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MISTAKEN BIDS AND UNILATERAL MISTAKEN ASSUMPTIONS, A NEW SOLUTION FOR AN OLD PROBLEM?

John D. McCamus*

The "two-contract" analysis of the Supreme Court of Canada's decision in Ron Engineering has created a very substantial obstacle to relief for mistaken bidders who discover calculation errors upon the opening of the bids. Nonetheless, Canadian courts are inclined to narrowly distinguish that analysis and grant relief in cases of extreme error in order to avoid unduly onerous penalties for mistaken bidders and large unearned windfalls for issuers of invitations to bid. This article argues that recent decisions of Canadian appellate courts articulating a rule which would excuse bidders where the burden imposed by the miscalculation is so grossly disproportionate that enforcement of the mistaken bid would be unconscionable represent a more satisfactory and elegant solution to the problem of mistaken bids and represents a useful incremental change in the law of contractual mistake.

L'analyse de la Cour suprême portant sur les « deux contrats » dans l'arrêt Ron Engineering a créé un obstacle important pour les soumissionnaires qui se rendent compte d'une erreur de calcul à la date d'ouverture des soumissions et qui sollicitent une réparation. Néanmoins, les tribunaux canadiens sont portés à distinguer cette analyse, de façon restrictive, et d'accorder un dédommagement dans les cas d'erreur très

* Osgoode Hall Law School, York University. I am grateful to Stephanie Ben-Ishai and Joost Blom for their comments on an early draft.

grave afin d'éviter d'infliger des sanctions indûment sévères aux soumissionnaires qui font erreur et d'accorder injustement des gains inespérés à la société responsable de l'appel d'offres. Le présent article soutient que les décisions récentes des cours d'appel canadiennes exprimant une règle qui accorderait une dispense pour les soumissionnaires dans le cas où la peine imposée à la suite de l'erreur de calcul est si disproportionnée que l'exécution de l'offre erronée serait déraisonnable, offrent une solution plus satisfaisante et élégante au problème engendré par les offres erronées et représentent un changement graduel et utile au droit en matière d'erreur contractuelle.

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1. Introduction

The Canadian common law of contracts has had a difficult time dealing with the legal issues arising from the perennial problem of mistaken bids. In the typical case of this kind, a *bidder* responds to an invitation to tender by submitting a bid to the *issuer* of the invitation. The bid contains an unsuspected clerical or mathematical error with the result that the bid price is accidentally reduced, perhaps to a very significant degree. Upon the opening of the bids, the mistaken bidder, whose bid may be substantially below the second lowest bid, checks the calculations, discovers the error and advises the issuer of its existence. In such circumstances, can the mistaken bidder be forced by the issuer of the invitation to carry on with the project at the accidentally low price? If not, can the mistaken bidder successfully recover any deposit paid to secure that performance?

In its decision in *R. v. Ron Engineering & Construction (Eastern) Ltd.*,[1] the Supreme Court of Canada reversed the trend of prior Canadian case law and effectively precluded any form of relief for the mistaken bidder. It did so on the basis of a novel analysis that will be referred to here as a "two-contract" analysis of the relationship between bidders and issuers of invitations to tender. Despite this apparently authoritative statement, the problem of mistaken bids persists. As a practical matter, bid errors appear to be endemic to the tendering process. Further, mistaken bidders continue to assert claims for relief and, at least in extreme cases of what might be referred to as gross error, courts appear to be inclined to find indirect means for providing relief in some form. In particular, courts have attempted, with some artificiality, to apply the "palpable error" rule to these situations with results, it will be argued here, that are less than satisfactory.

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1 [1981] 1 S.C.R. 111 [*Ron Engineering*].

The burden of this article is to suggest that a more direct and elegant solution to the problem of mistaken bids is available. In two recent decisions, Alberta[2] and Ontario[3] appellate judges have expressed the view that mistaken bidders should be excused from their obligations where the burden imposed by the error is so *grossly disproportionate* that enforcement of the mistaken bid would be *unconscionable*. What is being proposed, in effect, is the recognition of a rule permitting rescission of the bidder's contractual obligations on the basis of the bidder's *unilateral* mistaken *assumption*. The error is *unilateral* in the sense that the calculation error is the bidder's alone. It is not shared by the issuer. The error pertains to an *assumption* on the bidder's part that the calculation of the price was accurate. As we shall see, this approach, if more widely adopted, represents a significant adjustment to the law of mistaken assumptions. It will be urged here, however, that the proposed rule, which is in fact the current American rule, is sound and that it provides a sensible solution to the problem of mistaken bids.

Before turning to consider the proposed solution to the mistaken bid problem, it will be useful to portray briefly the innovative two-contract analysis adopted by the Supreme Court of Canada in *Ron Engineering*, to explicate in greater detail the nature of the mistaken bid problem and the reasons for its persistence and to provide a sketch of the law of contractual mistake as it applies to the phenomenon of the mistaken bid. This article then examines the unilateral mistaken assumption rule articulated in the recent Canadian cases and notes its rather precise similarity to the American rule on point. The article then offers a defence of the unilateral mistaken assumptions rule and its application to cases of mistaken bids. A number of arguments that support the rule will be examined. Finally, we consider and then reject what appear to be the arguments that could be made against the rule.

2. The New "Two-Contract" Logic of Ron Engineering

Since 1981, the year of the decision of the Supreme Court of Canada in *Ron Engineering*,[4] Canadian students of the common law of contract have been taught that the submission of a tender or bid in response to an invitation to tender is normally considered to constitute an acceptance of an offer constituted by the invitation, thereby creating, as it was called in

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2 *Calgary (City) v. Northern Construction Co*., [1986] 2 W.W.R. 426 (Alta. C.A.), aff'd [1987] 2 S.C.R. 757 at 443, *per* Kerans J.A. [*Northern Construction*].

3 *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 257 D.L.R. (4th) 539 (Ont. C.A.) at 548, *per* Rouleau J.A. [*Gottardo*].

4 *Supra* note 1.

that case, "Contract A." In *Ron Engineering*, the Supreme Court decided that "Contract A" related to the bidding process and created a binding contract out of the terms and conditions set out in the invitation to tender. Contract A was to be distinguished from "Contract B," the latter being the contract that would ultimately be entered into by the successful bidder and the issuer of the invitation to tender. In the typical case of a tendered building project, then, Contract A, constituted by the invitation and the submitted bid, would settle the terms of the bidding process. All bidders would enter a Contract A with the issuer of the invitation. Contract B would be the building contract ultimately entered into with the successful bidder. This innovative Canadian analysis can be contrasted with the traditional (and current) English approach which, generally speaking, holds that the invitation to tender is not an offer but a mere invitation to treat. It is the submission of a bid that constitutes an offer that, in turn, may or may not be accepted by the issuer of the invitation. When the issuer accepts one of the bids, a contract is created between the successful bidder and the issuer of the invitation. In other words, the traditional English approach envisages only one contract between the parties, that being, in Canadian terms, Contract B.[5]

In *Ron Engineering*, the implication of Contract A was designed to deal with the problem of mistaken bids. In that case, the Crown issued an invitation to bid on a particular project. Pursuant to the terms of the invitation, the plaintiff bidder had been required to pay a $150,000 bid deposit upon submission of its bid. The plaintiff's bid price was

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5 Although it is occasionally suggested that *Ron Engineering* decided nothing new and that English law is the same as Canadian law on this point, this does not appear to be correct. The similarity between English and Canadian common law is that the question of whether a contract is created by the submission of a bid rests upon the intention of the parties. The difference between the two, however, is that English law generally assumes that no such intention is to be implied, whereas Canadian law, after *Ron Engineering*, appears to assume that such an intention is normally present. In contrast to the Canadian position, then, English law persists in the view that it is normally the case that it is the bid that constitutes an offer that may ultimately be accepted by the issuer of the invitation. See generally I.N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th ed. (London: Sweet & Maxwell, 1995) at 13 ("…but more usually, it is the tender submitted in response to an invitation to submit tenders which is the offer and which, if accepted by the employer, will result in a binding contract") and 410-15; Stephen Furst and Vivian Ramsey, *Keating on Building Contracts* (London: Sweet & Maxwell, 2001) at 2. Nonetheless, in English law, there may be circumstances present, such as a commitment in the invitation to accept the lowest bid price, that may be considered evidence of an implied intention to enter what a Canadian lawyer would call "Contract A." See e.g. *Harvela Ltd. v. Royal Trust Co*., [1986] A.C. 207 at 224; *Blackpool and Fylde Aero Club v. Blackpool B.C*., [1990] 1 W.L.R. 1195 (C.A.) [*Blackpool*] (implication of a limited contractual right to at least consider bids submitted in timely fashion).

$2,748,000. Upon the opening of the bids, the plaintiff discovered that its bid was some $632,000 below the second lowest bid. Upon rechecking its calculations, it discovered that it had omitted a $750,058 item relating to its own workforce which would have increased its bid to $3,498,058. Under prior Canadian law[6] it had been accepted that in such circumstances, the issuer of the invitation was not in a position to "accept" the "offer" constituted by the bid because, prior to acceptance, the issuer had become aware that the bidder (the offeror) did not intend to contract on the basis of the written terms in the bid. The issuer could not "snap up" the bidder's erroneous offer.[7] This was not, however, the issue in the *Ron Engineering* case itself. In *Ron Engineering* the Crown did not attempt to force the plaintiff into an acceptance of the building contract. Rather, the Crown merely took the position that it was entitled to retain the bid deposit. The plaintiff's attempt to recover the deposit was rejected on the basis of the new "two-contract" analysis of tendering processes articulated by the Supreme Court in this case.[8] Contract A had been created by the submission of the bid and Contract A provided that the bid deposit would be forfeited in the event that the bidder, if selected by the Crown as the winning bidder, refused to enter into Contract B. Contract A was unaffected by the calculation error. As Estey J. remarked, "… no mistake existed which impeded or affected the coming into being of contract A."[9] For Estey J., then, the calculation error did not in any way impair the contractor's intention to submit a bid of $2,748,000. However misguided, the plaintiff intended to submit a bid at that price and, in so doing, entered into Contract A. Under its binding terms, the deposit was forfeited.

It is important to note, however, that *Ron Engineering* did not consider the question of the impact that this novel contract analysis might have on the formation of Contract B. Could the mistaken bidder be forced, in effect, to enter Contract B? In Estey J.'s view that was another matter. The possible effect of the calculation mistake on the enforceability of or interpretation of Contract B was simply not before the court. From a practical perspective, the two issues do appear severable. It is one thing to

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6 *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd.* (1978), 87 D.L.R. (3d) 761 (Ont. C.A.) [*Belle River*].

7 See generally John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 501-04 [McCamus, *The Law of Contracts*].

8 It is of merely passing interest, given the enormous importance that the *Ron Engineering* decision has acquired, that the two-contract analysis was not actually necessary to dispose of the merits of the dispute between the parties – a restitutionary claim by the mistaken bidder to recover its deposit. The Court could simply have denied relief on the basis that the enrichment of the defendant was not unjust in the circumstances. The two-contract analysis is now, however, a well-established feature of the Canadian law of tendering.

9 *Supra* note 1 at 125.

hold that a mistaken bidder who refuses to enter Contract B forfeits his deposit, quite another to expose that bidder to a claim for damages for refusing to enter Contract B. It is of considerable interest that Estey J. appeared reluctant to opine that the mistaken bidder could be forced to enter Contract B. The logic of his two-contract analysis would suggest, however, that this would indeed be the result. Estey J. did not limit the scope of Contract A, as he might have done,[10] to an understanding concerning the deposit. All of the terms of the invitation were to be included in Contract A. Contract A would therefore typically include a requirement, presumably binding in nature, that the bidder selected by the issuer would enter Contract B. Indeed, subsequent decisions have confirmed that Contract A also imposes a binding obligation on the successful bidder to enter Contract B.[11] Refusal to enter Contract B in such circumstances therefore sounds in damages.[12] In the typical case, then, the mistaken bidder would be liable to the issuer for the difference between the mistaken price and the bid price of the second lowest acceptable bid.

The decision in *Ron Engineering*, then, has had a significant impact on the law relating to mistaken bids. Prior law having been overruled, the mistaken bidder was essentially shut out of any form of relief. The mistaken bidder's bid deposit or bond was enforceable and the mistaken bidder could be forced to enter into Contract B or, upon refusal to do so, face the prospect of a substantial damages claim. What was not apparent at the time of the decision, however, was the enormous legal and practical impact that the decision would eventually have on the law and practice of tendering in a more general way.[13] The explanation for this expansive, indeed explosive, effect on the law of tendering is not some peculiar

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10 The idea that Contract A might consist merely of an intentionally binding arrangement concerning the deposit to the effect that it would be forfeited regardless of the bidder's reason for refusing to proceed appears not to have been explored in *Ron Engineering*. The court simply assumed that Contract A was constituted by the entirety of the invitation to bid. In English law, however, the possibility that a preliminary agreement, or, in Canadian terms, a Contract A, may consist of something less than the complete invitation has been considered; see e.g. *Blackpool*, *supra* note 5.

11 *Supra* note 2.

12 *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

13 Although the decision in *Ron Engineering* attracted vigorous criticism at the time, the enormous potential that the decision contained for complicating the legal position of issuers was, by and large, not foreseen; see e.g. Joost Blom, "Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd." (1981-82) 6 Can. Bus. L. J. 80; John Swan, "Comment on *The Queen v. Ron Engineering & Construction (Eastern) Ltd.*" (1981) 15 U.B.C. L. Rev. 447; R. S. Nozick, "Comment on *The Province of Ontario and The Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd.*" (1982) 60 Can. Bar. Rev. 345; G.H.L. Fridman, "Tendering Problems" (1987) 66 Can. Bar Rev. 582.

Canadian mathematical disability that has produced a proliferation of mistaken bid cases but, rather, a subsequent line of authority that has inferred a series of obligations to be present in Contract A including, principally, an obligation on the part of the issuers of invitations to treat all bidders "fairly and equally."[14] Many unsuccessful bidders take the view, it seems, that they have been treated unfairly or unequally and an impressive body of case law has developed. Indeed, the *Ron Engineering* line of authority has proven to be a treasure trove for the legal profession.[15] At the same time, of course, it has created a hazardous set of traps for those who issue invitations to tender in the modern post-*Ron Engineering* legal environment. In my limited personal experience of the phenomenon, it is not uncommon to find that one or more or all of a group of unsuccessful competitive bidders feel that they have a plausible *Ron Engineering* claim for breach of the issuer's duty to treat all of the bidders fairly and equally. As a consequence, it is not uncommon for well-advised issuers to simply stipulate in the invitation that there is no contract of any kind created by the submission of a bid.

3. The Persistence of the Mistaken Bid Problem

For all of the achievements of the mighty acorn planted by the Supreme Court in *Ron Engineering*, however, perhaps the crowning irony of this line of authority is that the decision appears not to have completely solved the problem of mistaken bids, the problem to which it was initially addressed. Lawsuits arising from mistaken bids have not disappeared, as they should have done if *Ron Engineering* was taken by the profession at its word. There is little room left by that decision for an argument that a mistaken bidder ought to be excused from the burdens of Contract B. Nonetheless, such claims continue to surface in the law reports, as is illustrated by the recent claim by a mistaken bidder in *Toronto Transit Commission v. Gottardo Construction Ltd.*[16] There is, I think, an obvious and quite sensible reason for the persistence of litigation by mistaken bidders. That reason is that the results dictated in mistaken bid cases by the holding in the *Ron Engineering* line of authority are, in many circumstances at least, simply and palpably unjust.

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[14] See generally McCamus, *The Law of Contracts*, *supra* note 7 at 742-43.

[15] A recent Quicklaw check of citations to *Ron Engineering* produced 231 citations, this being, we may safely assume, the substantial tip of a no doubt much larger litigation iceberg. The number of billable hours taken up with advising issuers and bidders as to whether or not particular decisions would or did amount to fair or unequal treatment is also, of course, inestimable.

[16] *Supra* note 3.

Consider, for example, the underlying facts of the recent decision in *Ottawa (City) Non-Profit Housing Corp. v. Canvar Construction (1991) Inc.*[17] Canvar, a building contractor, had submitted a bid of $2,289,000 on a municipal housing project. Upon the opening of the bids, Canvar realized that a mistake had been made. On rechecking its calculations, it discovered that the bid should have been stated at $2,989,000, a $700,000 difference on an approximately $3 million contract – almost one quarter of the entire price. The second lowest bid was $3,130,000. The municipality refused to allow Canvar to withdraw its bid, awarded the contract to the second lowest bidder and sued Canvar for the $841,000 difference between the mistaken bid and the second lowest bid. It is not at all obvious that the mistaken bidder's clerical or mathematical slip should result in a windfall of this size to the defendant municipality. In effect, the municipality would acquire the building at much less than its true cost. Nor does it appear that justice requires that so draconian a sanction be imposed on the mistaken bidder as a result of an innocent mistake of this kind. It is inherent in the nature of tendering exercises that they are likely to involve last-minute calculations by bidders as their potential subcontractors and other suppliers attempt to avoid "bid-shopping" by submitting their bids or quotations to the bidder at the eleventh hour. In the *Canvar* case, for example, the trial judge noted that the tender of Canvar itself and all of the eight other bidders were submitted in the final six minutes prior to the closing of tenders.[18] The fact that errors are likely to and do occur in this setting is amply evidenced in the case law of mistaken bids.

It would be most surprising if the reaction of the average member of the public to situations of this kind was that the mistaken bidder should invariably be hung out to dry. In the absence of survey evidence on point, it is of interest that engineers retained by Metropolitan Toronto to make an assessment of a similar error on a construction project noted that the contractor, if required to proceed, would likely sustain a loss in the order of $250,000. The engineers, having satisfied themselves that the error was genuine, recommended against forcing an equivalent loss upon the mistaken bidder and observed as follows:

> This sum would represent a substantial fine to a convicted felon let alone an honest businessman who made a mistake at no one's expense but his own.[19]

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17 (1999), 46 C.L.R. (2d) 116 (Ont. Gen. Div.), rev'd (2000), 131 O.A.C. 116 (Ont. C.A.).

18 *Ibid.* at 117.

19 Reported at *Metropolitan Toronto v. Poole Construction Ltd.* (1979), 10 M.P.L.R. 157 at 160 (Ont. S.C.) [*Poole*]. Passages from the engineers' report are set out in Christine Boyle and David Percy, eds., *Contracts: Cases and Commentaries*, 7th ed. (Toronto: Carswell, 2004) at 201. The particular dispute was resolved in the mistaken bidder's favour,

One suspects that such views may be widely held within the construction industry.[20] Unsurprisingly, then, mistaken bidders continue to assert claims and defences arising from their mistaken bids. Moreover, apparently impressed by the justice of their position, courts are inclined, where possible, to find a way around a straightforward application of the *Ron Engineering* approach. As we shall see, this was the result, for example, in the *Canvar* case itself. Such diversionary tactics, however, lead to complex and difficult, if not incoherent, doctrine. The recent Alberta and Ontario decisions indicate that the problem can be more successfully addressed in a direct fashion.

4. Mistaken Bids and the Law of Contractual Mistake

Concise explication of the law of contractual mistake is bedevilled by terminological complexity and other conceptual muddles. Nonetheless, there is a reasonably wide scholarly and judicial consensus that the law of contractual mistake, as it relates to the enforceability of agreements, can be divided into two subcategories, *misunderstanding* and *mistaken assumptions*. The law of misunderstanding, when applicable, prevents the very formation of an agreement. The law of mistaken assumptions, when applicable, holds that an agreement, though validly formed from a *consensus ad idem* perspective may be set aside on the basis that it has been entered into on the basis of a fundamental mistake concerning the context or actual circumstances of the agreement.

a) Misunderstanding

Parties who misunderstand each other have different understandings of the meaning of a particular term or terms of their proposed agreement. Where the term is fatally ambiguous in the sense that neither party can rely on an objective interpretation of the provision as a trump card, the agreement fails for lack of *consensus*. I expect that most law teachers' favourite example of the phenomenon involves the famous case involving a contract for the sale of cargo aboard HMS Peerless. As it happened, there were two

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relying on the prior doctrine overruled by the Supreme Court of Canada in *Ron Engineering*; see *Toronto (Metropolitan) v. Poole Construction Ltd.*, [1980] O.J. No. 633 (C.A.)(QL), affirming the lower court decision, leave to appeal to S.C.C. refused (January 27, 1981) (as it happens, the same day that the decision in *Ron Engineering* was handed down).

20 As John Swan noted at the time, among the materials filed in *Ron Engineering* was *A Guide to Construction and Tendering Procedures* endorsed by a number of professional and trade associations engaged in the industry. The Guide states that "If there is a serious and demonstrable error in the tender, the bidder should be allowed to withdraw without penalty." See Swan, *supra* note 13 at 463.

ships Peerless, one of which was intended by the seller and the other of which was intended by the buyer.[21] The agreement was unenforceable on grounds of fatal ambiguity.

Misunderstanding will also prevent formation of a contract where only one party misunderstands the meaning of the agreement but the other party is aware of that misunderstanding. One might say that the misunderstanding in such a case is "one-sided" or "unilateral" in the sense that only one party suffers from the mistake. The fact that the other party is aware of the error, however, prevents the formation of a *consensus ad idem*. In a case where it is the offeror who suffers from a misunderstanding, the point is often explained by saying that the offeree "cannot snap up the offer" but in a case where it is the offeree who is mistaken to the knowledge of the offeror, the rule preventing formation also applies.

Applying the law of misunderstanding to mistaken bids, it is easily seen how the *Ron Engineering* decision slams the door in the face of the mistaken bidder. Under prior law, a bidder who has informed the issuer of the invitation of the mistake prior to the moment of the issuer's acceptance of the offer constituted by the bid, can plausibly argue that the issuer should not be allowed to "snap up the bid." The issuer knows that the bidder's mind no longer "goes along with" the price expressed in the bid. After *Ron Engineering*, however, a binding Contract A has been entered into prior to the issuer's awareness of any mistake. Thus, even though the bid is infected by, let us assume, a clerical or mathematical error, the issuer is unaware of this fact and accordingly, the law of misunderstanding is simply inapplicable to the formation of Contract A. The numerical price term is unambiguous. The offeree is unaware of the offeror's error. As Estey J. said, "… no mistake existed which impeded or affected the coming into being of contract A."[22] The law of "misunderstanding" does not prevent formation of the agreement in these circumstances.

Estey J. did leave a slender escape hatch ajar in *Ron Engineering* by suggesting that it might be that a form of tender might be "so lacking" that it could not constitute an acceptance of Contract A.[23] Further, he suggested that there might be a possibility that "by some abstract doctrine of law a tender which could not form the basis of a contract upon acceptance in the sense of Contract B, could not operate as a tender to bring into being

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21 *Raffles v. Wichelhaus* (1864), 2 H. & C. 906 (Ex.); see also A.W. Brian Simpson, "Contracts for Cotton to Arrive: The Case of the Two Ships Peerless" (1999) 11 Cardozo L. Rev. 287.

22 *Supra* note 1 at 125.

23 *Ibid*.

Contract A."[24] Although no more revealing explanation of the nature of that abstract doctrine was suggested by Estey J., it was in his mind inapplicable to the circumstances of a mistaken bid such as that which occurred in *Ron Engineering*. Estey J. also noted in passing that

> …we are not here concerned with a case where the mistake committed by the tendering contractor is apparent on the face of the tender.[25]

It is not obvious how the existence of a palpable error would assist the bidder who is, by the rule's definition, the offeree who is accepting the offer set out in the invitation to bid. If the submission of the bid amounts to saying, in effect, "I accept your offer," it is not at all obvious that the fact that the bid itself might contain some error, palpable or otherwise, would prevent the formation of the agreement. In the particular case of sealed bids, where the issuer of the invitation will not examine the bids until they are opened, it is even less obvious how a palpable error on the face of the unseen bid would somehow preclude the formation of Contract A. Apart from some ambiguity relating to the question of the role of palpable error on the face of the bid – a point to which we shall return – the *Ron Engineering* rule thus appears to place a rather tight noose around the neck of the mistaken bidder. Nonetheless, the palpable error escape hatch, as we shall see, may prove to loom large in mistaken bid cases.

b) Mistaken Assumptions

Turning to the law of mistaken assumptions, a mistaken assumption arises in circumstances where, though the parties have reached a perfectly satisfactory *consensus ad idem* or agreement on the terms of a bargain, one or both of the parties is mistaken with respect to a fundamental assumption concerning the background circumstances, we might say, of that bargain. The facts of the leading case, *Bell v. Lever Brothers Ltd.*[26] are illustrative. Lever Brothers entered into an agreement to terminate the employment of two executives. The terms of the agreement were clearly understood both by Lever Brothers and by the two employees. Lever Brothers entered into the agreement on the basis of a mistaken assumption, however, that the two employees could not be dismissed for cause. In fact, as a result of wrongful conduct which subsequently came to light, it became apparent that the employees could have been so terminated. At the time of contracting, however, there was a satisfactory *consensus ad idem* but one of the parties,

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24 *Ibid*.

25 *Ibid*. at 117.

26 [1932] A.C. 161 (H.L.) [*Lever Brothers*]; see also Catharine MacMillan, "How Temptation Led to Mistake: An Explanation of *Bell v. Lever Brothers Ltd.*" (2003) 119 L.Q. Rev. 625.

at least, had entered into the agreement on the basis of a false assumption concerning an important contextual fact. The mistaken assumption will typically relate to a circumstance that explains why one or both of the parties are willing or, indeed, eager to enter into the particular transaction. Accordingly, mistaken assumptions are sometimes referred to, by judges and others, as mistakes of "motive."

The precise formulation of the actual rule concerning mistaken assumptions has been a matter of considerable judicial and academic controversy over the years.[27] Nonetheless, there would be general agreement on the proposition that to render an agreement unenforceable on grounds of a mistaken assumption, it must be established that the mistake was "common" to the parties and was, in some sense, "fundamental." Thus, in *Lever Brothers* itself for example, it was held that although the mistake was "common" in the sense that both Lever Brothers and the employees were labouring under the mistaken assumption that the employees were not dismissible, the mistake in question was not sufficiently "fundamental" in the requisite sense. Accordingly, the mistaken assumptions rule did not apply and the agreement was enforceable. The requirement that the mistake be "common," then, means that both parties must be suffering from the same mistake at the time of formation of the agreement. An attempt to apply the law of mistaken assumptions to a mistaken bid is easily seen to run afoul of the "common" mistake requirement. The mistaken bidder is in error but, in the typical case, the issuer of the invitation is not suffering from the same mistake. The mistaken bidder is suffering from a "unilateral" mistaken assumption that the calculations underlying the bid are accurate. Under the traditional law of mistaken assumptions, a unilateral mistaken assumption provides no form of relief for the mistaken bidder.

5. Mistaken Bids: Misunderstandings or Mistaken Assumptions?

One source of complexity in the law of mistaken bids arises from the fact that it is not entirely clear whether a mistaken bid resting on a calculation error should be considered to give rise to problems of misunderstanding or of mistaken assumptions. Is the mistaken bid a misunderstanding of the terms of the agreement (thus giving rise to offer and acceptance issues) or is it a mistake concerning a background assumption (the assumed accuracy of the underlying calculations) that might provide a basis for setting aside the contract even though perfectly formed from a *consensus ad idem* perspective?

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[27] See generally John D. McCamus, "Mistaken Assumptions in Equity: Sound Doctrine or Chimera?" (2004) 40 Can. Bus. L.J. 46 [McCamus, "Mistaken Assumptions"].

One might classify such a mistake as a misunderstanding on the slightly tenuous basis that the term as expressed does not really express the intention of the party submitting the bid. One could then say that the bidder is mistaken with respect to the meaning of the bid. On this basis, one could then argue that once the issuer of the invitation has been made aware of the mistake, the issuer now knows that the bidder's mind "does not go with" the written document and therefore the issuer cannot "snap up the offer." Indeed, the judicial desire to classify the mistaken bid as a problem of misunderstanding may well be motivated by a desire to be able to invoke the "snapping up an offer" rule. If the mistake were to be classified as one of mistaken assumptions, the unilateral nature of the mistake would preclude relief for the mistaken bidder.

The more clear-headed analysis, however, might be that a mistaken bid based on a calculation error should be classified as a mistaken assumption because it relates to the motivation of the bidder in submitting the bid in the form it is submitted rather than to a misunderstanding as to the meaning of the actual terms of the bid. The mathematical terms in which the bid price is expressed are very likely to be clearly expressed and easily understood by the bidder. The bid price has been expressed in these terms, however, because of a mistaken assumption that the underlying calculations have been soundly made. The better view therefore appears to be that a mistaken bid based on a calculation error rests on a unilateral mistaken assumption concerning the soundness of the bidder's underlying calculations.[28] If the calculation error is characterized as a mistaken assumption, however, the bidder's attempt to escape a commitment to the mistaken price is blocked by the current requirement that, to be effective, a mistaken assumption must be common to both parties. In the typical case, the issuer of the invitation is unaware of the calculation error and hence the mistaken assumption of the bidder is unilateral in character. Under traditional doctrine, a merely unilateral mistaken assumption would not preclude the coming into effect of Contract A.

In summary, then, the Contract A-Contract B analysis of *Ron Engineering* prevents the mistaken bidder from relying on mistake doctrine whether one characterizes the mistake in question as either a misunderstanding or mistaken assumption. By holding that the mistake, to be effective, must render Contract A unenforceable, the *Ron Engineering* analysis slams the door on relief for mistake of either kind. Further, the *Ron Engineering* analysis demolishes the slight variation on a misunderstanding analysis offered by the Ontario Court of Appeal in *Belle*

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[28] In *Northern Construction*, *supra* note 2 at 439, Kerans J.A. opined that a calculation error in a bid "was as to motive and not terms."

River Community Arena Inc. v. WJZ Kaufmann Co.[29] The facts of this case followed the normal pattern. The mistaken bidder neglected to include an item worth $70,000 in a tender price it mistakenly set at approximately $615,000. The bidder discovered the error after the opening of the bids and communicated the problem to the issuer of the invitation prior to a decision by the issuer to accept the mistaken bid. The Ontario Court of Appeal was able to find relief for the mistaken bidder on the basis that "an offeree cannot accept an offer which he knows has been made by mistake and which *affects* a fundamental term of the contract."[30] It is not clear whether the apparently novel idea that there could be a new category of mistake which *affects* a term of the contract was intended to find a *via media* between a misunderstanding and mistaken assumption analysis. Nonetheless, it is clear that Arnup J.A. had a misunderstanding analysis in mind as he went on to observe, for the Court, that "the purported offer [i.e. the bid], because of the mistake, is not the offer that the offeror intended to make, and the offeree knows that."[31] Thus, although, as required by traditional law, the mistake was not a mistake as to the meaning of a term in the contract, the Court was nonetheless of the view that since the mistake in question *affected* a fundamental term of the contract, the mistaken bid could not be "snapped up" by the issuer of the invitation. This creative solution to the problem did not find favour with the Supreme Court of Canada in *Ron Engineering*. *Ron Engineering* was also an Ontario case and, in the Ontario Court of Appeal, the Court had applied its previous analysis in *Belle River* with the result that the mistaken bidder would be entitled to recover its deposit and, presumably, would have been excused from any obligation to enter into a building contract with the issuer. In *Ron Engineering*, however, the Supreme Court quite explicitly rejected the analysis of the Court of Appeal and overruled *Belle River*. As we have noted, the traditional view, adhered to by the Ontario Court of Appeal in *Belle River*, that it was the bid rather than the invitation that constituted the offer, was overturned and replaced by the new view that the submission of the bid constituted the acceptance of Contract A and, accordingly, that the calculation error simply had no effect on the formation of Contract A.

6. The Proposed Solution: A Unilateral Mistaken Assumptions Rule

In two recent decisions of Canadian appellate courts, a new solution to the mistaken bidder problem has been proposed. It will be suggested here that the proposed solution is sound, that it is, in fact, a perhaps unintentional

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29 *Supra* note 6.

30 *Ibid*. at 766 [emphasis added].

31 *Ibid*.

adoption of the American rule on this point and finally, that its adoption by Canadian courts would effect a significant improvement of the common law on this point.

The first of the two cases is the decision of the Alberta Court of Appeal in *Calgary (City) v. Northern Construction Company*.[32] It is one of the cases in which Canadian courts worked out the implications of the *Ron Engineering* analysis with respect to a claim by the issuer for damages to be calculated in an amount representing the difference between the mistaken bid and the bid price of the second lowest acceptable bid. The mistaken bidder had made the issuer aware of the mistake prior to the issuer's attempt to create Contract B by acceptance of the bid. The bidder argued that, notwithstanding *Ron Engineering*, the formation of Contract B was precluded by the issuer's awareness of the calculation error. The Court of Appeal held, however, that the mistake was irrelevant to the formation of Contract A and that Contract A itself conferred an obligation on the bidder to enter into Contract B at the mistaken bid price. Accordingly, the issuer was entitled to expectation damages in the measure claimed. One cannot fault this analysis as a straightforward application of *Ron Engineering* though, as noted above, it did appear that Estey J. was hesitant to articulate this implication of the *Ron Engineering* analysis in the *Ron Engineering* case itself. Nonetheless, as an application of the logic of the *Ron Engineering* analysis, the *Northern Construction* decision is beyond reproach. What is of interest for present purposes, however, is the concurring opinion of Kerans J.A.

Kerans J.A. began his analysis by noting the basic propositions relating to misunderstandings, that is, mistakes as to terms. In Kerans J.A.'s view however, these rules were inapplicable. A calculation error leading to a mistaken bid was plainly, in his view, a mistake as to "motive" or, in the more commonly accepted usage, a mistake as to an assumption rather than a mistake with respect to the meaning of a particular term. Nonetheless, it was not Kerans J.A.'s view that characterization of the error as a mistake as to motive would invariably preclude relief. Indeed, it was his view that rescission could be ordered in what might be considered to be a severe or extreme case, where the effect of the error would be to impose a "grossly disproportionate burden" on the mistaken bidder and, it would be "unconscionable" for the issuer to hold the bidder to Contract B. In other words, notwithstanding the unilateral nature of the mistaken assumption, Contract B would be unenforceable. Further, a necessary implication of this analysis is that the obligation contained in Contract A under which the mistaken bidder could be required to enter into Contract B must similarly be unenforceable. In other words, the unilateral mistaken

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32 *Supra* note 2.

assumption – the assumption that there was no calculation error – also has the effect of rendering Contract A unenforceable. In applying this analysis to the facts of the *Northern Construction* case, however, Kerans J.A. was of the view that the case was not so extreme in nature that the mistaken bidder should be excused from the obligations imposed by Contract A to enter Contract B. Accordingly, he concurred in the result holding that the mistaken bidder was in breach of its obligation to enter Contract B. In a more extreme case, however, the mistaken bidder would be excused.

A similar analysis was recently offered by a unanimous panel of the Ontario Court of Appeal in *Gottardo*.[33] In *Gottardo*, the familiar fact pattern was present. The mistaken bidder discovered an error in the form of a failure to include a $557,000 item in a tender price of $4,811,000. Although the bidder apprised the issuer, the Toronto Transit Commission (TTC), of the error before the TTC purported to accept the tender, the TTC nonetheless sought to force the bidder, Gottardo, to enter Contract B. Upon Gottardo's refusal to do so, the TTC awarded the contract to the next lowest bidder and launched an action against Gottardo for $434,000, the difference between Gottardo's tender price and the ultimate price paid by the TTC under the Contract B entered into with the second lowest bidder. Although the trial judge held that Gottardo was entitled to rescission, presumably of Contract A, on equitable grounds, the Court of Appeal applied the *Ron Engineering* analysis and held that the bidder's mistake did not preclude the formation of Contract A. Again, however, it is of great interest that the Court of Appeal went on to suggest that even in a case of unilateral error of this kind, equitable relief in the form of rescission of Contract A could be available. As with the analysis of Kerans J.A. in the *Northern Construction* case, however, the Ontario Court of Appeal was of the view that the fact situation of *Gottardo* was not sufficiently extreme to warrant relief of this kind. Rouleau J.A. reasoned as follows:

> In my view, there are no unique circumstances in this case which distinguish it from Ron Engineering and which would operate so as to entitle the tenderer to have the contract rescinded. While it is conceded that some financial hardship will flow from enforcement of the contract, this is not sufficient to warrant rescission. The burden imposed on Gottardo by the enforcement of the contract freely entered into is not so grossly disproportionate so as to make enforcement of it by the courts unconscionable.[34]

Rouleau J.A. concluded that "[i]n the circumstances, there are simply no grounds for equitable intervention."[35] Although no further explanation

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33 *Supra* note 3.

34 *Ibid*. at 548.

35 *Ibid*.

was given by Rouleau J.A. as to why the burdens imposed on Gottardo by these circumstances would not be grossly disproportionate, we may surmise that the quantum of the error, when compared to what would have been Gottardo's accurate bid price of $5,368,000, a $557,000 error, or slightly more than 10 percent of the correct price, would reduce and might eliminate Gottardo's profit from the project but would not result in what might appear to be an extreme or "grossly disproportionate" form of liability. A similar calculation can be made on the basis of the facts in the *Northern Construction* case in which Kerans J.A., who proposed the unilateral mistaken assumption rule, also declined to find that the error in question was "grossly disproportionate" to the contract price with the result that imposing contractual liability on the mistaken bidder would be "unconscionable."[36]

Perhaps a different result is warranted on the facts of the *Canvar* case,[37] however. There, it will be recalled, a $700,000 error infected the calculation of a bid price of $2,289,000 with the result that the bidder mistakenly reduced its bid by that amount from what would have been a correct tendered price of approximately $3,000,000, an error of approximately 25 percent of the value of the contract. To force the mistaken bidder into Contract B in such circumstances would almost certainly impose very substantial losses and, at the same, confer a rather substantial and unearned windfall on the issuer of the invitation to bid. It seems realistic to assume that Kerans J.A. and the Ontario Court of Appeal would have been prepared to find such a result unconscionable and would have allowed the bidder to decline to enter into Contract B. As we shall see, although this was a conclusion that the trial judge in *Canvar* was reluctant to adopt, the Ontario Court of Appeal narrowly and, one might argue, artificially, distinguished the *Ron Engineering* authority so as to enable the mistaken bidder to find an escape route from liability in this case. Whether or not one agrees with this suggested application of the proposed unilateral mistaken assumption rule to the *Canvar* facts, however, it is clear that the substance of the proposal is that the mistaken bidder will not be allowed to escape on the basis of mistakes at the lower end of the percentage range but will be allowed to resist Contract B in circumstances where a gross error has occurred. As we shall see, this is in fact the American rule dealing with this problem and in the next section of this paper a brief survey of the American law of mistaken assumptions will be offered. We will then turn to a defence of the unilateral mistaken assumption rule developed in American law and articulated in the

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[36] *Northern Construction*, *supra* note 2 at 443. The defendant had submitted a bid priced at $9,342,000 and claimed a calculation error of $181,274, something in the order of 2 percent of what would have been an accurate bid price.

[37] *Supra* note 17.

Northern Construction and *Gottardo* decisions by Kerans J.A. and Rouleau J.A.

7. The American Law of Mistaken Assumptions

The American contract law rules relating to mistaken assumptions are, apart from the point being discussed here, essentially similar to the Anglo-Canadian rules. That is to say, American law holds that an agreement may be set aside where it has been entered into on the basis of a common fundamental assumption concerning the context of the agreement. The common mistake rule, as articulated in the *Restatement of Contracts 2d*,[38] improves upon the traditional Anglo-Canadian formulation, however, by stating explicitly two features of the rule which are merely implicit in the Anglo-Canadian jurisprudence. First, the *Restatement* clearly indicates that a mistake will be operative only where it has a substantial impact on the equivalence of the exchange between the parties. In the typical mistake case - and we may use *Lever Brothers* as our example - one party, the employer in that case, seeks to rescind a contract because the true facts reveal that the bargain is unexpectedly and grossly one-sided. In *Lever Brothers*, the employer has paid a great deal of money for the release of an obligation which did not, in fact, exist. The release was therefore of little or non-existent value to the employer. In the light of the true factual context, the contract was highly disadvantageous to the employer. The second respect in which the American rule makes explicit what is implicit in the Anglo-Canadian doctrine is that the *Restatement* articulation plainly indicates that a first step in the analysis of a mistake case is to determine whether or not the error is of a kind for which the mistaken party should normally bear the risk or error.[39] Thus, for example, a person in the business of doing excavation work for building projects would normally assume the risk of having poorly estimated the amount of work required to complete a particular project with a resulting underestimate of its price. Similarly, a supplier of goods under a long term contract of supply would normally be assumed to take the risk of increases in the market value of the goods which the supplier mistakenly failed to anticipate in calculating the contract price. The whole point of such agreements, one might say, is to allocate risks of this kind and such errors would not provide an excuse for a supplier to withdraw from the agreement.

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[38] American Law Institute, *Restatement of Contracts*, 2d ed. (St. Paul: American Law Institute Publishers, 1981) [*Restatement*].

[39] See e.g. *Associated Japanese Bank (International) Ltd. v. Crédit du Nord SA*, [1989] 1 W.L.R. 255 (Q.B.) at 268; *William Sindall Plc. v. Cambridgeshire County Council*, [1994] 1 W.L.R. 1016 (C.A.). See also Patrick S. Atiyah, "Judicial Techniques and the English Law of Contract" (1968) 2 Ottawa L. Rev. 337; L.B. McTurnan, "An Approach to Common Mistake in English Law" (1963) 41 Can. Bar. Rev. 1; Stephen M. Waddams, *The*

The basic American common mistaken assumption rule, then, is set out section 152 of the *Restatement* in the following terms:

> Sec. 152 When Mistake of Both Parties Makes a Contract Voidable
>
> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of a mistake under the rules stated in Sec. 154.[40]

The notion of "material effect" requires explication. The *Restatement* explains that it is not sufficient to establish that but for the mistake the mistaken party would not have entered the contract. Rather, the mistake must be such "that the resulting imbalance in the agreed exchange is so severe that [the mistaken party] cannot fairly be required to carry it out."[41] Subsection (2) of 152 provides that in determining whether or not there has been a "material effect" on the agreed exchange, a court should take into account any relief that might be available "by way of reformation, restitution or otherwise."[42] In other words, to the extent that the interests of the mistaken party are adequately protected by the rectification of the contract or restitutionary relief (including, for example, a court ordered reduction of the purchase price), the remedy of rescission may not be necessary.

As intimated, section 154 then goes on to articulate the fundamental features of a risk allocation analysis in the following terms:

> Sec. 154 When a Party Bears the Risk of a Mistake
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> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
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> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.[43]

Law of Contracts, 5th ed. (Aurora: Canada Law Book, 2005) at 280-81; McCamus, *The Law of Contracts*, *supra* note 7 at 543-45.

40 *Restatement*, *supra* note 38 at 385.

41 *Ibid*. at 388.

42 *Ibid*. at 385.

43 *Ibid*. at 402-03.

Subparagraphs (a) and (b) evidently identify circumstances in which the mistaken party should reasonably understand that he or she bears the risk of errors of this kind. Subparagraph (c), however, suggests that there are circumstances in which, although the mistaken party may not have appreciated the assumption of the risk in question, a court may determine that in a contract of this particular type, the risk of the particular error in question is assumed by the mistaken party. Again, it is my view that risk allocation analysis of this kind is certainly implicit in Anglo-Canadian jurisprudence. Indeed, in recent years, it has become a more explicit feature of both English and Canadian mistaken assumptions law. Thus, one possible explanation – I would suggest the only plausible explanation – for the result in *Lever Brothers*[44] is that in the context of negotiating a severance agreement of the kind of issue in that case, the employer may be considered to assume the risk of errors resulting from a failure to investigate the dismissability of the employee in question with reasonable diligence.

In summary, then, the American rule relating to *common* mistaken assumptions set out in sections 152 and 154 of the *Restatement* appears to offer what is essentially an elegant and more explicit statement of the Anglo-Canadian doctrine on this point.[45] Indeed, the illustrations of these sections set out in the *Restatement* indicate results that are consistent with current Anglo-Canadian doctrine. American law departs from the traditional Anglo-Canadian jurisprudence on mistaken assumptions, however, by articulating a rule permitting the setting aside of agreements on the basis of a *unilateral* mistake in assumptions. That rule is set out in section 153 of the *Restatement* in the following terms:

> Sec. 153 When Mistake of One Party Makes a Contract Voidable
>
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in section 154, and

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44 *Supra* note 26.

45 It should be noted, however, that the American rule plainly indicates that agreements affected by operative mistake are "voidable" rather than "void." Although English doctrine had essentially moved to this position under the leading decision of *Solle v. Butcher*, [1950] 1 K.B. 671 (C.A.), some doubt on this point and a potential resurgence of "voidness" for mistake in English law may result from the recent decision of the Court of Appeal in *Great Peace Shipping Ltd. v. Tsavliris Salvage (Ltd.)*, [2002] 4 All E.R. 689 (C.A.). For criticism see McCamus, "Mistaken Assumptions," *supra* note 27; Duncan Sheehan, "Vitiation of Contracts for Mistake and Misrepresentation" (2003) Rest. L. Rev. 26.

> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know the mistake or his fault caused the mistake.

We may note that, unlike the common mistaken assumptions rule, the unilateral mistaken assumptions rule requires not only that the mistake have a material effect on the agreed exchange but further requires that the effect of the mistake must be such that enforcement of the contract would be "unconscionable." In other words, the unilateral mistake rule applies only, one might say, in extreme circumstances.

The reason for setting a higher threshold for operative mistake in the context of a unilateral error may be thought to be obvious. Where the mistake is common and fundamental in nature, the situation is one in which both parties might reasonably agree (if asked at the time of contract formation at least) that the enforceability of the agreement is subject to an understanding that the underlying context is as the parties assumed to be. In the context of a common and fundamental mistaken assumption, then, the circumstances are ripe for the implication of an implied term conditioning the enforceability of the agreement on that assumption. In other words, we are in this context engaged in an exercise of giving effect to what may be considered to be the reasonable expectations of both parties in the circumstances in question.[46] When one turns to unilateral mistake, however, the grounds for relief appear weaker. The non-mistaken party can plausibly argue that it reasonably expected the agreement to be unconditionally enforceable in the circumstances. Hence, the *Restatement* insists on a higher threshold of an error of such a nature that enforcement of the agreement would be "unconscionable." As the *Restatement* explains: "The reason for this additional requirement is that, if only one party was mistaken, avoidance of the contract will more clearly disappoint the expectations of the other party than if he too was mistaken."[47] We shall return to this point below.

Consistent with this particular rationale for a higher threshold, the *Restatement* further stipulates in subparagraph (b) of section 153 that it would be material to take into account whether or not the non-mistaken party "had reason to know of the mistake or his fault caused the mistake." The non-mistaken party's entitlement to claim a reasonable expectation that the agreement should be enforced unconditionally is obviously

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[46] We need not explore here the question of whether the law requires that the parties' expectations on the point be actual or imputed reasonable intentions. See generally Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) c. 8.

[47] *Restatement*, *supra* note 38 at 395.

weakened if such circumstances are present. Indeed, it is this consideration that makes *Lever Brothers*[48] such a difficult case. The employees in question engaged in what might be considered to be rather gross breaches of fiduciary obligation. The House of Lords took the view, perhaps somewhat charitably, that the employees were unaware of the significance of their conduct – and hence the mistaken assumption that they were not dismissible for cause was "common" to the parties. A plausible view of the *Lever Brothers* facts might be that only Lever Brothers was unaware of the conduct rendering the employees dismissible. Let us assume that the employees were aware of and had present to their minds at the time of contracting, the nature of their misconduct and its significance. On this view, the mistake is a unilateral mistaken assumption and therefore inoperative on traditional Anglo-Canadian jurisprudence. American law, however, which renders the fact that the employees had reason to know of the employer's error at least relevant, may offer a preferable analytical framework for considering the particular context of cases like *Lever Brothers*. This is not to say, however, that *Lever Brothers* itself becomes an easy case under section 153. The question of whether the employer should be taken to assume the risk of such errors, though presumably the critical issue, is a matter upon which reasonable jurists might well differ.

It is worth emphasizing that the term "unconscionable" is being used in the context of section 153 to identify a concept approximating that of severe unfairness or injustice. In Canadian common law, of course, the concept of unconscionability has acquired a different meaning in the context of inequality of bargaining power. Thus, it is well-established Canadian law that where there exists in the formation of an agreement a severe inequality of bargaining power between the parties and an unfair advantage taken of that imbalance by the stronger party, the contract may be set aside or rescinded on grounds of "unconscionability."[49] "Unconscionability" in the context of section 153, however, does not rest on inequality of bargaining power in this sense. Rather, it is intended to refer to situations where the result of enforcing the contract, notwithstanding the unilateral error, would be extremely unfair or unjust. Enforcement of the agreement would be unconscionable only in the sense that it permits the non-mistaken party to press an unfair advantage resulting from the other party's innocent error.

As is readily seen, then, the rule proposed by Kerans J.A. and the Ontario Court of Appeal in the *Northern Construction* and *Gottardo* cases rather precisely mirrors the American rule restated in section 153 of the

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48 *Supra* note 26.

49 For an account of this doctrine, see McCamus, *The Law of Contracts*, *supra* note 7 at 404ff.

Restatement. It is of some interest, then, that in the illustrations to section 153 set out in the accompanying text of the *Restatement*, one finds the following:

> In response to B's invitation for bids on the construction of a building according to stated specifications, A submits an offer to do the work for $150,000. A believes that this is the total of a column of figures, but he has made an error by inadvertently omitting a $50,000 item, and in fact the total is $200,000. B having no reason to know of A's mistake, accepts A's bid. If A performs for $150,000, he will sustain a loss of $20,000 instead of making an expected profit of $30,000. If the court determines that enforcement of the contract would be unconscionable, it is voidable by A.[50]

The *Restatement* emphasizes, however, that the precise impact of the error on the financial burdens of the mistaken bidder should be examined. Thus, for example, a $15,000 error on a bid with respect to which the bidder had estimated a profit of $50,000 would not give rise to rescission on grounds of unconscionability.[51] Further, as the relief is equitable in nature, it should not be awarded in such fashion as to unfairly prejudice the non-mistaken party. Thus, relief may be withheld where the party has engaged in acts of detrimental reliance.[52] Finally, as in all mistake cases, it is necessary to consider whether the mistake relates to a matter for which the bidder would normally assume the risk of error. Thus, the American cases typically distinguish between clerical or calculation errors, to which the section 153 analysis might apply and "errors of judgment"[53] – such as exercising poor judgment in estimating how the work in question might be done most economically – for which the bidder would normally be considered to assume the risk of error.

8. The Case for Recognition of a Unilateral Mistaken Assumptions Rule

The principal argument in favour of recognition of a unilateral mistaken assumption rule is that it facilitates the achievement of just results in cases of extreme unilateral mistaken assumptions. Taking the mistaken bid cases

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50 *Restatement*, *supra* note 38 at 395.

51 *Ibid*. at 396 illustration 2.

52 *Ibid*. at 396-97. See also E. Allan Farnsworth, *Farnsworth on Contracts*, 2d ed. (New York: Aspen Publishers, 1998) at 588. A leading US contracts scholar has proposed an attractive refinement of the American rule to the effect that in a case where rescission is withheld and the contract is therefore enforceable, the issuer's damages should be limited to reliance losses; see Melvin A. Eisenberg, "Mistake in Contract Law" (2003) 91 Cal. L. Rev. 1573 at 1596-1601.

53 For explication of the American doctrine on this point, see Farnsworth, *ibid*. at 589-90.

as an illustration, where a gross or, indeed, grotesque error results from a clerical or calculation slip, the imposition of liability on the mistaken bidder to carry forward with Contract B, on pain of suffering an expectancy damages claim if the mistaken bidder refuses to do so, seems most unjust or, in the language of Kerans J.A., the Ontario Court of Appeal and the American rule, "unconscionable." The imposition of such liability provides a huge unearned windfall for the issuer of the invitation. At the same time, it exacts a harsh and unduly onerous penalty on the mistaken bidder. Unsurprisingly, American experience confirms that most applications of a unilateral mistaken assumptions rule occur in the context of bids affected by clerical or calculation errors. As the American case law also illustrates, however, similar cases of injustice can arise outside the context of mistaken bids. The rule has also been relied upon to set aside transactions for the sale of land where one party is mistaken as to the identity of the parcel to be sold or its boundaries. In one case,[54] for example, a purchaser who had purchased unseen and, for his purposes, valueless land by correspondence on the faith of a favourable report by an agent who mistakenly viewed the wrong property, was held entitled to rescind on the basis of unilateral error. In another, a purchaser was permitted to escape a transaction on the basis of a mistaken unilateral assumption that all of the land surrounded by a fence was included in the parcel.[55] Similarly, buyers have been permitted to avoid agreements for the sale of goods because of unilateral error concerning the identity of the goods being offered for sale.[56] In one such case, the newspaper in which the seller advertised the item for sale had mistakenly listed a much lower price for the item than the seller had instructed.[57]

A second argument in favour of recognition of a unilateral mistaken assumption rule is that it will enable the courts to do directly what they will otherwise be sorely tempted to achieve indirectly. When the imposition of liability on, for example, a mistaken bidder appears to be extremely unjust, it is not surprising that courts will be tempted to find an analytical route that will facilitate circumvention of the *Ron Engineering* analysis and the provision of an escape route to the mistaken bidder. The *Canvar* case[58] provides an illustration of this phenomenon. At trial, the mistaken bidder, relying on the proposed unilateral mistake rule suggested by Kerans J.A.

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54 *Fleischer v. McGehee* (1914), 163 S.W. 109 (Ark.). See also *Goodrich v. Lathrop* (1892), 29 P. 329 (Cal.).

55 *Beatty v. Depue* (1960), 103 N.W. 2d. 187 (S.D.).

56 *Calvin v. Baskett* (1966), 407 S.W. 2d 19 (Tex. C.A.).

57 *Donovan v. RRL Corp.* (2001), 27 P. 3d 702 (Cal.). For discussion of this case, see "Contract Law – Unilateral Mistake – Supreme Court of California Explicitly Accepts Restatement (Second) of Contracts Provisions as State Law" (2001) 115 Harv. L. Rev. 724 ["Contract Law – Unilateral Mistake"].

58 *Supra* note 17.

in the *Northern Construction* case, argued that it ought to be excused on the basis that the burden imposed by the error was "grossly disproportionate," and would therefore lead to a result that was "unconscionable." The trial judge, obviously attracted by this possible solution, invited counsel to provide further guidance on the meaning of "unconscionability" in this context. Unfortunately counsel, perhaps feeling constrained to refer only to the Canadian law of unconscionable transactions on this point, placed emphasis in their response on inequality of bargaining power. There being no problem of inequality of bargaining power present, the trial judge concluded that the requirement of "unconscionability" had not been met. An opportunity to explore the type of unconscionability evidently intended by Kerans J.A. and explicated in the American doctrine was thereby lost.

On further appeal to the Ontario Court of Appeal, however, relief for the mistaken bidder was achieved. That escape route rested on the Court's analysis of the facts concerning the bid bond included in Canvar's mistaken bid. The trial judge had noted that the invitation to tender required that the tender document include a bid bond in an amount that "was to be no less than 5% of the tender price."[59] It will be recalled that Canvar erroneously submitted a bid in the amount of $2,289,000 (rather than $2,989,000, the amount that would have reflected an accurate calculation). Five percent of $2,289,000 would be $114,050. In fact, however, Canvar included a bid bond in the amount of $149,450, this being 5 percent of the $2,989,000 figure. In other words, the bid bond was substantially in excess of the minimum amount required of $114,450. The bond exceeded the minimum by $35,000. As a percentage of the displayed bid price of $2,289,000, however, $149,450 is only 6.5 percent, an excess of 1.5 percent over the prescribed minimum of 5 percent. The trial judge did note that the amount of the bid bond, being in excess of 5 percent of Canvar's tendered price might raise some question of error as one might presume that in normal business practice a bidder would include only the minimum of the required bid bond. Nonetheless, it was his view that since the invitation set out merely a *minimum* for the bid bond, the fact that the minimum was exceeded did not constitute sufficient evidence of a mistake in the sense that the issuer should have appreciated that "Canvar did not intend to submit the tender in the form and substance it was in."[60] The Court of Appeal, however, seized upon the excessive bid bond as evidence of a palpable error which, in its view, prevented the formation of Contract A. Placing less emphasis than did the trial judge on the fact that the instructions required only a *minimum* of 5 percent, the Court of Appeal held that the bidder was obliged to include a bid bond in the amount of 5

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59 *Ibid*. at 117.

60 *Ibid*. at 118.

percent of the tender price and accordingly, considered that the tender documents revealed, "on their face, a clear error."[61] The bid therefore contained a palpable error and could not be "snapped up."

The Court further noted in distinguishing the *Ron Engineering* line of analysis, that Estey J. in that case acknowledged that "we are not here concerned with a case where the mistake committed by the tendering contractor is apparent on the face of the tender."[62] Although the application of the palpable error analysis to the phenomenon of mistaken bids gives rise to analytical issues that will be considered in the next section of this article, for present purposes it is sufficient to note that the Court of Appeal appears to have offered a somewhat generous view of the "palpable error" or "patent error" doctrine in order to avoid application of the *Ron Engineering* analysis to the *Canvar* facts. Canvar had submitted a bid bond which exceeded the minimum required bid bond of 5 percent. Should the issuer, in such circumstances, assume that the bid bond was intended by the bidder to constitute 5 percent of the intended price and accordingly, that a bid bond in excess of 5 percent is obviously an error? On the one hand, to reach this conclusion appears to deprive the concept that the 5 percent requirement was a "minimum" of any content or meaning. On the other hand, as the Court of Appeal concluded, the existence of a bid bond in an amount representing approximately 6.5 percent of the tendered price might at least have raised a suspicion of error of some kind. Again, however, to find that such an overage on the bid bond is evidence of palpable error preventing the application of *Ron Engineering* does appear to be a rather strained application of the palpable error rule. Moreover, as we shall see, it is not entirely clear how the *Ron Engineering* logic accommodates application of the palpable error rule. To this point we shall return.

It is argued here, however, that a more direct route for achieving this eminently sensible result in *Canvar* would be to adopt the approach advocated by Kerans J.A. and the Ontario Court of Appeal and hold that in these circumstances where a grossly disproportionate liability would otherwise be imposed on the mistaken bidder with a result that it is properly considered to "unconscionable," the mistaken bidder ought to be permitted to rescind Contract A on the basis of a unilateral mistaken assumption that the tender price stated in the bid was an accurate one. Application of the unilateral mistake rule to the *Canvar* facts achieves directly what the Ontario Court of Appeal has achieved only indirectly through a somewhat strained application of the palpable error rule.

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61 *Ibid.* at para. 6.

62 *Supra* note 1 at 117.

As is generally the case with indirect analytical solutions, the *Canvar* analysis is also unsatisfactory because it produces unattractively inconsistent results. The result achieved in the Court of Appeal rests on the happenstance of the fact that an erroneous tender price was coupled with an accurately calculated bid deposit. If Canvar had calculated its bid deposit on the basis of 5 percent of the mistaken price – thereby compounding its error, one might say – no palpable error would have been present on the face of the bid and Canvar would have been subjected to liability of an arguably draconian nature. By addressing the problem directly, the unilateral mistake rule avoids inconsistent results of this kind. As a matter of general principle, the achievement of just results by indirect means is not an ideal solution. As Karl Llewellyn famously remarked in another, but similar, context "covert tools are never reliable tools."[63]

A third consideration weighing in favour of the adoption of a unilateral mistaken assumption rule on the American model is that it provides a much more satisfactory solution than does current Anglo-Canadian doctrine to the problem arising in cases where the non-mistaken party either is or perhaps should be aware of the mistaken party's error. This problem is neatly illustrated by the fact situation of the famous *Lever Brothers* case. As we have noted, the impugned transaction in that case was an agreement terminating the services of two senior Lever executives in circumstances where, unbeknownst to Lever Brothers, the two executives had engaged in breaches of their fiduciary obligations to their employer. If Lever Brothers had been aware of the misconduct of the executives, their contracts of employment could have been terminated for cause. As noted above, the House of Lords held in this case that the existence of this conduct was not present to the mind of the executives when the agreement was negotiated. Accordingly, the error – that is, the assumption that the employees could only be dismissed for cause – was "common" and it only remained to consider therefore whether the error was sufficiently fundamental. Under existing Anglo-Canadian law it was necessary to find that the mistake was "common" in order to make the law of mistaken assumptions potentially applicable. If the mistake was merely unilateral on the part of Lever Brothers because the nature or significance of the misconduct was present to the mind of the employees, mistaken assumptions doctrine would be simply inapplicable. Application of the requirement that mistaken assumptions be "common" thus leads to a perverse result in such circumstances. If the mistake is merely unilateral, traditional Anglo-Canadian law would suggest that the employees have no obligation to

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63 Karl Llewellyn, "Book Review" (1939) 52 Harv. L. Rev. 700 at 703.

disclose the nature of their misconduct when negotiating the agreement.[64] Oddly, the more the employees know, the worse is the position of Lever Brothers. Under a doctrine of unilateral mistaken assumptions on the American model, however, it would become material to consider whether the non-mistaken party "had reason to know of the mistake or his fault caused the mistake." In other words, the American rule, by permitting Lever Brothers to rescind for material unilateral error in the presence of such circumstances would make relevant a consideration of the state of the employees' knowledge of the facts underlying their employer's error and their role in causing the mistake. Surely, it is hard to gainsay the argument that this is a relevant inquiry in the context of the facts of *Lever Brothers*. This is not to suggest, however, that the result of *Lever Brothers*, even upon application of the American rule, is necessarily an obvious one. One might reasonably persist in the view that in negotiating agreements of this kind an employer assumes the risk of errors resulting from failure to make appropriate inquires. The important point for present purposes, however, is that the American unilateral mistaken assumptions rule makes relevant a line of inquiry that seems plainly material but is rendered irrelevant under existing Anglo-Canadian doctrine.

In sum, the proposed unilateral mistake rule delivers more just results in cases of extreme error, it avoids the necessity of courts using covert or indirect tools to dispense justice in such cases and it provides a better analytical framework than does current law in cases where the non-mistaken party knew or ought to have known of or has caused the mistaken party's error.

For reasons such as these, then, it is suggested that modification of Canadian doctrine suggested by Kerans J.A. in *Northern Construction* and Rouleau J.A. for the Ontario Court of Appeal in *Gottardo* would represent a useful improvement in the Canadian law of mistaken assumptions. A fourth argument in favour of the unilateral mistaken assumptions approach is that it deals more directly and satisfactorily with the problem of unilateral palpable error than does current law because of the complications for the palpable mistake analysis produced by the *Ron Engineering* doctrine. The *Ron Engineering* analysis makes it difficult to apply the palpable error rule. The unilateral mistaken assumptions rule elegantly solves this problem. This argument for the new approach is explored in the next section of this article.

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[64] This would be the orthodox result of applying the *caveat emptor* principle of *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (Div. Ct.) and the general proposition drawn from *Smith v. Hughes* that negotiating parties have no general duty to disclose material facts to the other party. See generally, McCamus, *The Law of Contracts*, *supra* note 7 at 331ff.

9. Unilateral Error, Ron Engineering and the Palpable Mistake Rule

Under the *Ron Engineering* analysis, Contract A is created when the bid is submitted. The submission of the bid is the acceptance of the offer constituted by the invitation to tender. From that point in time, then, both parties become bound by Contract A. In the typical case, the bidder is bound by Contract A to forfeit a deposit or bid bond in the event that, when selected, the bidder refuses to enter Contract B. For its part, the issuer of the invitation is bound to conduct the tendering process in accord with the rules set out in the invitation and such implied terms as have been found to exist by the courts applying the *Ron Engineering* line of authority, including the implicit obligation to treat all bidders fairly and equally. This is the basic *Ron Engineering* analysis. In the typical case, where the bid accurately expresses the intentions of the bidder, this scheme works satisfactorily from an offer and acceptance perspective. Nor does it matter whether the issuer actually sees and reviews the bid. It is the submission of the bid which is the acceptance of the issuer's offer. The issuer merely *receives that acceptance* in order to create Contract A and does not in any legal sense "accept" that acceptance. Thus, the *Ron Engineering* scheme also functions quite satisfactorily from an offer and acceptance point of view in the context of sealed bids. The fact that the issuer of the invitation will not even see the bid until the opening of bids does not prevent the formation of Contract A at the time the bid is submitted. Even where bids are sealed, then, both parties are bound to the rules of the tendering process set out in the invitation.

So far so good. But what of the situation where there is a palpable error on the face of the bid? Although it is tempting to grant relief to the mistaken bidder in such circumstances, it is not immediately obvious how a palpable error on the face of a bid – often, by agreement of the parties, unread by the offeree – can prevent the formation of Contract A. Obviously, it is attractive to retain a "palpable error" escape hatch if it can be done. Two possibilities emerge. One could take the view that, as a matter of offer and acceptance doctrine in a two-contract situation, the initial bid (the acceptance of the offer contained in the invitation) must contain an offer to enter Contract B that could be binding if the usual rules of offer and acceptance were to apply to the formation of Contract B. A difficulty with this analysis is that a binding commitment to enter Contract B is set out in the bid and *Ron Engineering* does not appear to envisage a separate formation process for Contract B. Thus the fact the bidder may draw the issuer's attention to the error before the issuer's "acceptance" of contract – the very facts of *Ron Engineering* – does not prevent formation of Contact B. In an ordinary offer and acceptance setting, such a

disclosure, however, would preclude formation. To accommodate the palpable error rule, then, one has to take the view that a bid containing a palpable error (even though unseen by the issuer) is fatally flawed (and therefore not an acceptance) unless it is free of the sort of palpable error that would prevent formation of Contract B on the basis of the palpable error rule. Although unattractively complex and arguably circular, this novel rule would achieve the desired result – bids containing palpable errors do not constitute an acceptance and no Contract A is entered. This, indeed, appears to be the "abstract doctrine" briefly alluded to by Estey J. in *Ron Engineering*.[65]

An alternative and more straightforward solution, perhaps, would be to hold that the invitation includes an implied term to the effect that tenders must not contain a palpable error. Thus a bid that contains such an error does not comply with the terms of the invitation and, as a non-compliant bid,[66] therefore does not contain a proper acceptance of the invitation. Although this is, to be sure, a rather odd term to imply on the basis of presumed intentions of the parties, it would, again, achieve the desired result.

Each of these solutions suffers from two deficiencies. First, both are sufficiently complex that they are not likely to leap quickly even to the legal mind. Second, whether one insinuates a palpable error analysis into the bid either as a novel offer and acceptance rule or as an implied term in the invitation, there is no obvious explanation for the fact that the new rule or implied term is limited to palpable errors. One could as easily construct an offer and acceptance rule stating that an effective bid must be free of major errors, or at least major errors disclosed to the issuer in timely fashion. Alternatively, the implied term could be constructed in any of these forms. If we are to invent a new rule or an implied term, there is no reason to restrict it to palpable error. If the underlying premise for applying the palpable error doctrine in this setting is that a notional formation of Contract B is to take place, any error, when disclosed by the bidder, could prevent formation. As a matter of commercial practicality there does not seem to be a convincing reason for restricting relief to cases of palpable error. In summary, then, the attempt to preserve relief from Contract B for palpable error generates either a complex and novel offer and acceptance rule or a rather improbable implied term. In each case, it is not obvious why we would wish to restrict relief to palpable error.

Again, recognition of the doctrine of unilateral mistaken assumptions appears to provide a more elegant solution. The bidder's mistake is

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65 *Supra* note 1 at 125.

66 *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, *supra* note 12.

unilateral because it is only the bidder who suffers from the calculation error. The issuer is simply unaware that such an error has occurred. Nonetheless, the case is still one of unilateral mistaken assumption. Accordingly, the unilateral mistaken assumption rule potentially applies and renders Contract A voidable provided that the error creates a disproportionate burden and renders the enforcement of Contract A "unconscionable." When the basis for relief is framed in terms of the unilateral mistaken assumption rule it is more obvious that the rule could apply whether or not the mistake is palpable. For the rule to apply, it is *not* necessary to show that the non-mistaken party, the issuer of the invitation, could or should have been aware of the error. In a case like *Canvar*, then, the unilateral mistaken assumption analysis provides a basis for rescission, whether or not the error is palpable, as long as the burden imposed by the error is grossly disproportionate and enforcement of the agreement would be "unconscionable." If the issuer has reasonably and detrimentally relied on the form of the bid, however, relief, as we have seen, will be denied.

Under this analysis, does there remain any role for palpable error? Again, for the American rule to apply it is not necessary for the issuer to have seen a palpable error on the face of the bid at the time of submission of the bid. But what if the issuer did see the bid at that time? Surely the palpable nature of the error ought to have some relevance. Indeed, it would be relevant under the American version of the rule. If the error is palpable and the bid is seen by the issuer at the time of formation of Contract A, it can therefore be said that the issuer is or should have been aware of the error at the time of formation. Under the American rule, this fact could be taken into account in applying the unilateral mistaken assumption rule more generously. As we have seen, it would not be necessary in such a case, under *Restatement* section 153(b), to establish that the burden is disproportionate and that the result is unconscionable.

In summary, then, the fact that the unilateral mistaken assumptions rule provides a more elegant and satisfactory basis for dealing with palpable error than can be accommodated within the logic of *Ron Engineering* offers another persuasive reason, in my view, for adopting the views expressed by Kerans J.A. and Rouleau J.A. and applying a unilateral mistaken assumptions rule in this context.

10. A Rebuttal of Possible Criticisms of the Unilateral Mistaken Assumptions Rule

It remains, then, to consider the possible arguments that might be made against broader recognition of the unilateral mistaken assumptions rule articulated by Kerans J.A. and Rouleau J.A. At a general level of analysis,

the granting of relief for mistaken assumptions and, more particularly, unilateral mistaken assumptions raises the prospect of defeating the reasonable expectations of one of the parties to the agreement. This objection yields, I will suggest, to a more careful consideration of what those expectations might be in the particular context of tendering processes. Further, consideration must be given to the suggestion made by Estey J. in *Ron Engineering* to the effect that relief should be denied since "the integrity of the bidding system must be protected where under the law of contracts it is possible to do so."[67] Finally, attention must be paid to the possible objection that the proposed standards of "grossly disproportionate" burdens and "unconscionable" results are so unattractively vague that a unilateral mistaken assumption doctrine should not be more broadly adopted.

As noted above, the *Restatement* justifies the imposition of a higher threshold of "unconscionability" rather than "materiality" in the context of unilateral as opposed to common mistaken assumptions on the basis that "if only one party was mistaken, avoidance of the contract will more clearly disappoint the expectations of the other party than if he too was mistaken."[68] In other words, the *Restatement* favours relief for the mistaken party only in extreme cases in deference to the alleged reasonable expectations of the non-mistaken party. It may be asked, however, whether the possible frustration of reasonable expectations is potentially an argument for simply withholding relief of any kind in unilateral mistaken assumption cases. The answer to this suggestion, in my view, is to be found by considering more carefully what the reasonable expectations of the non-mistaken party are likely to be. In the tendering context, for example, we may ask whether or not it actually is the case that the issuer of the invitation has a reasonable expectation that the bids are all accurately calculated and that the lowest bid may be accepted on its face. Though it may be true that such thoughts occur to issuers from time to time, it is also quite likely that experienced issuers are aware of the fact that the somewhat frantic nature of the typical bidding process is such that clerical and mathematical errors in bids do, in fact, occur. At a more general level, however, it seems most unlikely that issuers have reasonable expectations that they will be able to take advantage of mathematical and clerical errors committed by bidders. If asked to explain the purpose of tendering a project, the typical issuer is surely likely to explain that tendering the project increases the likelihood of entering into a contract with a successful bidder in what will prove to be a fair and competitive price. It would be most surprising if an issuer were to continue to say: "And, moreover, bidders often make mistakes in calculating their bid price and, if you are

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67 *Ron Engineering*, *supra* note 1 at 121.

68 *Supra* note 47.

lucky, you may be able to snap up a mistaken bid and get the project done for substantially less than a fair and competitive price, even though this may cause substantial financial hardship for the bidder." Indeed, in the unlikely event that issuers had such expectations, one might incline the view that such expectations are not "reasonable." In short, it is very difficult to defend a "no relief ever" principle on the basis that such a rule is necessary in order to give effect to the reasonable expectations of the non-mistaken party.

It may be thought that this argument proves too much. If it cannot be said that the non-mistaken party has reasonable expectations of being able to take advantage of any mistakes that arise in the calculation of a bid, why would one simply not give relief in all cases of clerical or mathematical error rather than restrict relief to extreme cases of "grossly disproportionate" burdens and "unconscionability." Indeed, one author has suggested that American law could be improved by moving from an extreme case rule to a rule permitting relief for any case of mathematical or clerical error.[69] A simple response to this proposal, for purposes of Canadian law, is that such a rule is simply precluded by the holding in *Ron Engineering*. Whatever that case may be thought to stand for, it is rather plainly an authority which holds that the mere fact of a mathematical or clerical error in a bid does not provide a basis for rescission. To allow relief across the board in such cases would thus require an overruling of that case, an event which is, in my view at least, unlikely to occur in the foreseeable future.

Apart from the matter of precedent, however, there is a reason of principle that may be considered to support the approach advocated by Kerans J.A. and Rouleau J.A. of restricting relief to cases of extreme error. A principled argument for rejecting a rule that would allow relief for every clerical or mathematical error in a bid – however large or small – could rest on a risk allocation analysis. One could plausibly take the view that with respect to minor errors, both bidders and issuers might commonly expect that bidders would assume the risk of minor clerical or mathematical errors in the calculation of the bid. Bidders would not reasonably expect, one might say, that only if a bid is completely error free could it ever be accepted by an issuer. Risk allocation analysis does not point very precisely, however, in the direction of a "grossly disproportionate" standard. Issuers and bidders might have different views as to whether bidders should be deemed to assume the risk of more than minor but less than "grossly disproportionate" errors. Risk allocation analysis does suggest, however, that a rule granting relief for even minor clerical and mathematical errors is difficult to defend.

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[69] See "Contract Law – Unilateral Mistake," *supra* note 57.

An evaluation must also be made of the suggestion made by Estey J. that relief should be denied to the mistaken bidder plaintiff in *Ron Engineering* itself in order to protect "the integrity of the bidding system."[70] Although Estey J. did not provide further explanation of the nature of the perceived problem with the existing law relating to bidding processes,[71] Estey J. may be reasonably interpreted, in my view, as being concerned to discourage strategic conduct on the part of bidders designed to improve their price position after the opening of the bids. If one considers the types of strategic or devious conduct that bidders might be attempted to engage in after the opening of the bids, however, a strong case can be made for the proposition that no unhealthy incentives for strategic behaviour are created by a rule allowing relief in extreme cases. Under pre-*Ron Engineering* law, bidders would have absolutely no incentive whatsoever to intentionally plant an extreme error in a bid or, after the opening of the bids, to pretend deviously that an extreme error has occurred. With respect to the incentives in play at the time of creating the bid, no sensible bidder would intentionally plant an error in the bid with a view to providing an excuse in the event that they should be selected as the lowest bidder. Bidders are in the business of attempting to win contracts and it would make no sense from a commercial perspective to invest in the preparation of a flawed bid in order to provide a basis for not being awarded the project. Presumably, however, Estey J. was more concerned with the potential for misleading conduct upon the opening of the bids. Again, the incentives in play at this juncture do not suggest that bidders are very likely to pretend to have committed an extreme error in order to prevent the formation of what is now referred to as Contract B. Under prior law, the effect of successfully persuading a court that a genuine error has occurred is that the bidder will not be forced to enter Contract B. Again, bidders are not in the business of trying to lose competitive bidding processes.

Perhaps, however, Estey J. had in mind the possibility that a successful bidder might try to rely on an allegedly mistaken calculation in order to improve its position as the successful bidder and secure the voluntary agreement of the issuer to increase the bid price in an amount which would not bring the bid price up to the level of the second lowest bid. Even

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70 *Supra* note 1 at 121.

71 Indeed, Swan was critical of the reasoning in *Ron Engineering* on the basis that it failed to provide any empirical evidence of a practical problem with the existing law that required the solution offered by that case; see Swan, *supra* note 13 at 452, 464. The fact that English law appears to have persisted in the view that Contract A is normally not formed suggests that there is some force to this criticism; see sources cited at *supra* note 5. On the other hand, Estey J. was not the first nor will he be the last judge to engage in armchair speculation concerning the practical context of the law in crafting a legal rule. Nor, of course, is this practice restricted to judges.

though the effect of prior law would be to preclude the formation of Contract B in this situation, an issuer might feel under some pressure to voluntarily agree to an upward adjustment of the price in such a case and still award Contract B to the bidder claiming the mistaken calculation. Under prior law, but not under *Ron Engineering*, the bidder pretending to be mistaken has as an available stratagem a threat to prevent the formation of what is now called Contract B. If we assume that this is the problem targeted by Estey J. in *Ron Engineering*, recognition of a rule permitting relief, even if only in cases of extreme error, might be thought to undermine the solution. In the new world of *Ron Engineering*, however, an issuer who agreed to permit an increase in a bid price would be vulnerable to claims by other bidders for unfair and unequal treatment.[72] The devious bidder who is trying to improve his price and still win the contract is not likely to succeed under current law. Thus, any incentive for devious conduct of this kind – assuming that this is a realistic concern – appears to be offset by other features of the Contract A analysis. In short, Estey J.'s concern about the "integrity of the bidding process" does not appear to supply a reason for refusing to recognize a rule providing relief to a mistaken bidder in extreme cases.

Finally, consideration may be given to the potential complaint that a rule based on "grossly disproportionate burdens" and "unconscionability" in the result introduces unattractively vague standards into the analysis of these fact situations. There is obviously some force to this criticism. The standards articulated by the American rule and by Kerans and Rouleau JJ.A. are indeed open-textured and vulnerable to criticism on the ground of vagueness. As in other contexts of the law of contracts, however, a measure of vagueness may be considered to be a price we should be willing to pay in order to provide a standard that will deliver relief in cases of extreme injustice. Indeed, the law of contracts is rife with open-textured standards of one sort or another. The doctrine of unconscionable transactions itself, of course, is a prime illustration. The standards are vague and difficult to apply. Nonetheless, they permit courts to provide redress in cases of extreme unfairness and are accepted by the courts as an appropriate device for achieving such ends. Similar criticism could be made of doctrines relating to certainty of terms, intention to create legal relations, frustration of the venture and so on. The critical question, I would suggest, is whether it is appropriate to provide relief in cases where innocent error will result in enormous and unearned windfalls to issuers and oppressive burdens placed upon the shoulders of innocently mistaken bidders. Kerans J.A., Rouleau J.A. and the American law of contracts support the view that relief in such cases is warranted. I respectfully agree.

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[72] See sources cited in McCamus, *The Law of Contracts*, *supra* note 7 at 742-43.

In summary, then, the various arguments that might be advanced against more widespread recognition in Canadian law of the rule articulated by Kerans and Rouleau JJ.A. do not, in my view, singly or in combination create a persuasive argument against confirmation of the existence of a discretion to relieve for unilateral mistaken assumption in cases of extreme error.

11. Conclusion

It has been argued here that the *Ron Engineering* "two-contract" analysis of tendering situations, whatever its general merits, does not provide a sound solution to the problem of mistaken bids. There is some irony in this as *Ron Engineering* was itself a mistaken bid case. The issue in *Ron Engineering*, however, was whether the mistaken bidder could be required to forfeit a bid deposit. That decision did not consider the impact of the "two-contract" analysis on the position of the mistaken bidder more generally nor indeed, did it examine the implications of the *Ron Engineering* analysis for the law of tendering in a more general way. This article has attempted to tease out more particularly the problem of finding relief of some kind for mistaken bidders. As the case law amply indicates, cases of mistaken bids can give rise to situations where relief of some kind for the mistaken bidder appears to be irresistibly meritorious. The recent articulation by Kerans J.A. in the *Northern Construction* case and by Rouleau J.A. for the Ontario Court of Appeal in the *Gottardo* case of a doctrine of unilateral mistaken assumptions provides, in my view, an elegant solution to the mistaken bid problem. Interestingly, the rule stated by these judges mirrors rather precisely the existing American rule on this point. The virtues of this new solution to the problem are, as has been argued above, that (a) it is capable of providing just results in cases of mistaken bids and in other similar cases that cry out for relief; (b) it avoids the necessity for courts, minded to dispense justice in such cases, to distort other rules in order to achieve such results; (c) it provides a more elegant analytical model for dealing with problems where the non-mistaken party either is or should have been aware of or indeed caused the error in question; and (d) it provides an elegant means for providing relief in the context of mistaken bids containing palpable errors. Although clearer recognition of the rule would not have an impact on the results of many cases, the effect it would have in the rare cases to which it would apply would be quite beneficial. This development in the law of mistaken assumptions, though modest and incremental in nature, would provide a more rational and coherent basis for results achieved only indirectly, if at all, under current law. For all of these reasons, it is much to be hoped, in my view, that other Canadian judges will adopt the views expressed by Kerans and Rouleau JJ.A. and confirm the existence of a unilateral mistaken assumptions rule in Canadian contract law.