CASE COMMENT

TOWARDS RECOVERY FOR PAYMENTS MADE UNDER A MISTAKE OF LAW: AIR CANADA v. BRITISH COLUMBIA[1]

I

At its simplest, the "mistake of law doctrine" holds that money paid under a mistake of law (as opposed to one of fact) is irrevocable. As any restitution lawyer can tell you, however, the doctrine is actually anything but simple. The amount of confusion which it has generated over the years is exceeded only by the amount of contempt which it has engendered. "Monstrous",[2] "most unfortunate"[3] "decrepit [and] unsupportable on principle"[4] — these are just some of the more colourful epithets which have been applied to the doctrine. Fortunately, the Supreme Court of Canada has, in *Air Canada v. British Columbia*, taken great strides towards dispatching a rule which for too long has produced unjust results and ill-reasoned judgments.

The issue arose in *Air Canada* because the Province of British Columbia had between 1974 and 1976 collected revenue pursuant to the *Gasoline Tax Act*. The Act taxed every purchaser of gasoline sold in British Columbia for the first time after its manufacture or importation into the province. Mr. Justice La Forest, delivering the majority opinion,[5] struck down the legislation as being *ultra vires* on the grounds that it imposed a tax which could be passed on to subsequent purchasers and was therefore "indirect" and hence contrary to s. 92(2) of the *Constitution Act, 1867*.[6] The plaintiff

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[1] (1989), 59 D.L.R. (4th) 161, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97 (hereafter referred to as "*Air Canada*").

[2] Patterson "Improvements in the Law of Restitution" (1954-55), 40 Cornell L.Q. 667 at p. 676.

[3] *St. Paul & Marine Ins. Co. v. Pure Oil Co.*, 63 F.2d 771 (2nd Cir, 1933) at p. 773, *per* Learned Hand J.

[4] "Mistake of Law in Equity and at Law" (1918-19), 32 Harvard L. Rev. 283 at p. 285.

[5] On this point Lamer, Wilson and L'Heureux-Dube J.J. concurred, Beetz and McIntyre JJ. dissented.

[6] *Air Canada*, *supra*, footnote 1, at p. 1185 S.C.R.

airlines, which in the course of their operations had purchased a great deal of gasoline in B.C. between 1974 and 1976, sought to recover the money which they had paid pursuant to the impugned statute.

The question before the court therefore was whether or not payments made under a mistake of law were recoverable. La Forest J. (Lamer and L'Heureux-Dubé JJ. concurring) felt that the mistake of law doctrine should be abolished but nevertheless refused the airlines' claim on two grounds. First, while the province had been enriched, it was not at the expense of the airlines; they had passed the burden of the tax on to their customers. Second, and more importantly, special considerations were said to operate because the payments were made under constitutionally invalid legislation. As a result, the dispute was taken out of the normal restitutionary framework and required a rule "responding to the specific underlying policy concerns in [the] area".[7] The new rule formulated by Mr. Justice La Forest generally denies recovery of unconstitutional or *ultra vires* levies. Madam Justice Wilson agreed that the mistake of law doctrine should no longer form part of the law but disagreed with La Forest J. as to his reasons for refusing the airlines' claim.[8] Beetz and McIntyre JJ., although their conclusion that the British Columbia statute was constitutionally valid relieved them of the need to address the mistake of law issue, gratuitously contributed their voices to the chorus of condemnation. However, they reserved their opinion as to whether or not Mr. Justice La Forest's position on the recovery of money paid pursuant to unconstitutional taxing legislation was correct.

II

The mistake of law doctrine stands as an extraordinary monument to over-achievement; rarely, if ever, has so confounding a rule emerged from so humble an origin. Until 1802 payments made under a mistake, whether of fact or law, were, it seems, generally recoverable in both law and equity.[9] In that year Lord Ellenborough

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[7] *Ibid.*, at p. 1203 S.C.R.

[8] Discussed, *infra*, footnotes 43 and 59.

[9] Sir Robert Goff and Gareth Jones, *The Law of Restitution*, 2nd ed. (London, Sweet & Maxwell Ltd., 1978), p. 117. See also *Hydro Electric Com'n of Nepean (Township) v. Ontario Hydro* (1982), 132 D.L.R. (3d) 193, [1982] 1 S.C.R. 347 at p. 359, 16 B.L.R. 215, *per* Dickson J. (hereafter referred to as "*Nepean*").

C.J. rendered his decision in *Bilbie v. Lumley*[10] and fatefully uttered a dictum which has served to frustrate and obfuscate for nearly 200 years. The facts were simple. The defendants bought a policy of insurance from the plaintiff underwriter but failed at the time of the purchase to disclose certain relevant information. That fact alone entitled the plaintiff to repudiate any liability which might arise, notwithstanding the fact that the defendants did eventually set out all of the facts in a letter to the underwriter. A claim was made on the policy and the plaintiff, still not appreciative of the letter's importance, paid. In time the oversight was realized and an action was brought to recover the money from the defendants on the grounds that it was paid under a mistake of law. The defendants resisted the claim, arguing that the plaintiff had acted with full knowledge, or with full means of knowledge, of the circumstances. The Chief Justice reversed the trial judge's decision and found for the defendant, stating in the process that: "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."[11] Thus was born a doctrine: payments made under a mistake of law are generally irrecoverable.

The generous welcome afforded Lord Ellenborough's statement by the common law world is quite remarkable. As Goff and Jones have noted,[12] the mistake of law doctrine was adopted immediately in England and within 14 years in the United States of America.[13] It is all that much more remarkable given Lord Ellenborough's 1811 decision in *Perrott v. Perrott*[14] in which he was required to determine the status of a deed which had been cancelled under a mistake as to the legal effect of a will:[15]

> . . . once it is established, as it clearly is, that a mistake in point of fact may also destroy [the cancellation], it seems difficult upon principle to say that a mistake in point of law, clearly evidenced by what occurs at the time of cancelling, should not have the same operation.

The deed was declared to be legally effective.

Whether or not the rule in *Bilbie v. Lumley* was a wholly unprecedented departure from the past is uncertain. While the

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[10] (1802), 2 East, 469, 102 E.R. 448.

[11] *Ibid.*, at p. 472 East.

[12] *The Law of Restitution*, *supra*, footnote 9.

[13] *Shotwell v. Murray*, 1 Johns Ch. R. N.Y. 512 (1815), at p. 516.

[14] (1811), 14 East, 423, 104 E.R. 665.

[15] *Ibid.*, at p. 440 East.

authors of the *Restatement*[16] and others[17] have stated that before 1802 money paid under either type of mistake was recoverable, Goff and Jones support a contrary view with case-law of respectable vintage.[18] Nor has the law since 1802 been uniform. Aside from the numerous specific exceptions which have been developed,[19] several decisions broadly deny that a mistake of law cannot give rise to a restitutionary claim.[20] Nevertheless, Lord Ellenborough's dictum did come to be almost universally accepted as the *locus classicus.*

While the precise reasons why the legal world so easily yielded to the new doctrine are likely lost forever in the mists of time, various theories have been suggested. Professor Waddams attributes its appeal to its environment. The early part of the 19th century was marked by an increasingly rigid, formalistic attitude among lawyers. As part of that trend, the sanctity of contracts was assigned an almost absolute value.[21] The effect which this had on the law of restitution was inevitable. "The notion of absolute sanctity of contract cannot live with a flexible system of granting relief against unjust enrichment, for the two sets of principles come too often into conflict."[22] The prevailing ideology inhibited the application of any rule by which the courts could intervene to reallocate risks taken on by the parties. Obviously, a doctrine which ousted the courts' ability to reverse payments made under a mistake of law had much to recommend itself in the eyes of the commercial and legal communities.

Current opinion holds that the sanctification of the freedom to contract without interference from the state should be tempered by countervailing values. Commercial efficiency as predicated upon commercial stability is being de-emphasized; the need to prevent unjust enrichment is increasingly being accepted as a worthy

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[16] *Restatement of the Law of Restitution* (1937) "Introductory Note", at p. 179.

[17] *E.g.*, Keener *Quasi-Contracts* (1893), pp. 85-6.

[18] *Restitution, supra*, footnote 9, at p. 118. The decisions offered in support include *Hewer v. Bartholomew* (1598), Cro. Eliz. 614, 78 E.R. 855; *Bonnel v. Foulke* (1657), 2 Sid. 4, 82 E.R. 1224; and *Munt v. Stokes* (1792), 4 T.R. 561, 100 E.R. 1176. These cases, however, are not free of ambiguity.

[19] See Goff and Jones, *Restitution, supra*, footnote 9, at pp. 124-35, G.H.L. Fridman and J.G. McLeod, *Restitution* (Toronto, Carswell Co. Ltd., 1982), pp. 149-66; P. Birks, *Introduction to the Law of Restitution* (1985), pp. 166-7.

[20] See, *e.g., Allcard v. Walker*, [1896] 2 Ch. 369; *Stone v. Godfrey* (1854), 5 De G.M. & G. 76, 43 E.R. 798; *Rogers v. Ingham* (1876), 3 Ch. D. 351.

[21] S.M. Waddams, *The Law of Contracts* (Toronto, Canada Law Book Ltd., 1977), p. 212.

[22] *Ibid.*, at p. 213.

objective. Consequently, the law is now experiencing a trend towards a new state of equilibrium in which (as seen in *Air Canada*) the need for the ability to effect desirable results through the application of more flexible, policy-oriented and fact-sensitive rules is balanced against the law's former preoccupation with upholding transactions at any cost.

Bilbie v. Lumley[23] is, as Goff and Jones have argued,[24] best regarded as an otherwise unremarkable case in which recovery was denied on the basis that the money was paid in settlement of an honest claim. The courts have long held that a party who submits to such a claim, regardless of its actual validity, is bound by the compromise even if it is subsequently discovered that there was no grounds for liability.[25] Unfortunately, as noted, Lord Ellenborough's comments about ignorance of the law were seized upon by the legal world and transmogrified into a hard and fast rule. *Ignorantia juris non excusat* soon came to be the blunt reply to those who sought to recover money which they had paid under mistake of law.

For a court to answer a plaintiff's restitutionary claim by informing him that he was presumed to know the law is wholly inappropriate. First, properly interpreted, the maxim holds that ignorance of the law excuses no one, not that everyone is presumed to know the law. That difference is crucial in light of the fact that in mistake of law cases the plaintiff is not attempting to escape the consequences of a law, but rather the consequences which would not have occurred had the law been properly observed. He is, as Palmer has noted, seeking to "bring the situation into conformity with the rule of law, by asserting his rights based on it."[26] Second, it was long ago established that the maxim has no place in civil litigation;[27] criminal law is its proper domain.[28] In such areas, important policy considerations undoubtedly necessitate its operation. In civil law and, now we are told, in public law important policy considerations militate against its operation.

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[23] (1802), 2 East, 469, 102 E.R. 448.

[24] Goff and Jones, *Restitution*, *supra*, footnote 9, at p. 119.

[25] See, *e.g.*, *Stapilton v. Stapilton* (1739), 1 Atk. 2, 26 E.R. 1; *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Scivoletto v. De Dona* (1961), 35 W.W.R. 44 (Alta. Dist. Ct.).

[26] G.E. Palmer, *The Law of Restitution* (Boston & Toronto, Little, Brown & Co., 1978), vol. 3, p. 347. The counter-argument, that conformity of the law as articulated by the maxim requires that recovery be denied, is obviously circular.

[27] *Lansdown v. Lansdown* (1730), Moseley 364 at p. 365, 25 E.R. 441.

[28] *Hydro Electric Com'n of Nepean (Township)* (1982), 132 D.L.R. (3d) 193, [1982] 1 S.C.R. 347 at p. 360, 16 B.L.R. 215.

Admittedly, there are concerns which can legitimately be raised by the maxim's proponents. Professor Birks advocates its retention by arguing that mistakes of law are far more prevalent than mistakes of fact.[29] Thus, while the payor's mental process is equally vitiated by error in either case, the danger of too much restitution properly inhibits recovery, he argues, in the latter class of cases. However, even Professor Birks recognizes that an absolute bar to recovery is far too insensitive an approach and accordingly favours the existence of a host of exceptions.[30] Others, including Goff and Jones,[31] and now the Supreme Court of Canada, prefer to turn the equation around and generally allow restitutionary claims. There does not appear to be any evidence from those jurisdictions which have abolished the mistake of law doctrine that leads one to the conclusion that such a move inevitably results in an unmanageable number of claims.[32] Further, to make a claim is one thing, to succeed is another. Little weight should be given to Lord Ellenborough's warning that if the mistake of law rule did not exist, ignorance of the law "would be urged in almost every case". If addressed in a manner sensitive to both policy and fact, worthy claims can be separated from unworthy ones.

Before it developed a "luxuriant growth of exceptions",[33] the mistake of law rule also had simplicity arguing in its favour. It was a blunt yet plausible rule which the bench could unthinkingly invoke to dispose of bothersome disputes. As the Chief Justice of Canada has said:[34] "The rule though is often used as a handy means of disposing of cases where, in fact, recovery of money *should* be barred, and would be, under a more searching analysis of the case." Chronically overburdened, judges can almost be excused for receiving with open arms such time-saving devices. Ultimately, however, it must be recognized that such an attitude, born as it is out of

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[29] Birks, *Introduction to the Law of Restitution, supra*, footnote 19, at p. 165.

[30] *Ibid.*, at p. 166. One such exception involves public authorities which claim property. As a type of stewardship relation exists, reliability is assigned a high-value. Significantly, however, Professor Birks (at p. 298) concedes that recovery should be denied if repayment by the state would involve a "serious danger that public finances will be disrupted".

[31] *Restitution, supra*, footnote 9, at p. 119.

[32] New Zealand *Judicature Amendment Act 1958*, s. 94A; Western Australia *Law Reform (Property, Perpetuities and Succession) Act 1962*, s. 23. Discussed in Fridman and McLeod, *Restitution, supra*, footnote 19, at p. 167.

[33] *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161, [1989] 1 S.C.R. 1161 at p. 1199, [1989] 4 W.W.R. 97.

[34] *Nepean, supra*, footnote 28, at p. 362 S.C.R.

improper motives, does not accord with the common law's nobler characteristics. Sloth, ignorance and cowardice do not easily underlie valid policy justifications.

Another modern excuse for the mistake of law rule is that it furthers a policy in favour of commercial certainty. Mr. Justice Estey in *Nepean* praised the "good sense and practicality" of the rule on this basis.[35]

> The narrower rule applicable to mistake of law as compared to that applicable to mistake of fact springs from the need for this security and the consequential freedom from disruptive undoing of past concluded transactions. Mistake of fact is, of course, limited to the parties and has no *in rem* consequences; hence the more generous view.

It is difficult to know what to make of Mr. Justice Estey's second sentence. The first is much more easily given to reply. Surely, if certainty is so important a policy consideration, it should preclude recovery regardless of whether the mistake is one of fact or one of law. A grave error resulting in the unnecessary payment of money is no less disruptive merely because it can be characterized as going to fact.[36]

> The policy against reopening settled transactions has insufficient force to lead to a refusal of restitution of money paid in the belief that it was owed when it was not. That is clear if the mistake is one of fact, and no reason is suggested or is present to support a different view because the mistake is one of law.

The arguments in favour of the mistake of law rule are, therefore, rebuttable. The factor which most advances the efforts of its opponents is the recent revival of the law of restitution. Dickson J. (as he then was) noted in *Nepean* that the resurgence of the doctrine of unjust (or, as he preferred, "unjustified") enrichment renders the distinction between mistakes of fact and mistakes of law otiose.[37] In *Air Canada*, Mr. Justice La Forest agreed with his brother's opinion and noted that while it was rendered in dissent, it was certainly not disputed by the majority of the bench.[38] The proper approach today is to see the forest rather than the trees. Any analysis of a restitutionary claim is to begin from the premise that recovery should

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[35] *Ibid.*, at p. 412 S.C.R.

[36] Palmer, *The Law of Restitution, supra*, footnote 26, at p. 342.

[37] *Supra*, footnote 28, at p. 379 S.C.R.

[38] *Air Canada, supra*, footnote 33, at p. 1200 S.C.R. The majority in *Nepean* did not, in fact, address the issue of the mistake of law doctrine. Counsel had not questioned its operation and Estey J. conveniently followed their lead (*Nepean, supra*, footnote 28, at p. 412 S.C.R.).

generally be permitted when a defendant has unjustly been enriched at the plaintiff's expense.[39] Recovery may be denied if one of the recognized defences is established[40] or if, as in *Air Canada*, policy considerations remove the dispute from the realm of ordinary cases. In light of this new, broader approach, the rule in *Bilbie v. Lumley* cannot seem to be anything other than anachronistic.

III

Although he called for the abolishment of the mistake of law doctrine, Mr. Justice La Forest did deny the airlines' claims. As mentioned in this comment's introduction, two reasons were given in support of that result. The more mundane reason was that while the province was undoubtedly enriched as a result of the unconstitutional levy, his Lordship was not convinced that it was done at the plaintiffs' expense.[41] The airlines protested that while they may have passed the immediate expense onto their customers, ultimately the province's gain did come at their expense in the form of digruntled passengers seeking cheaper fares elsewhere. La Forest J. conceded that the limits of recovery in the still-evolving law of restitution were not easily ascertainable, but held that the policy against allowing windfalls demanded that plaintiffs establish the elements of their claim with more precision than had been done:[42]

> [Restitution's] function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense.

Curiously, Madam Justice Wilson disagreed. As far as she was concerned, the airlines were entitled to recover without proving that the province's enrichment came at their expense. Her Ladyship felt that: "Where the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be

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[39] *Air Canada, supra*, footnote 33, at p. 1201 S.C.C., *per* La Forest J.

[40] *E.g.* "change of position": *Storthoaks (Rural Municipality) v. Mobile Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, or "compromise of honest claim": *Maskell v. Horner*, [1915] 3 K.B. 106.

[41] *Air Canada, supra*, footnote 33, at p. 1202 S.C.R.

[42] *Ibid.*, at pp. 1202-3 S.C.R.

retained."[43] By the same token, however, there appears to be no legitimate basis for imposing a new tax (as Wilson J. recommended)[44] to pay a restitutionary judgment to a plaintiff which has not established that it ever suffered a loss! The authorities which she offered in support of her proposition are, with respect, hardly convincing. First, the issue addressed by the Supreme Court in *Amax Potash Ltd. v. Saskatchewan*,[45] as La Forest J. notes,[46] centred not on "the effect of action taken pursuant to an *ultra vires* or unconstitutional statute" but rather on the question of whether or not a province could legislatively bar recovery of unconstitutional taxes. There was no discussion of the scope of restitutionary claims. Second, Professor Hogg's contention that taxpayers should be entitled to recover unconstitutional levies[47] appears to have been made in the abstract, without consideration as to what is usually required for a particular restitutionary claim in Canada. If a unique head of recovery is to be developed for payments made under unconstitutional legislation, surely a deeper analysis is in order. Third, Madam Justice Wilson finds comfort for her position in Dickson J.'s dissenting opinion in *Nepean* in which he held that a plaintiff's claim should not be defeated merely because the defendant, having received the payment, spent it.[48] Her Ladyship accordingly felt that:[49]

> If this appeal is properly disposed of on the basis of the equitable doctrine of unjust enrichment, I see no reason why the same approach taken by Dickson J. towards the difficulties of Ontario Hydro in making restitution should not be taken to any similar difficulties faced by the government of British Columbia.

Why *Nepean* was invoked on this point is not at all clear. The issue under consideration was not the province's ability to make resti-

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[43] *Ibid.*, at p. 1216 S.C.R.

[44] *Ibid.*, at p. 1215 S.C.R.

[45] (1976), 71 D.L.R. (3d) 1, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61.

[46] *Air Canada, supra*, footnote 33, at p. 1197 S.C.R.

[47] P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto, Carswell Co. Ltd., 1985), p. 349.

> Where a tax has been paid ... under a statute subsequently held to be unconstitutional, can the tax be recovered by the taxpayer? In principle, the answer should be yes. The government's right to the tax was destroyed by the holding of unconstitutionality, and the tax should be refunded to the taxpayer.

[48] *Nepean, supra*, footnote 28, at p. 373 S.C.R. It would be different if the defence of change of position was proved. However, "mere spending of money is not, of itself, sufficient to establish a defence".

[49] *Air Canada, supra*, footnote 33, at pp. 1216-17 S.C.R.

tution. Rather, it was whether or not the airlines had to prove that the province's enrichment came at their expense. The comments of Dickson J. do not really support an argument based on analogy either. Subject to the change of position defence, it is irrelevant what a defendant did with the money it received. The pertinent fact is that it *was* enriched. By contrast, the fact that a plaintiff suffered no deprivation is exceedingly relevant. Unjust enrichment does not exist in the abstract; it exists by virtue of the facts which support it.

Even if the mistake of law doctrine was to be retained in other contexts, Mr. Justice La Forest felt that it should have no role to play on the constitutional stage. That, of course, does not mean that recovery should always be allowed. Instead, the unprincipled doctrine, "so replete with technicality and difficulty"[50] should be replaced by a new rule, suited to "the accommodation and resolution of broad social and political values".[51] The result is the same, but the reasoning is refreshingly candid.

That reasoning centres on the fear that permitting recovery would lead to disruption and fiscal chaos within the government. First, La Forest J., quoting with approval[52] from the decision of the Kentucky Court of Appeals in *Coleman v. Inland Gas Corp.*,[53] recognized that once money has found its way into the treasury, its destiny is sealed. The practical reality of modern budgets ensures that each dollar is allocated before it comes into the government's hands. Are successful plaintiffs to be allowed to affect a reallocation of government resources and insist upon the consequent restructuring of programmes?: "[No] taxpayer should have the right to disrupt the government by demanding a refund of his money, whether paid legally or otherwise . . . ."[54] Or are they to be allowed to insist upon the imposition of a new tax, a levy significant enough to satisfy the judgments and to pay for the cost of its own operation? His Lordship said "no". Such a solution would force a new generation to pay for the expenditures of the old and would be inefficient at best. Further, if recovery is to be the rule, there do not appear to be any nice legal means by which governments could evade liability. As noted above, the Supreme Court of Canada held in *Amax Potash*

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[50] *Ibid.*, at p. 1201 S.C.R.

[51] *Ibid.*

[52] *Ibid.*, at p. 1204 S.C.R.

[53] 21 S.W.2d 1030 (1929) at p. 1031.

[54] *Ibid.*, at p. 1031.

that legislators could not simply enact legislation which prevents taxpayers from enforcing their claims. Mr. Justice La Forest also admitted that the *Statute of Limitations* and laches might not be available or appropriate answers in all circumstances.[55]

> Equitable laches could be brought into service, but these ordinarily involve some discernible act of acquiescence to trigger their operation. The obvious remedy is a period of limitations, but it would be inappropriate for courts at this date of legal development to define such periods which, to be effective, may have to differ from one type of tax to another.

Second, a rule which generally favoured recovery could add to "fiscal chaos".[56] This fear is related to the first, but focuses less on the inconvenience which would result and more on the magnitude of the potential liability to which a government could be subject. It is certainly possible that a broad statute could be declared unconstitutional or *ultra vires* only after years of operation. As evidenced in the 1936 American case of *United States v. Baker*,[57] the amount wrongly collected could be staggering. There, the U.S. Treasury had taken in over $1 billion during the depression under the *Agricultural Adjustment Act*. True, only about $6 million were being claimed by the airlines in *Air Canada*.[58] However, new rules must be formulated with a view to the future when the stakes could be much higher.

Madam Justice Wilson once again was unable to agree with her colleagues. Driven to a conclusion she considered to be mandated by the dictates of fairness, and downplaying the practical difficulties which would follow from allowing such claims, Her Ladyship held that unconstitutional levies should be recoverable. She felt that tax payments are not "'voluntary' in a sense which should prejudice the taxpayer",[59] and that citizens should be entitled to presume the validity of statutes. No policy justifications could alter the fact that it would be "grossly unfair" to saddle the taxpayer with the full

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[55] *Air Canada*, *supra*, footnote 33, at pp. 1205-6 S.C.R.

[56] *Ibid.*, at p. 1205 S.C.R.

[57] (1936), 297 U.S. 1.

[58] Not insignificant claims by others were waiting in the wings, ready to be paraded out if the airlines were successful.

[59] *Air Canada*, at p. 1214 S.C.R. It is not altogether clear what exactly Her Ladyship meant by this remark. "Compulsion" has traditionally been recognized as a grounds upon which restitution could be based, regardless of whether a mistake of law was involved: see, *e.g.*, *Eadie v. Township of Brantford* (1967), 63 D.L.R. (2d) 561 at p. 571, [1967] S.C.R. 573. La Forest J. considered and rejected the airlines' assertion that such was the case in *Air Canada*, at pp. 1209-10 S.C.R.:

burden of the government's error. The only appropriate answer, Wilson J. argued, was a new tax which would spread the cost of the legislature's mistake over the entire population. Such a view undoubtedly has an intuitive appeal. Whether or not it should be accepted, however, depends on what lengths the courts, the legislatures and ultimately society are willing to go to in order to affect a "just" result. For what it is worth, among the great restitution scholars, including even those who would otherwise favour recovery in such circumstances, most agree that an exception must be made when recovery would disrupt public finances.[60]

Mr. Justice La Forest appreciated that if invariably followed, his judgment could work intolerable injustices. Consequently, he thought that an exception should exist to facilitate recovery of *ultra vires* or unconstitutional levies "where the relationship between the state and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances."[61] The facts before the court did not call for an elaboration and, unfortunately, none was given. The issue raised was said to come close to being a "mere technical" one and it was held that there was not an element of "discrimination, oppression or abuse of authority."[62] *Air Canada*, apparently, exemplifies the type of case in which tax payments will be found to be beyond the payor's reach.

His Lordship also took pains to restrict the scope of his decision to payments made under *ultra vires* or unconstitutional taxing statutes. Theoretically, a government could find itself in dire straits financially whether the Act in question was of such a nature or whether it was entirely valid, although misapplied. Practically, the fear of disruption is much more well-grounded in the former case. It is improbable that when mere errors of assessment are made, every dollar paid pursuant to a particular Act will have been paid

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> What the rule of compulsion seems to require is that there is no practical choice but to pay . . . before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment . . . [Here] there was no practical compulsion . . . .

[60] See, *e.g.*, Palmer, *Restitution, supra*, footnote 26, at pp. 246-58; Birks, *An Introduction to the Law of Restitution, supra*, footnote 19, at p. 298; McCamus "Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada" (1983), 17 U.B.C. L. Rev. 233 at pp. 254-60. Goff and Jones are non-committal on this issue: *The Law of Restitution, supra*, footnote 9, at p. 122.

[61] *Air Canada*, at pp. 1206-7 S.C.R.

[62] *Ibid.*, at p. 1207 S.C.R.

as a result of its misapplication.[63] Conversely, *every* dollar paid pursuant to an unconstitutional or *ultra vires* statute would *prima facie* be recoverable if such claims were permitted. Mr. Justice La Forest recognized this. Accordingly, his rule barring recovery of paid taxes would extend no farther than was likely necessary to guard against the possibility of "fiscal chaos":[64]

> . . . where an otherwise constitutional or *intra vires* statute or regulation is applied in error to a person to whom on its true construction it does not apply, the general principles of restitution should be applied . . . and . . . the general rule should favour recovery.

Once again, however, a proviso is added.[65]

> In exceptional cases public policy considerations may require a contrary holding, but those exceptional cases do not justify extending the general rule of non-recovery of unconstitutional or *ultra vires* levies.

IV

The mistake of law rule was decried in the Supreme Court of Canada, partly because its application had over the years become an increasingly complicated matter due to the "luxuriant growth of exceptions" which had grown up around it. Having tilled the restitutionary garden clean, Mr. Justice La Forest sought to plant a new rule. Unfortunately, practical considerations compelled him also to sow the seeds of a new generation of exceptions. Payments made under a mistake of law should be recoverable, but not if the facts involve an *ultra vires* or unconstitutional taxing statute, unless, of course, there is an element of discrimination, oppression or abuse of authority involved.

Nevertheless, the judgment is certainly a welcome one. First, it shows our highest court addressing the specific facts before it in a sensitive, policy-oriented manner rather than invoking a time-honoured (though otherwise ignominious) doctrine. Second, it will surely go a long way towards ensuring the death of the rule in *Bilbie*

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[63] See Palmer, *Restitution*, *supra*, footnote 26, at p. 247, as quoted by La Forest J. in *Air Canada*, at p. 1208 S.C.R.:

> "The effect of restitution in dislocating the fiscal affairs of the government unit in such isolated instances of mistake is nothing like it would be where many payments have been made under a tax law which is unconstitutional or invalid for some other reason."

[64] *Air Canada*, at p. 1207 S.C.R.

[65] *Ibid.*

v. Lumley. The *ratio* of *Air Canada* is, of course, rather narrow. Much of what was said was dicta. In light of the Supreme Court's unanimous damnation, however, it would be an exceedingly intrepid and unenlightened bench that would deny a plaintiff's claim simply on the basis that it arose out of a mistake of law.

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