obtained.

Because Dickson J. rendered the minority decision in *Ontario Hydro* by placing mistakes of fact and law on the same footing and viewing them as categories of recovery under the general law of unjust enrichment, it was unnecessary for him to deal with the *in pari delicto* exception. His Lordship stated that he believed the primary obligation for application of the legislation rested with Ontario Hydro; however, this formed no basis for the minority judgment.

Dickson J. considered the question of whether there were any equitable reasons which would preclude Nepean from recovering monies paid to Ontario Hydro under the mistake of law. First, Dickson J. believed that Ontario Hydro had in fact received a benefit because between the immediate parties it had wrongfully overbilled Nepean. His Lordship would not accede to the proposition that Ontario Hydro had credited other municipalities with the amounts received from the plaintiff because:[35]

> the determination as to whether Ontario Hydro received a benefit should be made in relation to the transactions between Nepean and Ontario Hydro rather than in relation to the ultimate position of Ontario Hydro under the new power costing system.

Essentially, Dickson J. felt that Ontario Hydro could not be allowed to say that it had wrongfully taken Nepean's money but could nevertheless escape repayment because of its second mistake of crediting the money to the accounts of other municipalities. Secondly, Dickson J. strongly disagreed with the view of Craig J. that liability could not be imposed upon Ontario Hydro because of the difficulties attendant in restoring the *status quo ante*:[36]

> Ontario Hydro did not plead that it lacked the funds to satisfy any judgment that Nepean might obtain . . . in my view the trial Judge in denying Nepean's claim was wrong in law in considering the possible source of funds to satisfy any judgment Nepean might obtain.

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33. *Fibrosa Spolka Akcyjua* v. *Fairbairn Lawson Combe Barbour Ltd.* (1943) A.C. 32 at 61.
34. *Supra* n. 2 at 207.
35. *Supra* n. 2 at 212-13.
36. *Supra* n. 2 at 215-16.

His Lordship added that even if this were a proper consideration, it would conceivably be capable of rectification by virtue of the legislation which allows Ontario Hydro to correct errors in its power bills and thereby collect back the amount of a judgment.

Finally, Dickson J. firmly rejected the contention of Craig J. that Nepean was to be faulted for failing to act and to investigate its legal rights and take legal advice in the first year or two of the system. Dickson J. stated that having rejected the defenses of estoppel, *laches* and acquiescense, no obligation could be said to have fallen upon Nepean to conduct an independent investigation as to the statutory powers of Ontario Hydro.

Regarding the notion of voluntariness, Dickson J. was somewhat unclear in his view. His Lordship stated that Nepean's claim could not be defeated on the ground that it was a voluntary payment because voluntariness is not a factor when the parties are not *in pari delicto* or when the recipient is the one primarily responsible for the mistake. It will be noted that Dickson J. did not consider the determination of whether the parties were *in pari delicto* to be necessary to the judgment. This author submits that voluntariness remains a factor to be considered when assessing the equities between the parties, notwithstanding that it may not be determinative of the issue.

There is a troubling expression by Estey J. at the conclusion of the majority judgment which will no doubt be a source of judicial distinction in future cases. His Lordship stated:[37]

> since writing the foregoing I have had the opportunity of reading the reasons of my colleague Dickson J. The thrust of the appellant's submission was centered on the question as to whether the parties to the mistake of law were *in pari delicto*. Unjust enrichment is mentioned in its factum only with reference to the argument that the appellant and the respondent were not *in pari delicto* . . . accordingly my considerations have been confined to the operation of the doctrine of mistake of law as argued.

This statement leads the reader to believe that the basis and rationale for Mr. Justice Dickson's comprehensive judgment may not even have been considered by Estey J. although it is difficult to see how the question of recovery for mistake of law could be considered in isolation from principles of unjust enrichment.

Most legal writers and critics have expressed their dissatisfaction with the policy reasons for maintaining the mistake of law rule. Estey J. contended that the authorities relating to mistake of law are "founded on good sense and practicality"[38] and that "certainty in commerce and in public transactions . . . is an essential element of the well being of the community."[39] This writer suggests that certainty in commerce and in public transactions would be more readily facilitated by a rule of law with fewer exceptions and circumventions. Estey J. further stated that the narrower rule of recovery for mistake of law as opposed to mistake of fact

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37. *Supra* n. 2 at 243.
38. *Id.*.
39. *Id.*.

"springs from the need for this security and the consequential freedom from disruptive undoing of past concluded transactions."[40] Other writers believe that there are no grounds in either policy, reason or justice which are capable of sustaining and providing a rationale for the present state of the law.

Specifically, it has been argued that since both payor and payee are assumed to know the law equally, there is no reason to prefer the latter over the former. Mr. Justice Estey's argument regarding commercial expediency is weak in that it invariably allows the defendant to benefit and "tends towards the simplistic, naive, and subservient acceptance of the notion that 'authority' must always be right and should never be questioned."[41]

It is of course unclear what effect *Ontario Hydro* will have on the law of mistaken payments. It is hoped that other Canadian courts will adopt the reasoning of Dickson J. and award recovery on the basis of unjust enrichment. The constraints to recovery under this *prima facie* approach will involve an examination of the equities of each case. Clearly, Estey J. has by virtue of his closing remarks, left a door open for other Courts to distinguish *Ontario Hydro*. If the majority approach is adopted, recovery may be possible on the ground that a payment was made under compulsion; or where illegality exists recovery may be available on the basis of the *in pari delicto* exception. Certainly it will be much more difficult for an aggrieved party to fit within the exceptions to the mistake of law rule as a result of their redefinition by Mr. Justice Estey.

40. *Id.*.

41. *Supra* n. 25 at 169.