Restitntion from Government Officials

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This paper considers the legal position of the private citizen who pays to a government official a sum which subsequently turns out to have been invalidly demanded. The author examines the existing common law authorities and finds three conflicting and confusing theories used to deny or justify recovery. As neither provides a clear, rational and just basis upon which to allow restitution, the author propounds a new theory. A special standard, the author argues, should apply to statutory authorities as the duties owed by government officials are public in character and derive from basic principles of public law. The special standard theory thus places the onus on the public official to demonstrate the invalid payment was made voluntarily. This would facilitate the plaintiff's claim for recovery and, in the author's opinion, provides a more just solution to the problem of when recovery should be allowed.

Cet article traite de la situation juridique du citoyen qui fait un paiement à un officier public en vertu d'une demande qui s'avère par la suite être sans fondement légal. Un examen de la jurisprudence en *common law* pousse l'auteur à conclure qu'il existe trois théories vague et contradictoire portant sur le droit du citoyen de réclamer l'indû. Considérant qu'aucune des théories déjà formulées ne fait justice au citoyen dans son effort de recouvrer de l'État, l'auteur en propose une nouvelle. Les officiers publics se doivent de suivre certaines normes de conduites particulières puisque leurs fonctions tirent leur origine du droit public. Il faudrait selon l'auteur administrer une présomption de recouvrement en plaçant sur l'officier public le fardeau de prouver que le paiement fut volontaire.

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Synopsis

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Introduction

If you asked the man on the street whether he ought to be able to recover money which he paid to the government pursuant to a statute or demand which turned out to be unauthorized or illegal, his answer would be prompt and confident: of course he should recover. Unfortunately the law of restitution has not yet developed a coherent set of principles for this situation. Our man on the street would be surprised to learn that the law is complicated and confused in this area and that his chances of recovery are poor. It is the purpose of this paper to suggest a way in which the law can be brought into step with the common perception of the just solution to this problem.

Let us first define the problem as the situation where a government official receives money from an individual pursuant to a statute or demand

which turns out to be unauthorized. Let us call this problem the *colore officii* situation, a term which translates simply enough as "by colour of office". Although this Latin label is potentially misleading,[1] and is objected to by some meticulous theorists,[2] it is a convenient shorthand for the purpose of analysis.

One finds in the cases and doctrinal commentary several different theories purporting to explain restitution from public authorities. The more traditional theories are three in number, and suggest that recovery is based on either: the *ultra vires* nature of the official's demand; the mistake in the citizen's mind when he paid; or duress, on a private law standard, being exerted by the official on the citizen.

Despite several recent Supreme Court of Canada decisions in the area, there is as yet no clear authority as to which theory of recovery is correct. Frequently, the fact situation before the court will confuse the issue. For instance, the plaintiff might have made the payment under a mistake of fact, in urgent circumstances, and in response to an official demand. In such a situation he could be entitled to restitution on two or three independent grounds. The facts may be unclear as to whether any of these independent grounds are established, and the lawyer argues in the alternative. Unfortunately, the judgments in such cases often do not make it clear which ground is relied upon, nor do they sufficiently distinguish between the elements of the different grounds.[3] The resulting confusion in the case law has made it difficult to predict when recovery will be allowed. The costs of this uncertainty are high: decisions are inconsistent; plaintiffs' rights are seldom known clearly; and judgments can often be criticized as unjust.

In an effort to resolve these problems, this paper presents a new theory which may be used as a simple, rational basis for recovery from public officials. The theory is based on the special public character of statutory

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[1]It could be misleading because lawyers are often confused or side-tracked by the use of Latin. The phrase has venerable history as describing extortion by public officials (see *infra*, notes 97-8 and accompanying text), but it was also sometimes used as a name for a technical defence. In *Irving* v. *Wilson* (1791) 4 T.R. 485, (1791) 100 E.R. 1132 (K.B.), *colore officii* was pleaded as a defence by a public official who argued that he should not be liable because he had acted in execution of a public office.

[2]Birks, *Restitution from Public Authorities* [1980] C.L.P. 191, 199.

[3]Restitutionary theory is still in a formative stage. The law has developed piecemeal in specific areas where plaintiffs have managed to convince the courts that injustice would result if recovery were not allowed. Only relatively recently have legal thinkers sought to combine these areas. Grounds for recovery which developed independently have been recognized as differing aspects of the subject of restitution, united by the principle of unjust enrichment. Nevertheless, the elements which must be established in order to permit recovery vary in different categories of restitution, and it is important to keep these distinctions in mind in any restitutionary analysis.

authorities and the unique nature of their relationship with the citizens they represent. In essence this theory is that wherever a *colore officii* situation arises the legal burden of proof is placed upon the public official, so that there is a presumption of recovery; the presumption is rebutted if the defendant government can establish in the particular instance that the citizen's payment was voluntary. This "special standard" theory can be analysed as either a special sub-category of the duress branch of restitution, or as a unique category unto itself.

In one sense the confusion in the case law on restitution from government officials could be regarded as fortunate in that it requires us to review the rationale behind recovery, and this allows us to choose a theory which best fits our conception of justice. The choice will depend to some extent on our policy positions regarding when we would like to see restitution in *colore officii* situations. We must consider the basic principles of unjust enrichment and the rule of law, and balance the roles of state and citizen in the twentieth-century world.

I. Existing Theories: Contradiction and Uncertainty

A. The Ultra Vires Theory

The view that restitution in *colore officii* situations is based on the *ultra vires* nature of the public official's demand is propounded by Birks in his excellent article, *Restitution From Public Authorities.*[4] Birks uses as a cornerstone for his argument the *Bill of Rights, 1688*,[5] which enshrines the principle that there shall be no taxation without the consent of Parliament. This constitutional principle[6] allows one to distinguish the unauthorized demands of private individuals from those of public officials. A payment in response to a private demand must be made under mistake or duress in order to be recoverable, but a payment in response to a public official's demand should always be recoverable where the demand was *ultra vires* and the payment unconstitutional.[7] Birks is thus suggesting that all payments

[4]*Supra*, note 2.

[5]1 Wm. 3 & M. Sess. 2, c. 2. See *supra*, note 2, 203-4.

[6]Note that the principle of no taxation without the consent of Parliament is part of the Canadian Constitution as well—it is an English constitutional principle formed prior to 1867 and so included in the preamble to the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*, 30 & 31 Vict., c. 3. (U.K.). It is possible that the *Charter of Rights* in our new Constitution reinforces this position. Under section 7 everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice, and section 15 provides that everyone has the right to equal protection of the law. Arguably an unauthorized tax violates both of these rights.

[7]*Supra*, note 2, 203.

made in response to unauthorized demands by public officials be recoverable, whether or not there is any mistake or threat backing up the demand, simply because the demand was *ultra vires*. He admits that the cases have not yet gone this far, but argues that they should.[8] Birks would limit this general rule only by making it inapplicable to government bodies acting in a private capacity and by preventing recovery where the official was led into error by the individual who later complained.[9]

The *ultra vires* theory finds strong support in the case law in the converse situation where a government official makes a payment which was unauthorized and therefore *ultra vires*. In such a situation the government can recover any *ultra vires* payment that can be traced.[10]

> This right, which has never been questioned in any common law jurisdiction, is so extensive that the recipient cannot plead that he changed his position in reliance on any representation that he was entitled to the money. For a "party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says he shall not do."[11]

Since a government which makes an *ultra vires* payment can always recover, it would seem logical and just that the reverse also be true, that when the government makes an *ultra vires* demand it should always repay.

Despite the attractiveness of the *ultra vires* theory, it has received on the whole relatively little support in the case law, and has never been the express basis on which recovery was allowed. A number of cases, mostly from the last century, concerned themselves almost exclusively with the validity of the tax in question, and awarded recovery immediately upon the conclusion that the tax was invalid.[12] Such cases suggest that all improper taxes must be repaid, and therefore support the *ultra vires* theory.[13] Further

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[8]*Ibid.*, 205-6.

[9]*Ibid.*, 205.

[10]*R.* v. *Toronto Terminals Railway Co.* [1948] Ex. C.R. 563.

[11]See R. Goff & G. Jones, *The Law of Restitution*, 2nd ed. (1978) 103, where the authors quote Newton J. in *The Commonwealth of Australia* v. *Burns* [1971] V.R. 825, 830 (S.C.). In this case the defendant raised an estoppel defence which would have been successful against a private plaintiff but was rejected by Newton J. as inapplicable to an *ultra vires* payment by the government.

[12]See, for example, *Newdigate* v. *Davy* (1693) 1 Ld. Raym. 742, 91 E.R. 1397 (K.B.); *Campbell* v. *Hall* (1774) 1 Cowp. 204, 98 E.R. 1045 (K.B.); *Hooper* v. *Exeter Corp.* (1887) 56 L.J.Q.B. 457; *Queens of the River Steamship Co. Ltd* v. *The Conservators of the River Thames* (1899) 15 T.L.R. 474 (Q.B.); *South of Scotland Electricity Board* v. *British Oxygen* [1959] 1 W.L.R. 587, [1959] 2 All E.R. 225 (H.L.).

[13]It should be noted that these cases provide as much implied support for the *ultra vires* theory as they do for the special standard theory, which is presented more fully *infra*, Part II.

support can be found in two English cases which strongly repeat the principles contained in the 1688 *Bill of Rights*, but their statements on the subject of recovery are *obiter*.[14]

A number of other cases, while finding the particular tax or payment to the government to be unauthorized, nevertheless refused recovery.[15] The leading decision is that of the Supreme Court of Canada in *Nepean Hydro* v. *Ontario Hydro*.[16] In this case the defendant had a complicated system for computing the cost of hydro to municipalities. The system resulted in newer municipalities like the plaintiff paying a higher rate than that paid by older municipalities. The plaintiff sued for a declaration that the surcharge was invalid and for restitution of the surcharges paid in the past, some $921,463. The Supreme Court of Canada ruled that the surcharge was invalid but refused restitution. *Nepean Hydro* was not on its facts a *colore officii* case, because the plaintiff was another branch of government, not a private individual. However, if the *ultra vires* nature of an unauthorized government demand had been the true basis for recovery in *colore officii* cases, then restitution should have been allowed in this case, since here too the demand was *ultra vires*. The Supreme Court of Canada in *Nepean Hydro* refused restitution of an *ultra vires* payment. Thus, although the case did not deal with a *colore officii* situation between an individual and government, its result is still inconsistent with the *ultra vires* theory. In practical terms, then, *Nepean Hydro* casts great doubt upon *ultra vires* as a tenable theory for explaining restitution in *colore officii* situations in Canada.

In addition to this lack of support in the case law, there is a conceptual problem with the *ultra vires* theory. The *ultra vires* theory would make restitution in a *colore officii* situation turn entirely on the nature of the defendant's demand, without regard to the voluntariness of the plaintiff's payment. The problem with this approach is that it would allow recovery of a payment which had been made as a voluntary settlement. The general restitutionary rule is that where the plaintiff voluntarily submits to the defendant's honest claim, with the intention of waiving any further rights, he

[14] *A.G.* v. *Wilts United Dairies, Ltd* (1921) 37 T.L.R. 884 (C.A.); *Brocklebank, Ltd* v. *The King* [1925] 1 K.B. 52, (1925) 132 L.T. 166 (C.A.). Again, these cases support the special standard theory as well as the *ultra vires* theory.

[15] See, for example, *Slater* v. *Burnley Corp.* (1888) 59 L.T. 636, (1888) 36 W.R. 831 (Q.B.); *William Whitely Ltd* v. *The King* (1909) 101 L.T. 741, [1908-10] All E.R. Rep. 639 (K.B.); *Twyford* v. *Manchester Corp.* [1946] 1 Ch. 236, [1946] 1 All E.R. 621. These cases are all discussed by Birks, and can be rejected as poor and inconsistent decisions. See *infra*, note 58, and text following. However, *Hydro Electric Commission of the Township of Nepean* v. *Ontario Hydro* [1982] 1 S.C.R. 347, (1982) 132 D.L.R. (3d) 193 [hereinafter cited to S.C.R. as *Nepean Hydro*] cannot be rejected in this manner.

[16] *Ibid.*

cannot later come back and recover his payment.[17] This rule is based upon the general policy that voluntary compromises should not be reopened. The *ultra vires* theory, in ignoring the plaintiff's voluntariness, would violate this rule in *colore officii* situations. Thus the plaintiff who knew the government was making an invalid demand and was under no practical pressure but who perhaps thought the payment was "for a good cause" could later change his mind and obtain restitution.[18] Such a result, while in strict compliance with the 1688 *Bill of Rights*, is contrary to the general policies and rules of restitution.

B. Mistake

The second theoretical explanation offered for allowing restitution in a *colore officii* situation is that the plaintiff acted involuntarily since he was mistaken as to the validity of the official's demand. Crawford, in his article *Restitution: Mistake of Law and Practical Compulsion*,[19] takes the position that the element of mistake is the primary reason for allowing restitution in these cases.[20] The theory here is that the citizen's mistake as to some fact relating to his obligation to pay is what entitles him to recovery, with the normal rules for restitution for mistake applying.

The first difficulty with this theory is that, at least as the law now stands,[21] there can be no restitution for a mistake of law.[22] In most *colore officii* situations, if the citizen believes the official to be making a valid demand, he does so because of a mistaken view of the law (which is probably shared by the official) and not because of a mistake of fact. An example of the problems mistake analysis leads to is found in *George (Porky) Jacobs Enterprises Ltd* v. *The City of Regina*.[23] In that case the plaintiff had paid

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[17]See generally Goff & Jones, *supra*, note 11, 30 *et seq.*

[18]For an example of how this could arise, see the passage from *Steele* v. *Williams* (1853) 8 Ex. 625, (1853) 155 E.R. 1502, quoted in the text below at note 81.

[19](1967) 17 U.T.L.J. 344.

[20]See *ibid.*, 352, where Crawford says that "[l]ogically, although these cases contain elements of both compulsion and mistake, it is really only the mistake which is material".

The reader is also referred to an excellent article by 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. McCamus' article is principally concerned with advocating the abolition of the rule preventing recovery of moneys paid under a mistake of law, and is essentially a critique of *Nepean Hydro*. Hence, Dean McCamus discusses *colore officii* restitution in the framework of mistake. However, he is more concerned with overruling *Bilbie* v. *Lumley* (1802) 2 East 469, (1802) 102 E.R. 448 (K.B.) than with developing a general *colore officii* doctrine.

[21]Although this law might change after *Nepean Hydro*, *supra*, note 15.

[22]*Bilbie* v. *Lumley*, *supra*, note 20.

[23][1964] S.C.R. 326, (1964) 47 W.W.R. 305, (1964) 44 D.L.R. (2d) 179 [hereinafter cited to S.C.R. as *George (Porky) Jacobs*].

under a mistaken belief that the provisions of an amending by-law required *per diem* fees as had the previous by-law. In essence, the plaintiff paid in ignorance of the content of the current law, which seems to be a bald mistake of law. However, the Supreme Court of Canada, *per* Hall J., was reduced to describing this as a mistake of fact in order to allow recovery:

> The mutual mistake of fact here was as to the existence of one or more by-laws calling for a licence fee on a per day basis. Both the licence inspector and Jacobs believed that such by-laws existed in fact but they did not actually exist at all so the mistake is one as to the fact of the existence of the by-laws and not one of interpretation of by-laws that in any way purported to stipulate for a per day fee.[24]

It would be preferable to base the law on a theory which did not require such tortured logic.

In *Eadie* v. *Township of Brantford*,[25] the Supreme Court of Canada attempted to avoid such difficulties by treating *colore officii* situations as an exception to the general rule that there can be no restitution for a mistake of law. The decision in *Eadie* is worth reviewing in detail because it has done so much to confuse the law in this area. The plaintiff owned land in the defendant Township which he wanted to subdivide. Upon applying for severance he was informed that he would have to pay a large fee and to convey a "road-widening" strip to the Township. He refused and his application was rejected. Over a year later, the plaintiff became ill and was hospitalized for a considerable period of time. Concerned for his wife, he concluded that he must sell his property, and after some negotiations between his solicitor and the Township he agreed to their severance fee in order to be able to close the sale. An independent case later proved the by-law under which the Township demanded the severance fee to be invalid, and so the plaintiff brought this action to recover his money. By a three-to-two margin the Supreme Court of Canada allowed restitution. Spence J. for the majority accepted the municipality's position that the case must be analysed as "an action for the repayment of moneys paid under a mistake of law".[26] By adopting this as his starting point, Spence J. was forced to consider all the possible grounds of recovery as if they were exceptions to

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[24]*Ibid.*, 329-30.
[25][1967] S.C.R. 573, (1967) 63 D.L.R. (2d) 561 [hereinafter cited to S.C.R. as *Eadie*].
[26]*Ibid.*, 580.

the general rule that money paid under a mistake of law cannot be recovered.[27] After erroneously treating the law of duress as if it were an exception to the mistake of law rule,[28] Spence J. went on to create a new exception to the rule for *colore officii* situations, based on a famous passage from a judgment of Lord Denning in *Kiriri Cotton Co. Ltd* v. *Dewani*.[29] Unfortunately, *Kiriri* had nothing to do with *colore officii*, and the use of this passage out of context created a great deal of confusion.

Kiriri dealt with the recovery of money paid under an illegal contract between two private individuals. The ordinary rules of illegal contracts are that a court will not enforce payments yet to be made under them, nor will it allow recovery of payments that have already been made under them. A party to an illegal transaction cannot rely on the illegality of his own bargain in order to obtain recovery. This is sometimes stated as a Latin maxim *in pari delicto potior est conditio defendentis*, which translates roughly as "where two parties are equally involved in an illegality, the position of the defendant is stronger". However, there is an exception to this general rule where the parties are for some reason not equally involved in the illegality, or "not *in pari delicto*". It was this exception that was at issue in *Kiriri*. In that case the statute which made the contract illegal was one designed to protect tenants from excessive rents. The plaintiff tenant had paid rent under a lease which called for an amount of rent illegal under the statute, and sued to recover it. The Privy Council held that the parties were "not *in pari delicto*" and allowed recovery. The statute was to protect people like the plaintiff from people like the defendant, and so the "primary responsibility" for the illegality lay on the defendant landlord.[30]

The defendant in *Kiriri* had argned that the rent was paid under a mutual mistake of law and so there could be no recovery. Lord Denning's famous passage was a response to this argument. It is a very broad statement of the principle that the rule preventing recovery for a payment under a

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[27]The municipality's counsel was no doubt highly persuasive in promoting this analysis as he sought to have the general rule applied.

[28]Spence J. based his judgment in *Eadie* on the "exception" to the mistake of law rule found in *Maskell* v. *Horner* [1915] 3 K.B. 106, (1915) 84 L.J.K.B. 1752 (C.A.) [hereinafter cited to K.B. as *Maskell*], citing the famous "urgent and pressing necessity" passage. See *Eadie, supra*, note 26, 581. It is difficult to understand how such a learned judge could have taken this step. Immediately before the passage cited, Lord Reading C.J. had expressly found "that the plaintiff did not pay under a mistake" (118). Lord Reading made it clear that duress was an alternate ground for recovery that had nothing to do with mistake. This independence of the rules for restitution in duress situations is emphasized by the fact that a plaintiff will often recover when he knew a demand was invalid, protested, but paid under duress. Nevertheless, Spence J.'s erroneous analysis has been incautiously followed many times since. Even McCamus, *supra*, note 20, 255, refers to duress as an exception to the mistake of law rule.

[29][1960] A.C. 192, [1960] 1 All E.R. 177 (P.C.).

[30]See generally Goff & Jones, *supra*, note 11, 329 *et seq.*

mistake of law applies only where the mistake of law is all that the plaintiff relies upon. If there is "something more" to the plaintiff's case, then the rule does not prevent recovery. In other words, if the plaintiff has paid under mistake of fact or duress he is entitled to recover regardless of whether or not he was also operating under a mistake of law. In *Kiriri* the Court allowed recovery because the payment was illegal under a statute designed to protect the plaintiff. The parties were "not *in pari delicto*". In the passage quoted, Lord Denning was simply pointing out that in this situation the plaintiff's mistake of law did not prevent recovery. He was not formulating an exception to the mistake of law rule. He was stating that it did not apply because the plaintiff's case was based on other grounds, that is, on "something more".

This passage in *Kiriri* was used entirely out of context in *Eadie*. Spence J. quoted Lord Denning as if he was stating an exception to the mistake of law rule, and then applied the passage as if this exception was the guiding principle in *colore officii* cases.[31] He stated that the duty of a public clerk toward taxpayers makes the clerk "not *in pari delicto*" to the taxpayer when he demands money under an illegal by-law.[32] This use of the phrase "not *in pari delicto*" is completely inappropriate. It is true that in a *colore officii* situation the parties are not equally involved in the illegality of the demand based on the invalid law. However, as the phrase *in pari delicto* carries doctrinal significance in a different area of restitution, use of it in *colore officii* situations is certain to create confusion.

After *Eadie*, there were a number of trial and appeal level decisions in which great difficulty was experienced in applying this "not *in pari delicto*" exception to the mistake of law rule in *colore officii* situations.[33] A typical

[31]The principle stated in this passage does have some relevance to *colore officii* cases. If the plaintiff paid under a mistake of law, the rule in *Bilbie* v. *Lumley*, *supra*, note 20, does not prevent recovery. Indeed, as was said before, he can recover whether or not he believes the demand legal. The plaintiff recovers because of "something more". However, such relevance does not make this passage a guiding principle.

[32]*Eadie*, *supra*, note 25, 583.

[33]See, for example, *G. Gordon Foster Developments Ltd* v. *Corporation of the Township of Langley* (1977) 5 B.C.L.R. 42, (1977) 810 D.L.R. (3d) 216 (S.C.), (1979) 14 B.C.L.R. 29, (1979) 102 D.L.R. (3d) 730 (C.A.) (restitution of invalid subdivision approval fees denied); *A.J. Seversen Inc.* v. *Corporation of Qualicum Beach* [1980] 3 W.W.R. 375 (B.C.S.C.), (1982) 135 D.L.R. (3d) 122 (B.C.C.A.) (restitution of invalid water improvement fees refused); *Greenwin Developments* v. *Corporation of the City of Toronto* (1980) 10 M.P.L.R. 174 (Ont. Div. Ct) (restitution of an invalid sewer charge refused); *Ronell Developments Ltd* v. *Duncan (1981)* 25 B.C.L.R. 123 (Cty Ct) (restitution of invalid subdivision charge refused); *Conin Construction Co. Ltd* v. *Borough of Scarborough* (1981) 32 O.R. (2d) 500, (1981) 122 D.L.R. (3d) 291(H.C.) (restitution of an invalid sewer charge allowed); *Re Hay and City of Burlington* (1981) 38 O.R. (2d) 476 (1981) 131 D.L.R. (3d) 600 (C.A.) (restitution of an invalid re-zoning charge allowed); *J.R.S. Holdings Ltd* v. *Corporation of the District of Maple Ridge* (1981) 27 B.C.L.R. 36, (1981) 122 D.L.R. (3d) 398 (S.C.) (some invalid subdivision charges repaid).

example is *Wilson* v. *District of Surrey*.[34] In this case, the defendant municipality had exacted "service costs" from the plaintiff developer as a prerequisite to approval of a subdivision plan. Hinds J. held that the defendant did not have legal authority to require most of these charges. After rejecting a compulsion argument, Hinds J. went on to discuss the "not *in pari delicto*" exception. He stated that the plaintiff paid under a genuine mistake of law and that "of the two parties here, the defendant must bear the primary responsibility for the occurrence of the mistake of law".[35] The defendant municipal officials ought to have known that the demand for these payments was not supported by legislative authority. Hinds J. got his "primary responsibility" language directly from Lord Denning's passage in *Kiriri* (which he cited), and used these as the key words for invoking this new "not *in pari delicto*" doctrine based on *Eadie*. He continued by giving effect to another disturbing twist of the law which has developed since *Eadie*, citing the Ontario Court of Appeal in *Nepean Hydro*. Once the determination is made that the defendant received an unauthorized fee paid under a mistake of law for which the defendant was "primarily responsible" so that the parties are "not *in pari delicto*", restitution does not automatically follow. The court must proceed to "balance the equities" between the parties:

> It is therefore necesary 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 moneys of [the plaintiff].[36]

Hinds J. proceeded to perform just such a balancing. He considered how the "service costs" exacted by the defendant municipality were to be applied, and decided whether "in equity" the plaintiff developer ought to contribute toward these municipal services. He ended up allowing recovery of some of the charges, but not of others. Such an approach can at best be described as "palm tree justice". It is certainly a far cry from a predictable rule of law.[37]

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[34][1981] 3 W.W.R. 266 (B.C.S.C.).

[35]*Ibid.*, 281.

[36]*Ibid.*

[37]Many of the cases cited above, *supra*, note 33, take a similar approach. Most of these deal with developers paying subdivision charges which the local municipality did not have the authority to demand. In *J.R.S. Holdings*, for example, after balancing the equities and "finding that the parties were 'not *in pari delicto*'", Berger J. ordered, at page 49, some of the invalid subdivision charges to be repaid and others not, depending on whether he thought it "fair" that the plaintiff contribute to them. This recurrent fact situation has contributed in an unfortunate way to the development of the law. The courts are reluctant to allow recovery of moneys which they feel ought to be paid. It is generally considered that the developer who profits from a subdivision ought to contribute toward the extra burden for services which it places on the municipality. However, it is submitted that it is a serious error to achieve this result by the "balancing of equities" approach which has emerged since *Eadie*, *supra*, note 25. It is not consistent with the rule of law that a government body should obtain money illegally and then be able to retain the money because the court in hindsight determines it fair that the

The Supreme Court of Canada decision in *Nepean Hydro* has done much to rectify the confusion created by *Eadie*. Estey J. for the majority made a careful and excellent analysis of the *Kiriri* decision and what it really stands for. He made it clear that *Kiriri* is a case dealing with the recovery of moneys paid under an illegal contract, and that it could not be applied to the facts of *Nepean Hydro*:

> The *in pari delicto* test and its terminology seem most inappropriate and utterly unconnected to the realities of the transaction.[38]

He dismissed the entire mistake analysis of *Eadie* by saying:

> In my view, the presence of mistake of law in the parties to the transaction was superfluous as the entitlement to recovery arose on the finding of payment under practical compulsion.[39]

This clear rejection by Estey J. and the numerous conceptual difficulties described above combine to make untenable the theory that restitution in *colore officii* situations is based on a mistake of law, that is, as an exception to the general mistake of law rule.

It has been suggested that the solution to this problem is to overrule *Bilbie* v. *Lumley* and allow restitution for a mistake of law.[40] The rule preventing recovery of moneys paid under a mistake of law has been subjected to intense judicial and academic criticism, and is long overdue for abolition. While I support such a reform, it is my submission that changing the law in this way will not provide an adequate theory for restitution in *colore officii* cases. It is true that once the law is changed, mistake of law will be an alternative ground for relief in many *colore officii* fact situations. However, this new doctrine would be incapable of explaining why there had been recovery in *colore officii* situations prior to the change. Most *colore*

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payment be made. Applying a "change of position", estoppel, or other equitable defence is entirely appropriate, for restitution is a claim in equity. But to deny recovery because the judge feels it fair — usually for unexpressed reasons — that the plaintiff make certain contributions, is to make the judge's sense of commercial fairness the retroactive validator of an illegal act. It would be better to allow restitution where the grounds can be established and then to provide for future payments by appropriate changes in the authorizing laws.

[38]*Nepean Hydro, supra*, note 15, 394. See also 392-3, 399 and 407.

[39]*Ibid.*, 409-10. It would seem that the *Kiriri* argument has been successfully buried. In *Seversen, supra*, note 33, 125, the only decision since *Nepean Hydro, supra*, note 15, to raise the point, Hutcheon J.A., for the B.C. Court of Appeal, said: "It follows from *Nepean* that the principle in the *Kiriri* case relied upon so heavily by the respondent has no application."

[40]*Supra*, note 20. See also the persuasive dissenting opinion of Dickson J. in *Nepean Hydro, supra*, note 15.

officii cases do not even mention mistake.[41] If mistake of law was the primary rationale for restitution in such cases, the careful written reasons of many earlier judgments would have to be ignored. The answer to the problem is that there is a different, more rational basis for restitution in these cases.

There remains one final difficulty with explaining restitution in *colore officii* situations in terms of mistake. In some of the leading cases[42] the plaintiff was convinced the official's demand was invalid, protested, but paid anyway to avoid possible harmful consequences. The plaintiff was not operating under any mistake, legal or factual, when he made the payment. Yet he recovers. The fact that a plaintiff can recover in cases like this reveals that the existence of a mistake is irrelevant to the reason for restitution. It is submitted then that mistake analysis cannot provide an adequate theory of *colore officii* restitution.

C. Duress on a Private Law Standard

A third theory for recovery in *colore officii* situations is based on duress on a private law standard being exerted by the defendant on the plaintiff. Under this theory there are no special *colore officii* rules; the problem is treated simply as another example of duress. If a public official uses wrongful pressure on a citizen to extract an unauthorized payment, then restitution will be allowed. The Court will look to the wrongfulness of the pressure and to the level of compulsion in determining recovery, and will do so according to the same standards as in a case between two citizens. By this theory no distinction is made between a duress case like *Maskell* v. *Horner*[43] and a *colore officii* case like *Steele* v. *Williams*.[44]

The first problem with this theory is that it is very difficult to apply the private law standard of compulsion in cases where the demand is made by a government official. To begin with, there is no single private law standard. The law has recognized a number of different types of wrongful pressure which will entitle a party to restitution. These include physical threats

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[41]The recent line of Canadian cases based on *George (Porky) Jacobs*, *supra*, note 23, and *Eadie*, *supra*, note 25, are unique. Few of the old cases, English or Australian, make any mention of mistake as a possible ground for recovery.

[42]See *Mason* v. *New South Wales* (1958) 102 C.L.R. 108 (Aust. H.C.). This is the leading Australian authority on *colore officii* and probably the best modern judicial analysis of the subject. See also *St. John* v. *Fraser-Brace Overseas Corp.* [1958] S.C.R. 263, (1958) 13 D.L.R. (2d) 177. Estey J. in *Nepean Hydro*, *supra*, note 15, 409, points out that "no element of mistake was present" in that case — but restitution was still allowed.

[43]*Supra*, note 28. The defendant in this case was acting as a *private* citizen when he exacted market tolls from the plaintiff.

[44]*Supra*, note 18.

to the person,[45] threats to bring a criminal action,[46] wrongful seizure of goods,[47] various types of economic duress[48] and undue influence.[49] The level of compulsion required to justify restitution differs between these various sub-categories of duress. For example, in cases of physical threats restitution will be allowed whenever the threat was part of the inducement which caused the plaintiff to benefit the defendant. The plaintiff "is entitled to relief even though he might well have entered into the contract if [the defendant] had uttered no threats to induce him to do so".[50] However in cases of economic duress the compulsion must essentially leave the plaintiff with no other alternative; it must be sufficiently severe to amount to "a coercion of [the plaintiff's] will so as to vitiate his consent".[51]

Which standard should we apply to *colore officii* cases? The differences in the required levels of compulsion stem from different policy considerations in the various sub-categories of duress. We are more concerned to see a man recover and more certain that he has acted involuntarily when his life has been threatened than when his property has been threatened. Thus we must weigh our policy considerations when determining the appropriate level of compulsion for recovery in a *colore officii* situation.

The theory which we are presently considering takes the position that there are no special policy considerations when wrongful pressure is applied by a government official as opposed to when it is applied by a private citizen. To take this stance it is necessary to say that there is no difference between coercion applied by the government or by an individual, that we are not more concerned to see recovery where a citizen has been wrongfully pressured by his government than when pressured by another individual, and that we are not more certain that the individual paid involuntarily in response to a demand from the government than in response to any other demand. If one accepts these propositions then it would seem appropriate that *colore officii* cases be judged on a private law standard. Recovery would depend on the seriousness of the compulsion exerted by the official; there would be no separate *colore officii* sub-category of duress.

However, many would not accept the above propositions. When a government official demands a payment from a private individual, the demand

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[45]*Barton* v. *Armstrong* [1976] A.C. 104, [1975] 2 All E.R. 465 (P.C.).

[46]*Kaufman* v. *Gerson* [1904] 1 K.B. 591, [1904-07] All E.R. Rep. 896.

[47]*Astley* v. *Reynolds* (1731) 2 Str. 915, (1731) 93 E.R. 939 (K.B.).

[48]*Nixon* v. *Furphy* (1915) 25 N.S.W.S.R. 151; *The "Siboen"* [1976] 1 Lloyd's Rep. 293; *Pao On* v. *Lau Yiu Long* [1979] 3 W.L.R. 435, [1979] 3 All E.R. 65 (P.C.).

[49]*Mutual Finance, Ltd* v. *John Wettan & Sons, Ltd* [1937] 2 K.B. 389, [1937] 2 All E.R. 657.

[50]*Supra*, note 45, 119.

[51]*Pao On* v. *Lau Yiu Long*, *supra*, note 48, 450.

is qualitatively different from one made by an individual in a private capacity.[52] This inherent difference in the nature of a governmental demand suggests that the coercive effect of that demand, and therefore the possibility of recovering moneys illegally demanded, should be tested by a different legal standard.

A second problem is that the private law duress theory discriminates against the impoverished or law-abiding citizen. The factors which distinguish a governmental demand from a private demand suggest that once it has been established that a government official has illegally demanded and received a payment, the citizen should recover his payment without further enquiry into whether he paid wholly involuntarily or only partially so. If we required further proof that the plaintiff did not want to pay the tax, such as evidence of a protest or initial refusal to pay until sanctions were threatened, then we would be left with the situation that the more law-abiding the citizen, the less his chances of recovery. Further, given the complexity of modern laws, only individuals with access to expensive legal advice can determine that a given statutory demand is invalid. If an official protest or litigation at the earliest possible opportunity was a requirement of recovery, citizens without access to such advice would be precluded from obtaining restitution. Such a rule offends both common sense and public policy.[53]

A third conceptual problem with the private law duress theory is that it completely ignores the *ultra vires* nature of the official's demand and the constitutional prohibition of taxation without the consent of Parliament. Surely these factors should have some influence on a plaintiff's right to restitution, even if we do not accept Birks' entire *ultra vires* theory. Yet the private law duress theory rejects these factors by making recovery turn exclusively on the presence or absence of compulsion on the same basis as if the demand had been made by a private individual.

A fourth problem with the private law duress theory is most visible in the formulation provided by Goff and Jones, who express the test as follows:

> Where money has been paid to a public officer to obtain performance by him of a duty which he is bound to carry out for nothing or for less than the sum paid, such money or, where some money is due, the excess is recoverable as money had and received.[54]

This could be called the "entitlement" theory of *colore officii*. By this theory wherever a public official refuses a plaintiff something to which he is legally entitled without the payment of an invalid fee, a sufficient level of compulsion would be deemed to be established and restitution allowed. The

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[52]See *infra*, notes 93-4, and accompanying text.

[53]See McCamus, *supra*, note 20, 247, for a similar criticism.

[54]See Goff & Jones, *supra*, note 11, 171.

problem with this theory is pointed out by Birks.[55] Consider a statute setting out a licensing scheme and requiring a licence fee. The citizen will be refused a licence unless he pays the fee, and so he pays. If it later turns out that the fee requirement in this statute was invalid, the citizen would recover his payment under the entitlement theory because he had been refused something to which he was entitled. However, if it turns out that the entire licensing statute was invalid, the citizen would not recover his fee under the entitlement theory because he had never been entitled to a licence in the first place. The result would be that the plaintiff's "hope of restitution diminishes as the illegality established against the agency becomes more radical".[56]

Despite these conceptual problems, a number of cases have explicitly applied the private law duress theory. While the private law test for duress varies according to the type of compulsion applied, most *colore officii* situations involve an economic threat against the plaintiff: he will have to pay an additional penalty, he will be deprived of a vital service, he will be prevented from doing business, or his goods will be seized or detained if he does not pay the unauthorized fee. The classic statement of the private law standard for recovery in these situations is found in the following passage from Lord Reading C.J. in *Maskell* v. *Horner*:

> If a person pays money which he is not bound to pay, under the compulsion of urgent and pressing necessity, or of seizure, actual or threatened, of his goods, he can recover it as money had and received. The money is paid, not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods, which is analogous to that of duress. 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... .[57]

To recover under the private law test the plaintiff must have had virtually no alternative but to pay; he must have been "under the compulsion of urgent and pressing necessity". The possibility of litigating before paying is generally considered to remove the situation from one of sufficient compulsion.

The first English case specifically to apply the private law test for duress in a *colore officii* situtation was *Slater* v. *Burnley*.[58] The plaintiff sought to recover a water rate payment which had turned out to be invalid. Cave and Wills J.J. in brief judgments ignored the leading case of *Steele* v. *Williams*,

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[55]*Supra*, note 2, 196-7.
[56]*Ibid.*, 197.
[57]*Supra*, note 28, 1755.
[58]*Slater* v. *Burnley Corp.*, *supra*, note 15.

which had been cited in argument and which refused to apply the private law test.[59] They stated simply that the plaintiff had paid "voluntarily" and so could not recover; in short, they applied the private law standard of duress without further discussion of their reasons.[60]

In *William Whitely Ltd* v. *The King*[61] the plaintiffs were seeking restitution of duties paid to Inland Revenue for certain servants. For five years the plaintiffs had paid these duties under protest, fearing the consequences of nonpayment. They then refused to pay and when they were prosecuted for penalties it was established that the duties had never been payable. The fact that it had always been open to the plaintiffs to refuse and litigate induced Walton J. to consider the payments to have been "voluntary" and so he denied recovery. He referred to the *colore officii* cases only by citing a summary of them in *Leake on Contracts*.[62] Relying only on texts and without any examination of the cases, Walton J.'s position is untenable in view of the authorities at the time. The leading case was still *Steele* v. *Williams*, where a higher court had expressly rejected the position which he took.[63] Walton J.'s notion that the possibility of litigation made the plaintiff's payment "voluntary" is also questionable. One should note that the litigation that proved the tax invalid was a penal action seeking the payment of fines. If criminal prosecution is treated as an option, then no government demand backed by threats of fine or imprisonment could constitute compulsion.

Twyford v. *Manchester Corp.*[64] was a case involving the demand by the defendant municipality for fees for permission to cut inscriptions in a cemetery. The plaintiff stonemason paid these fees under protest and then sued to have them declared invalid and to obtain restitution. Romer J. held that the fees were invalid, but denied recovery. The case appears to have been poorly argued on behalf of the plaintiff, as no *colore officii* cases were cited; the only authority relied upon was a case of private duress. The defendant brought forward *Slater* v. *Burnley* and *William Whitely Ltd*, and Romer J. followed these two cases without further investigation into the law. He applied the private law of duress and found as a fact that the plaintiff was never threatened with exclusion from the cemetery. The case cannot be

[59]There is no explanation given for ignoring *Steele* v. *Williams*, *supra*, note 18.

[60]This was the first English *colore officii* case where restitution was denied for this reason, and is, I would argue, wrongly decided, especially in view of the state of the law at the time.

[61]*Supra*, note 15.

[62]S. Leake, *Principles of the Law of Contracts*, 5th ed. (A. Randall, ed., 1906) 58-62. The Court also referred to the third edition (1878) by Bullen and Leake.

[63]See the quotation from Martin B., cited below at note 81.

[64][1946] 1 Ch. 236, [1946] 1 All E.R. 621.

considered a very strong authority in view of its failure to consider most of the relevant law.[65]

The first significant[66] Canadian *colore officii* case was *Cushen* v. *The City of Hamilton.*[67] The plaintiff butcher paid a licensing fee to the defendant municipality for two years and then refused to pay the third year and was prosecuted. He was convicted but on *certiorari* the conviction was set aside and the by-law creating the licence fee was declared illegal. He then sued to recover his payments. The payments were made with "some unwillingness and hesitation" but there was no evidence of a protest. Osler J.A. cited *Morgan* v. *Palmer,*[68] *Dew* v. *Parsons*[69] and *Steele* v. *Williams*[70] and stated that "the case at bar bears no analogy to any case of the classes I have mentioned."[71] Having thus without explanation rejected the leading authorities, he went on to cite at length American cases and texts to a contrary effect. Restitution was denied. The Court stressed that, although the by-law made it necessary for the plaintiff to obtain a licence in order to earn his livelihood, he could have refused to pay the first year in the same way that he had the third. They thus held that he had not been compelled to make the payments, clearly setting compulsion in this *colore officii* situation at a

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[65]See the case comment by Marsh at (1946) 62 L.Q.R. 333, which suggests that *Twyford* is wrongly decided and that the Court should have followed the *Steele* v. *Williams colore officii* principles.

Other cases sometimes cited on this point include *Sebel Products Ltd* v. *Commissioners of Customs and Excise* [1949] Ch. 409, [1949] 1 All E.R. 729, where although recovery was allowed, it was suggested that *William Whitely* was correctly decided. However, Vaisey J. expressed a strong public policy that government should always return taxes that turn out to have been illegally imposed. Again, none of the other *colore officii* cases were cited. See also *Eric Gnapp* v. *Petroleum Board* [1949] 1 All E.R. 980 (C.A.). The case does not really deal with *colore officii,* but with a contract between the plaintiff and the Board. To the extent that it does deal with recovery from a government agency it is explicable in terms of the wartime situation and shortage of petrol. In *National Pari-Mutuel* v. *The King* (1930) 47 T.L.R. 110 (C.A.) a bookmaking company had paid duty on a betting machine. The duty was held in another case to be illegal, and so the plaintiff company sued to recover its payments. No cases were cited, and Scrutton L.J. began his judgment with a snide remark about the plaintiff's business. He then dismissed the claim very briefly with no mention of *colore officii* principles. The case cannot be regarded as a very strong authority.

[66]In *Grantham* v. *City of Toronto* (1847) 3 U.C.Q.B. 212, 215, a previous Ontario case, restitution was refused because the official had been led into error by the individual who later complained. *Trusts Corp.* v. *City of Toronto* (1899) 30 O.R. 209 is another case which is sometimes cited as a *colore officii* case. However, it is not such a case on its facts. While the plaintiff had paid under mistake, the defendant municipality *was* lawfully entitled to the money.

[67][1902] 4 O.L.R. 265 (Ont. C.A.).

[68](1824) 2 B. & C. 729, (1824) 107 E.R. 554 (K.B.).

[69](1819) 2 B. & Ald. 562, (1819) 106 E.R. 471 (K.B.).

[70]*Supra,* note 18.

[71]*Supra,* note 67, 267. The basis of his distinction is impossible to fathom.

private law standard.[72] It should be noted that *Cushen* was implicitly overruled by the Supreme Court of Canada in *George (Porky) Jacobs*,[73] a decision which will be discussed below.[74]

While there are many cases which decide *colore officii* situations in terms of duress, the cases referred to above are the only ones which clearly do so on a private law standard of duress. When listed sequentially they constitute a formidable line of authority, but seen individually each of these decisions is questionable. A number of other cases are ambiguous on this issue, because the plaintiff was subjected to such severe compulsion that recovery would be allowed on any standard. There remains a third group of cases which decide *colore officii* situations on the basis of duress, but allow recovery on facts which do not come within the private law test. These latter cases cast doubt on the private law duress theory as a solution for *colore officii* situations, since they seem to apply a different standard for recovery.

An early example of recovery being allowed in a *colore officii* case which would not have met the private law test for compulsion is *Dew* v. *Parsons*.[75] In this case the plaintiff was a Sheriff suing an attorney to recover fees for issuing certain warrants. The defendant claimed as a set-off certain fees which his clerk had previously paid to the plaintiff and which were in excess of the legal charge. Abbot C.J., Holroyd and Best J.J. held that the defendant was entitled to the set-off: "If the defendant has paid more money than the Sheriff is allowed by law to demand as his fee, the Sheriff cannot retain that surplus. . . ." The clerk paid out of ignorance, made no protest, and there is no suggestion that the Sheriff refused to issue the warrant unless he was paid. The very fact that the Sheriff was suing to be paid other fees creates a strong likelihood that he performed his services before requesting payment. There is thus nothing in the facts equivalent to the private law standard of duress and no indication in the judgments that such a finding of duress was necessary.

The decision in *Morgan* v. *Palmer*[76] is to a similar effect. The plaintiff publican paid an annual licence fee for his pub, a portion of which went to

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[72]*Cushen* was treated as conclusive authority in *O'Grady* v. *City of Toronto* (1916) 37 O.L.R. 139, (1916) 31 D.L.R. 633 (H.C.). It was also treated as good law, although distinguished, in *Pople* v. *Dauphin* (1921) 31 Man. R. 125, (1921) 60 D.L.R. 30 (C.A.).

[73]*Supra*, note 23.

[74]See *infra*, text following note 86. In both *Cushen* and *Jacobs* a licence fee was paid for some period of time without protest. In both cases the licence was necessary to the plaintiff's means of earning his livelihood, the fee turned out to be invalid, and it would have been possible to litigate the validity of the fee at an earlier point in time. Thus, the decision in *Cushen* must be taken to be overruled by *Jacobs*.

[75]*Supra*, note 69.

[76]*Supra*, note 68.

the defendant mayor. The plaintiff paid the fee for some sixty-five years before objecting and suing for recovery. The judges allowed restitution, ruling that the mayor's fee was illegal and "that the payment was by no means voluntary". Clearly the facts here would not have been sufficient to allow recovery under the private law test for duress. The plaintiff had been paying for a long period of time and there was no suggestion of a threat to withhold his licence. Abbot C.J. in ordering recovery was concerned with the inequality between the official and the citizen, and Bayley J. referred to the public policy of the situation.[77]

The leading early case on *colore officii* is *Steele* v. *Williams*.[78] The plaintiff was a solicitor who had had his clerk perform certain searches of a parish registry. After the searches were made, the defendant, who was the parish clerk, charged the plaintiff's clerk an excessive fee for the searches. There was no protest at the time of payment.[79] The plaintiff then sued to recover the excess, and obtained a rule *nisi*. The case was heard by Parke, Martin and Platt B.B. and it is significant that the judges did not even call on the plaintiff for his argument. They ruled that the fee was illegal and that the plaintiff was entitled to restitution. "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."[80] In his submissions the defendant argued that "the money was paid voluntarily, and with a full knowledge of the law and facts, and therefore cannot be recovered back". Martin B. replied during argument that "the case of *Morgan* v. *Palmer* shows that if a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back". Then in his judgment he wrote:

> It is the duty of a 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.[81]

The Supreme Court of Canada first confronted a *colore officii* situation in 1958 in the case of *Municipality of St. John* v. *Fraser-Brace Overseas*

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[77]Note that this case is consistent with either the *ultra vires* theory or the special standard theory, but the words of the judges strongly favour the special standard theory.

[78]*Supra*, note 18.

[79]See the summary of the defendant's argument, *supra*, note 18, 1503.

[80]*Per* Platt B., *supra*, note 18, 1505.

[81]*Per* Martin B., *supra*, note 18, 1505.

Corp..[82] The plaintiff Fraser-Brace was a construction company which was building a radar base in the City of St. John. Title to the land was vested in the United States Government and the plaintiff held the land on a lease. The defendant imposed certain taxes on the plaintiff in respect of its leasehold interest and personal property on the land. The plaintiff from the beginning took the stance that such taxes were not valid, but paid on demand, sometimes under protest, sometimes not.[83] After several years Fraser-Brace brought this action to recover the payments. Most of the judgments in the case discussed the international law relevant to the taxation of a foreign sovereign and concluded that these taxes were invalid. Having come to this conclusion the Court was unanimous that restitution should be allowed, with only Rand J. addressing the issue of the basis for recovery. Even the reasons of Rand J. are remarkably sparse. He makes it clear that recovery is based on the compulsion inherent in a municipality's demand, and that the contractors were not required "to take proceedings that might later be obviated".[84] They could have brought their action earlier, but the desire to avoid "rancorous controversy" was sufficient justification for not doing so.[85] The case was decided on the basis of compulsion, but does not come within the private law test of duress, for surely a construction company's desire to avoid controversy does not amount to a situation of urgent and pressing necessity.

In *George (Porky) Jacobs*[86] the plaintiff wrestling promoter was required by officials of the defendant municipality to pay a *per diem* licence fee for wrestling exhibitions. In fact, but unknown to either party, the relevant by-law only called for annual fees, and so the demands were illegal. When the plaintiff discovered this he sued for restitution. The Supreme Court of Canada allowed recovery on the basis of mistake of fact, as is discussed above. Hall J. for the unanimous Court also recognized duress as an alternative ground for judgment. In summarizing the law of duress he cited the famous passage from Lord Reading C.J. in *Maskell* v. *Horner*.[87] Immediately after citing this passage he stated that the "question was reviewed by this Court in *Municipality of St. John* v. *Fraser-Brace*" and went on to quote from Rand J.'s judgment in that case. *Fraser-Brace* was a *colore officii* case, and allowed

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[82][1958] S.C.R. 263, (1958) 13 D.L.R. (2d) 177.

[83]*Ibid.*, 263, *per* Locke J.

[84]*Ibid.*, 272.

[85]See *ibid.*, 272, where Rand J. states: "pressure was present here inducing payment as a temporary means of avoiding rancorous controversy, as well as interference with the prosecution of the work". There was no evidence that the municipality made any threats of seizure; it is unclear what the "interference" refers to, unless it is the general aggravation of "fighting City Hall".

[86]*Supra*, note 23.

[87]See *supra*, notes 28 and 57, and accompanying text.

recovery in a situation which did not come within the *Maskell* test of "urgent and pressing necessity". Yet by putting the two cases together without further comment, Hall J. seems to be suggesting that the *Maskell* test should apply to *colore officii* cases. Hall J.'s judgment then went on to hold that on the facts Jacobs met the test for compulsion because he "had no actual alternative but to pay the fee being demanded".[88] Note that there was no evidence of any threat to close down the wrestling shows or other sanctions; Jacobs simply paid in response to the demands without protest. It is significant that he paid each fee after the show to which it applied, so there was no question of preventing him from operating.[89] Thus the finding of duress on the facts of *Jacobs* is actually an application of a different test than the more stringent one enunciated in *Maskell.*

The Supreme Court of Canada in *Eadie* again left it unclear as to whether it was applying the private law test for duress in allowing recovery. The *Maskell* test of urgent and pressing necessity was relied upon by the municipality, which took the position that in order to recover "the plaintiff must have been faced with a situation where there was no other alternative available to him".[90] Spence J. rejected this and stated that "practical compulsion is alone necessary". Alternative courses which were "time consuming and impractical" should not prevent a plaintiff from recovering.[91] He went on to find that Eadie's hospitalization and desire to provide for his wife met this test and so compulsion was established. This is significantly lower than the required standard of duress in private cases of economic compulsion, at least prior to this case.[92]

In the result, the private law duress theory for restitution in *colore officii* situations receives at best ambivalent support from the case law. Most *colore officii* cases are decided on the basis of some form of duress. However, those which expressly apply the private law test are of questionable authority, and many allow recovery in situations which do not meet the test applied in a case between two private individuals. When we combine these difficulties

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[88]*Supra*, note 23, 331.

[89]See the statement of facts in the decision of the Saskatchewan Court of Appeal, (1963) 37 D.L.R. (2d) 757, (1963) 47 W.W.R. 233 [hereinafter cited to D.L.R.].

[90]*Eadie, supra*, note 25, 571.

[91]*Ibid.*

[92]It is unclear whether in taking this step Spence J. was intending the lower standard to apply to all compulsion cases between private individuals, or whether this was a special *colore officii* standard to be applied where the compulsion was the result of an act by a government official. The Supreme Court of Canada decision in *Nepean* makes it clear that compulsion was the only reason for recovery in *Eadie*, but does not address the question of whether the new *Eadie* "practical compulsion" test applies to all cases, or only to *colore officii* cases. It is possible that Spence J. intended it only as a *colore officii* standard, because later in his judgment he emphasized the duty of the municipality toward the taxpayers.

in the case law with the numerous conceptual problems discussed above, we must conclude that duress on a private law basis is not an adequate foundation on which to build a theory of restitution in *colore officii* situations.

II. A Better Theory: A Special Standard for Government Officials

Statutory authorities occupy a unique position. As the wielders of state power, their demands are backed by a vast array of possible sanctions. Yet this vast power they wield is subject to the rule of law and constitutional restraints. As government officials, they owe a high level of duty to the citizens whom they serve and represent. Whether elected, or appointed by elected representatives, their role is to apply the law. Great coercive power is given to them to ensure compliance with the law, and it is their duty to use this power only in accordance with the law.[93] When a government official illegally demands money from a citizen, the demand is both a breach of duty toward that citizen and a coercion of that citizen's will.

There are inherent elements of compulsion in every government demand for money.[94] When such a demand turns out to be unauthorized, and therefore *ultra vires*, it becomes wrongful compulsion. There is an essential difference between an invalid demand from the government and an invalid demand from an individual. This difference is to be found in the duty of the government towards the citizen, in the gross inequality between the government and the individual, in the multitude of serious sanctions available to the government to back up its demands, and in the *ultra vires* theory and the constitutional principle that there can be no taxation without the consent of Parliament. When a government official has received money from an individual pursuant to a statute or demand which turns out to be unauthorized or illegal, this essential difference between governmental and private demands should be recognized. In other words, in *colore officii* situations the law of restitution should recognize these special factors and apply a special standard in determining recovery.

This conclusion is strengthened by the criticisms which were directed at the private law duress theory above. The law-abiding citizen or the person

[93]We touch here upon matters of political and legal theory beyond the scope of this paper. The special standard theory is based on the starting point that in a democratic society the coercive nature of state power gives rise to a corresponding duty on the part of the state to exercise that power fairly. While the exact nature of this duty is a question which has been debated by philosophers for centuries, the general duty is now firmly rooted in principles of public and administrative law. Of course, it must be conceded that if the very existence of such a duty is denied, the special standard theory would have no basis.

[94]As MacPherson J. said in the trial judgment of *George (Porky) Jacobs*, quoted in the appeal judgement, *supra*, note 89, 760: "No normal person pays a tax or a licence fee that he is not compelled to pay".

without access to legal advice should not have a lesser right of recovery when the government has illegally taken his money. To prevent such a result, the right to recovery must rest upon the illegality of the governmental demand being made and should not depend upon subsequent protests by the plaintiff.

Given the inherent coercive nature of a public official's demand, a special standard should be applied in *colore officii* situations in determining whether or not the individual's payment was voluntary and therefore whether or not he should recover. This special standard could be described as a presumption, once a *colore officii* situation is established, that the payment was involuntary, unless the contrary can be proved. It seems reasonable to make the presumption that the citizen did not pay an illegal tax or licence fee voluntarily, and so the special standard theory does not require any further evidence of compulsion in order to establish the plaintiff's case. However, it should remain possible for the defendant government to defeat the plaintiff's claim with evidence that this was one of the rare situations where the citizen wanted to give money to his government, whether he owed it or not.[95] The special standard theory would thus essentially shift the legal burden of proof in *colore officii* situations. Note however that the presumption of involuntariness should be strong enough that the government defendant could not rebut it simply by proving certain negative elements like the absence of protest or the possibility of earlier litigation. To prevent recovery the government should have to prove a positive intention on the part of the plaintiff to make the payment whether or not the demand was valid.

The special standard theory is similar to the *ultra vires* theory in that it would allow restitution in a majority of *colore officii* situations. However, it avoids the conceptual problem of the *ultra vires* theory, in that it continues to focus on the plaintiff's voluntariness. Therefore it does not violate the general principle that there should be no restitution where the parties have made a voluntary compromise intending to waive any further rights. Although the legal burden of proof is reversed, the special standard theory still looks to the voluntariness of the plaintiff's payment as well as to the wrongfulness of the defendant's pressure, and so there would be no recovery if there had been a genuine voluntary compromise. As we will see below, the special standard theory has implicitly received considerably more support in the case law than the *ultra vires* theory.

The special standard theory could be viewed as a sub-category of duress, allowing restitution on a public law rather than a private law standard. All

[95]See *supra*, note 81, and accompanying text for a passage from *Steele* v. *Williams* which is an example of this.

of the objections to the private law duress theory are met by the special standard theory.[96] Alternatively, the special standard theory could be considered a unique restitutionary category. The choice between these two viewpoints is largely academic. The combination of breached duty and inherent coercion render the payment involuntary and provide the basis for restitution.

There is really nothing novel about the theory that a special standard should apply to government officials when they unlawfully demand money. This has been a common law principle since at least the year 1275.[97] The Latin phrase we have been using was originally *colore officii sui false, corrupte et extorsive* and formed the indictment for the common law misdemeanor of extortion by a public official.[98] Recovery of government extortion developed with the common law action of *indebitatus assumpsit* for money had and received.[99] The leading cases from the nineteenth century, discussed

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[96]See *supra*, pages 419 to 422. None of these conceptual problems arises under the special standard theory.

[97]Statute of Westminster, 3 Ed I, c. 26 (1275). See also Statute 9 Hen. VI, c. 7 (1430). The early history of *colore officii* cases is superbly set out by Windeyer J. in *Mason* v. *New South Wales*, *supra*, note 42, 139-42.

[98]Coke, Co. Lit. 368b, defined this offence as "the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due". See also *Beawfage's Case* (1603) 10 Co. Rep. 99b, 102a, (1603) 77 E.R. 1076 (K.B.). Early *colore officii* cases dealt with the criminal liability of the official for his extortion, and made little mention of the possibility of the victim of the extortion being able to recover his money. See, for example, *R.* v. *Roberts* (1692) Carth. 226, (1692) 90 E.R. 735 (K.B.) or *R.* v. *Burdett* (1696) 1 Ld. Raym. 148, (1696) 91 E.R. 996 (K.B.). In another early case, *Empson* v. *Bathurst* (1619) Hutt. 52, (1619) 123 E.R. 1095 (C.P.), a sheriff had used his office to obtain an agreement for the payment of an excessive fee. The sheriff then sued on the agreement and was held unable to recover "for his obligation is extortion, and *colore officii*, and void by the common law".

[99]There is an early *dictum* in an anonymous case *per* Holt C.J. that *indebitatus assumpsit* would lie "where money was paid for fees which were not justly due": (1697) Comb. 447, (1697) 90 E.R. 583 (K.B.). The point was then made explicit by Lord Mansfield in *Moses* v. *Macferlan* (1760) 2 Burr. 1005, (1760) 97 E.R. 676, 681 (K.B.).

In *Irving* v. *Wilson* (1791) 4 T.R. 485, (1791) 100 E.R. 1132 (K.B.), recovery of an invalid fee paid to a revenue official after seizure of the plaintiff's goods on the highway was permitted. In *Jons* v. *Perchard* (1796) 2 Esp. 507, (1796) 170 E.R. 436 (N.P.), recovery of an excessive bail bond was permitted from a sheriff whose bailiff had demanded it; similarly in *Lovell* v. *Simpson* (1800) 3 Esp. 153, (1800) 170 E.R. 570 (N.P.). In *Parsons* v. *Blandy* (1810) Wight. 22, (1810) 145 E.R. 1160, recovery of an excessive toll charged by a public official was permitted, with no discussion of reasons. In *Waterhouse* v. *Keen* (1825) 4 B. & C. 200, (1825) 107 E.R. 1033 (K.B.), the plaintiff's claim for an invalid toll was defeated due to a defective notice of action, but the implication was that otherwise he would have won. It is clear on the facts of this case that the defendant tollkeeper was not extorting the excess for his own benefit, but was simply misinterpreting his authorizing statute. An extravagant charge for the use of court roles and deeds was recovered in *Pigott's Case* which is cited by Lord Kenyon C.J. in *Cartwright* v. *Rowley* (1799) 2 Esp. 723, (1799) 170 E.R. 509, 510 (N.P.). In *Longdill* v. *Jones* (1816) 1 Stark. 345, (1816) 171 E.R. 492 (N.P.), the defendant sheriff executed a writ of *fi. fa.* for the plaintiff but only turned over part of the sum executed, retaining the rest as his fee. Lord

above, were *Dew* v. *Parsons*,[100] *Morgan* v. *Palmer*[101] and *Steele* v. *Williams*.[102] In each of these cases recovery was allowed on the basis that the payment was not voluntary, and yet the facts did not come within the private law test for duress. The reasons of the judges in allowing recovery emphasized factors such as the inequality between the official and the citizen,[103] the public policy of the situation,[104] and the duty of a public officer.[105] It is submitted that the judges were applying a special public law standard in awarding restitution in these cases.

The force of these cases can be seen from the way the law developed in reliance on them in Australia. In *Sargood Brothers* v. *The Commonwealth*,[106] the plaintiff had paid a customs tariff which was not authorized by the law, and sued for recovery. Most of the judgments concerned whether or not the tariff was valid, and the Court concluded that it was not. On the question of recovering the illegal charges, O'Connor J. cited *Morgan* v. *Palmer*, *Steele* v. *Williams* and *Hooper* v. *Exeter Corp.*[107] and said:

> The principle of law applicable in such cases is well recognized. Where an officer of Government in the exercise of his office obtains payment of moneys as and for a charge which the law enables him to demand and enforce, such moneys may be recovered back from him if it should afterwards turn out that they were not legally payable even though no protest was made or question

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Ellenborough C.J., with no explanation, held the plaintiff entitled to recover the excess of the legal fee. In *Umphelby* v. *M'Lean* (1817) 1 B. & Ald. 42, (1817) 106 E.R. 16 (K.B.), the defendant collectors of taxes had made an excessive charge for expenses upon a distress upon the plaintiff's property, and, wihout reasons Lord Ellenborough held the plaintiff entitled to recover the excess. In *Traherne* v. *Gardner* (1856) 5 El. & Bl. 913, (1856) 119 E.R. 721 (K.B.), the defendant charged the plaintiff an excessive fee for registering his title to four pieces of land "in copyhold". The judges allowed the plaintiff to recover the excess, saying basically that the payment was not "voluntary".

Most of these cases involved the defendant public official charging an excessive rate for the performance of his duty and the plaintiff was held entitled to recover the excess. Note however that the defendant's motive was irrelevant, and there is usually no mention of whether the plaintiff was mistaken as to the legality of the fees at the time he paid them. Although sometimes the plaintiff was clearly compelled within the private law standard of duress, other cases make no reference to the plaintiff having been in urgent circumstances when he paid.

[100] *Supra*, note 69.
[101] *Supra*, note 68.
[102] *Supra*, note 18.
[103] *Per* Abbot C.J. in *Morgan* v. *Palmer*, *supra*, note 68.
[104] *Per* Bayley J. in *Morgan* v. *Palmer*, *supra*, note 68.
[105] *Per* Platt B., in *Steele* v. *Williams*, *supra*, note 18, 1505.
[106] (1910) 11 C.L.R. 258 (Aust. H.C.).
[107] *Supra*, note 12.

> raised at the time of payment. Payments thus demanded *colore officii* are regarded by the law as being made under duress.[108]

This clear enunciation of the special standard theory remains the law in Australia.[109]

Despite a remarkable failure to cite any of the leading nineteenth-century cases,[110] Canadian case law is for the most part consistent with, if it does not explicitly support, the special standard theory. We have seen that the Supreme Court of Canada in *Fraser-Brace* allowed recovery in a *colore officii* situation on a compulsion basis, even though the private law test for duress had not been met. The same happened in *George (Porky) Jacobs*. The Court never stated that it was applying a special standard because the defendant was a government official, and yet the result is not consistent with the private law theory of duress.

In *R.* v. *Beaver Lamb and Shearling Co.*,[111] restitution of an invalid tax was refused by the Supreme Court of Canada. The majority of the Court refused to consider whether this tax could have been recovered on the basis of duress, because it had not been pleaded.[112] However, Ritchie J. expressly considered the duress argument and rejected it. He applied the private law standard of duress, and cited two duress cases between individuals. Without addressing the matter fully or citing any of the old English authorities, he

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[108]*Ibid.*, 276. It is interesting to note that this clear and powerful statement of what we have called the special standard theory of *colore officii* was challenged by Issacs J. in dissent at page 309: "[s]uch a doctrine, it is evident, would throw the finances of the country into utter confusion." See text accompanying notes 118 *et seq.*, *infra*, for a response to this criticism.

[109]The leading Australian case is *Mason* v. *New South Wales*, *supra*, note 42. The plaintiff was a carrier and paid licensing fees for interstate transport. Another carrier challenged the validity of these fees and had them declared illegal under the Australian Constitution. The plaintiff, who had always paid under protest, then brought this action to recover the fees. The High Court allowed restitution, with differing reasons being given. Dixon C.J. cited *William Whitely* (*supra*, note 15), *National Pari-Mutuel* (*supra*, note 65), and *Sebel Products* (*supra*, note 65) and recognized that those English cases seemed to be saying that an illegal tax cannot be recovered from the Crown "unless the circumstances were such that they would be recoverable as between subject and subject". He expressed disagreement with this position but did not resolve his conflict with the earlier cases, saying "it is enough if there be just and reasonable grounds for apprehending that unless payment be made an unlawful and injurious course will be taken by the defendant in violation of the plaintiffs' actual rights": *supra*, note 42, 117. Menzies and Windeyer J.J., however, both cite and approve O'Connor J.'s passage above from *Sargood Bros.*: *supra*, note 42.

[110]Only one case (*Cushen*, *supra*, note 67) cites the leading *colore officii* authorities, and it rejects them without discussion in favour of American authorities.

[111][1960] S.C.R. 505, (1960) 23 D.L.R. (2d) 513.

[112]See Kerwin C.J.C., Fauteux J. concurring, *ibid.*, 507, where he stated "no such claim was ever alleged". See also Locke J., *ibid.*, 522: "this is not pleaded and the matter was not in issue at the trial and need not be considered".

rejected the idea that there should be a special standard in *colore officii* cases. He quoted McDonald J.A. from the British Columbia Court of Appeal:

> 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.[113]

Ritchie J.'s minority view will have to be rejected if a special standard *colore officii* doctrine is to be established in Canada.

The decision of the Supreme Court of Canada in *Eadie* offers considerable support to the special standard theory. The County Court Judge had allowed restitution because the municipal clerk was a public officer in a position analogous to that of an officer of a court "and it was highly inequitable if not dishonest"[114] for the Municipality to insist on retaining the money illegally demanded by such an officer. In the Supreme Court Spence J. commented that "there is much to be said in support of such a view", but left it without further discussion. This passage constitutes an open invitation to judges in future *colore officii* cases to apply the special standard theory.

We have already discussed the references to *Kiriri* which created so much confusion in *Eadie*. Immediately after invoking *Kiriri*, Spence J. emphasized the duty of the municipal clerk toward the taxpayers,[115] and used this as a basis for his finding of "not *in pari delicto*".[116] *Nepean* has made it clear that *Eadie* was decided on the basis of compulsion. Although Spence J. uses the Latin phrase *in pari delicto*, the argument can be made that his analysis imperfectly expresses a special standard theory. The phrase indeed speaks to the inequality between official and citizen, and the duty of the

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[113]*Ibid.*, 524. The quotation is from *Vancouver Growers Ltd* v. *Snow Ltd* (1937) 52 B.C.L.R. 32, 37-8, [1937] 4 D.L.R. 128. The logic of this passage is highly questionable. It agrees that in practice compliance with a statute is compelled, but then asserts that for the purposes of the law we must assume compliance voluntary. That amounts to a legal obligation to "pay voluntarily, whether you want to or not".

[114]*Eadie, supra*, note 25, 570.

[115]*Ibid.*, 572.

[116]Spence J.'s "duty analysis" was followed by McKenna in *Mistake of Law Between Statutory Bodies and Private Citizens* (1979) 37 U.T. Fac. L. Rev. 223. McKenna points out the importance to Spence J.'s judgment of the recognition of a duty owed by the public official to the taxpayer. Unfortunately his analysis is flawed by an unnecessary reliance on *Kiriri* and the out-of-context passage cited by Spence J.

official was raised as relevant. Restitution therefore was allowed on a standard different from that in *Maskell* v. *Horner*.[117]

Although not referred to as such, the special standard theory thus receives considerable support in the case law. It also avoids the conceptual problems of the existing theories. However, we must still confront a major policy objection which can be raised[118] against any *colore officii* theory which allows recovery in a majority of cases. This objection is that such a wide right to restitution would create uncertainty and danger for the public treasury. Suppose for instance that a government agency like the Hydro Commission imposed an invalid surcharge of $1.00 on its monthly bill to all customers. Some ten years later an individual realizes the illegality of this surcharge and sues to recover as much as the six year limitation period will allow. The plaintiff would be suing for seventy-two dollars. However, if he brought his suit as a class action on behalf of all Hydro customers, the government would stand to lose hundreds of millions of dollars. Fear of this possibility has made the courts slow to develop the law in the *colore officii* area.

One partial solution is to shorten the limitation period for restitution cases.[119] This would reduce the total of any given claim. It would also prevent late-coming plaintiffs, in situations where class actions were not used, from seeking to cash in on a government mistake after someone else had taken all the risks and expense of proving a tax invalid. A vigorous application of the doctrine of laches could achieve the same result.

A second solution would be to recognize a "change of position" defence.[120] The Supreme Court of Canada has already done so in mistake cases such as *Rural Municipality of Storthoaks* v. *Mobil Oil of Canada Ltd.*[121] This defence would be a difficult one to establish in *colore officii* situations

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[117]*Supra*, note 28.

[118]See McCamus, *supra*, note 20, 256.

[119]This paper is not the appropriate place to develop this position, but a two year limitation period, not only in *colore officii* cases, but on all restitutionary claims, would be reasonable. Such a limitation period would, in effect, operate as an assumption of "change in position" after a reasonable time.

[120]See Goff & Jones, *supra*, note 11, 545 *et seq.* for a good analysis of this restitution defence.

[121][1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, (1975) 55 D.L.R. (3d) 1. It is not yet decided whether this defence would apply to duress situations. It usually would not, as one of the elements of the defence is that the defendant must not have "knowledge of the facts entitling the other to restitution" (*Restatement of Restitution*, § 142), and in most duress situations the defendant does have such knowledge. However, *colore officii* cases are unique in that the official is usually ignorant of the illegality of his demand at the time he makes it. In the recent Canadian cases concerning invalid development taxes it would have been infinitely preferable if the courts had seen fit to apply the change of position doctrine rather than the vague "balancing of equities" to which they resorted.

because it would be hard to prove that the government had changed its position in response to any one addition to the public treasury. However, in our Hydro example it may be that they had used the revenue from the surcharge specifically for a new generating station which would not otherwise have been built. It would be appropriate to deny restitution in those situations where the government could establish a detrimental change of position directly related to the invalid tax.

A third possibility is that the limitations suggested by Birks in developing his *ultra vires* theory could also apply to the special standard theory. *Colore officii* rules would be inapplicable to government bodies acting in a private capacity, and recovery would be refused where the official was led into error by the individual who later complained.

The final answer to the concern over the potential magnitude of government liability to *colore officii* claims is that this problem should not be solved by limiting the citizen's right to restitution. The solution should be found in seeking to eliminate illegal demands by the government, not in preventing recovery once they have taken place. Such a righteous answer might seem excessively idealistic and impossible to achieve. There will always be public officials who make honest mistakes and impose unauthorized charges. It is suggested, however, that the cost of these mistakes is more appropriately borne by the government, whose position in society gives official demands so much inherent coercive power, rather than by the law-abiding citizen who simply obeys.

Unfortunately, government debts are paid by taxpayers. A large *colore officii* restitution case might put a sufficient hole in the public treasury that future taxes would have to be increased to replace the funds which were intended for public projects. The objection could be made that we would then be taxing today's citizens to compensate for payments illegally exacted from yesterday's taxpayer.[122] The unauthorized tax may well have funded services which have benefited the plaintiff. The first response is that, with a short limitation period, yesterday's taxpayer is almost certainly still paying tax today. He will in any case end up paying legally for the service he has enjoyed. More importantly, the integrity of our system of constitutional law, which includes the principles of the 1688 *Bill of Rights*, should not be compromised simply because the plaintiff probably benefited from the services provided by the illegal tax. The overall cost to society of violating

[122]See McCamus, *supra*, note 20, 257-9 on this point.

these principles would be far greater than the burden of a slight increase in taxes to rectify an error.[123]

Conclusion

Present case law reveals neither a clear nor consistent explanation for recovery in *colore officii* situations. The result is that it is difficult to predict whether restitution will be allowed in any given situation. The early authorities consistently allowed recovery on a duress basis, and the indications are that a special standard was being applied when the duress was exercised by a public official. Later English cases are inconsistent, but the higher courts continue to show support for *colore officii* restitution on grounds different from those of private law duress. The Australian High Court has endorsed a special standard basis for recovery.

Canadian courts to date have revealed a remarkable failure to perceive the problem. Rarely have they even recognized that they are dealing with a *colore officii* situation.[124] The Supreme Court of Canada has been confronted with the problem on four occasions. In *Fraser-Brace* restitution was allowed without explanation, although the facts are not consistent with the private law test for duress. In *Beaver Lamb* restitution was denied because duress had not been pleaded, but one judge in a minority decision rejected the possibility of a special standard of duress for government demands. In *George (Porky) Jacobs* and *Eadie* recovery was allowed on a compulsion basis, with implicit support for the special standard theory in the result itself and in the references to "not *in pari delicto*" and the attendant duty of public officials. It is noteworthy that in the only instance where the Supreme Court of Canada denied restitution it did so because duress had not been pleaded.[125] Thus it is still possible for a court to adopt the special standard theory without having to overrule any of the leading cases.

On a theoretical level, the existing theories are plagued with conceptual problems. The *ultra vires* theory ignores the plaintiff's voluntariness. The mistake theory cannot get around *Bilbie* v. *Lumley*, and even if we overrule

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[123]Another possible policy concern with a rule permitting general recovery in *colore officii* situations is raised but adeptly dismissed by McCamus, *supra*, note 20, 259-60. The concern is that a general rule permitting recovery might cause public officials to be unduly cautious in their exercise of their statutory powers. However, as McCamus puts it, 259-60, "[t]here are other pressures present in the political system which are likely to be more influential than the law of restitution in determining the degree of caution or abandon exhibited by public officials in the discharge of their responsibilities".

[124]This is despite the remarkable appearance of the quotation from *Sargood*, *supra*, note 106, in *Severson* v. *Corporation of Qualicum Beach*, *supra*, note 33, 383.

[125]Remembering always that *Nepean Hydro*, *supra*, note 15, was not a *colore officii* case between a private citizen and a public official.

this old obstacle, the theory cannot explain why there has been *colore officii* recovery prior to such overruling. Nor can the mistake theory explain why there has been, and arguably should be, restitution even when the plaintiff knew the fee was invalid when he paid.

Nepean Hydro has rejected the mistake and *ultra vires* theories. That case has also made it clear that restitution is given in *colore officii* situations because the citizen's payment was involuntary due to compulsion. The only question becomes whether there should be a special standard for the required level of compulsion exercised by a government official or statute, or whether all cases should be judged according to the same private law standard. Here the Canadian law of restitution remains uncertain. For the reasons discussed above, there is a fundamental difference between an invalid demand made by a government and one made by private individual. The public official's demand inherently contains a strong element of compulsion, and it offends the rule of law to permit an official to retain an unauthorized payment without placing some minimum onus of proof on that official. The basic difference between public and private demands should be reflected in our law of restitution, and this would be accomplished by adopting a presumption of involuntariness in *colore officii* cases. The official would have the burden of proving the citizen's payment was voluntary. The result would be that recovery would almost always be allowed in these cases, which is what the man on the street would have expected in the first place.