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July 14, 2010

Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Sir/Madam:

**Re: In the Matter of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15
(Schedule B);
In the Matter of Assessments issued by the Ontario Energy Board pursuant
to section 26.1 of the Ontario Energy Board Act and Ontario Regulation
66/10;
And In the Matter Of Rule 42 of the Rules of Practice and Procedure of the
Ontario Energy Board.**

Please find enclosed a copy of the Supreme Court's decision in *Kingstreet Investments Ltd. v. New Brunswick*, which Ms. Minor referred to in her submissions yesterday.

Yours truly,

Robert Donato
RD/sn

Encl.

Indexed as:
Kingstreet Investments Ltd. v. New Brunswick (Finance)

**Kingstreet Investments Ltd. and 501638 NB Ltd.,
Appellants/Respondents on cross-appeal;**

v.

**Province of New Brunswick as represented by the
Department of Finance and New Brunswick Liquor
Corporation, Respondents/Appellants on cross-appeal, and
Attorney General of Manitoba, Attorney General of
British Columbia, Attorney General of Alberta, Canadian
Constitution Foundation and Consumers' Association of
Canada, Interveners.**

[2007] 1 S.C.R. 3

[2007] S.C.J. No. 1

2007 SCC 1

File No.: 31057.

Supreme Court of Canada

Heard: June 20, 2006;
Judgment: January 11, 2007.

**Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron and Rothstein JJ.**

(62 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

Constitutional law -- Remedy -- Restitution -- Ultra vires taxes -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether Crown immune from claims for recovery of ultra vires taxes -- Whether such claims must be analysed on basis of constitutional principles rather than unjust enrichment.

Restitution -- Unjust enrichment -- Ultra vires taxes -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether taxpayers' claims for recovery of ultra vires taxes must be [page4] analysed on basis of constitutional principles rather than unjust enrichment.

Restitution -- Defences -- Passing-on defence -- Protest and compulsion exception -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether passing-on defence applicable to deny recovery -- Whether taxpayers' payments made under protest and compulsion recoverable.

Summary:

Since 1988, the corporate taxpayers have been operating a number of night clubs in New Brunswick that are licensed to sell alcoholic beverages. They purchase their alcohol from the provincial liquor corporation's retail stores and, in addition to the retail price, pay a user charge, as prescribed by regulation. The taxpayers challenged the constitutional validity of the user charge and seek by way of relief reimbursement of all amounts paid over the years with compound interest. The Court of Queen's Bench declared the user charge to constitute an unconstitutional indirect tax but denied recovery. The court found that the taxpayers had passed on the tax burden to their customers in the form of increased prices and applied the passing-on defence to the taxpayers' claim for unjust enrichment. The court also applied the general rule against recovery of *ultra vires* taxes. The majority of the Court of Appeal allowed the restitutionary claim with respect to all monies paid from the time the taxpayers protested by commencing legal proceedings against the Province. For monies paid prior to the commencement of legal proceedings, which were held not to have been paid under protest, the majority denied the claim on the basis of the passing-on defence.

Held: The appeal is allowed in part. The cross-appeal is dismissed.

This case should be decided on the basis of constitutional principles rather than unjust enrichment as an unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The taxpayers in this case have recourse to a remedy as a matter of constitutional right. This remedy is the only appropriate one because it raises important constitutional principles [page5] which would be ignored by treating the claim under another category of restitution. [para. 12] [para. 34]

Restitution is generally available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. Such restitution is warranted to guarantee respect for constitutional principles, in particular, in this case, the principle that the Crown may not levy a tax except with authority of the Parliament or the Legislature. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would thus condone a breach of this most fundamental constitutional principle. As a result, a taxpayer who has made a payment pursuant to *ultra vires* legislation has a right to restitution. In a public law context, a rule which would, for policy considerations, immunize public authorities from restitutionary claims with respect to monies paid under invalid legislation must be rejected. To privilege policy considerations in the case of *ultra vires* taxes threatens to undermine the rule of law. Moreover, the availability of suspended declarations of invalidity and the possibility for Parliament or a legislature to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes, are sufficient to guard against the possibility of fiscal chaos. [para. 12] [paras. 14-15] [paras. 20-21] [paras. 25]

The passing-on defence is not available to the Crown in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. The defence is inconsistent with the basic premise of restitution law. Restitutionary principles provide for restoration of what has been taken or received from the plaintiff without justification. Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall because it is not founded on the concept of compensation for loss. The defence is

also economically misconceived and creates serious difficulties of proof as there are inherent difficulties in a commercial marketplace of proving that the loss was not passed onto consumers. [para. 42] [para. 44] [paras. 47-48]

[page6]

Since the passing-on defence is generally inapplicable in the context of *ultra vires* taxes, it is unnecessary to deal with the doctrine of protest and compulsion which functions as an exception to the passing-on defence. However, as a general rule, this doctrine should be discarded insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid legislation. [para. 52] [para. 57]

Claims for the recovery of *ultra vires* taxes may be subject to an applicable limitation period. Here, the six-year limitation period set out in s. 9 of the New Brunswick *Limitation of Actions Act* applies. The taxpayers can therefore only recover, with interest, the user charges paid during the six years preceding the filing date of their notice of application. However, this is not an appropriate case for the awarding of compound interest as the taxpayers did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction. [para. 59] [paras. 61-62]

Cases Cited

Discussed: *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; **referred to:** *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1993] A.C. 70; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *United States v. Butler*, 297 U.S. 1 (1936); *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Ross v. The King* (1902), 32 S.C.R. 532; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210; *Ville de Sept-Îles v. Lussier*, [1993] R.J.Q. 2717; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, 2004 SCC 38; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Miron v. [page7] Trudel*, [1995] 2 S.C.R. 418; *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43.

Statutes and Regulations Cited

Civil Code of Lower Canada, arts. 1047, 1048.

Civil Code of Québec, S.Q. 1991, c. 64, art. 1491.

Constitution Act, 1867, ss. 53, 90, 92(9).

Fees Regulation -- Liquor Control Act, N.B. Reg. 89-167, s. 5.

Limitation of Actions Act, R.S.N.B. 1973, c. L-8, s. 9.

Liquor Control Act, R.S.N.B. 1973, c. L-10, s. 200(3).

Authors Cited

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 6e éd. Cowansville, Qué.: Yvon Blais, 2005.

Birks, Peter. "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution*. Sydney, Australia: Law Book Co., 1990, 164.

Goff of Chieveley, Robert Goff, Baron, and Gareth Jones. *The Law of Restitution*, 4th ed. London: Sweet & Maxwell, 1993.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 2005, release 1).

Hogg, Peter W., and Patrick J. Monahan. *Liability of the Crown*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated September 2005).

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the New Brunswick Court of Appeal (Ryan, Robertson and Richard JJ.A.) (2005), 254 D.L.R. (4th) 715, 285 N.B.R. (2d) 201, 744 A.P.R. 201, 8 B.L.R. (4th) 182, 2005 G.T.C. 1510, [2005] N.B.J. No. 205 (QL), 2005 NBCA 56, reversing in part a decision of Russell J. (2004), 236 D.L.R. (4th) 733, 273 N.B.R. (2d) 6, 717 A.P.R. 6, [2004] N.B.J. No. 75 (QL), 2004 NBQB 84. Appeal allowed in part and cross-appeal dismissed.

[page8]

Counsel:

Eugene J. Mockler, Q.C., and *Adam B. Neal*, for the appellants/respondents on cross-appeal.

David D. Eidt, for the respondents/appellants on cross-appeal.

Eugene Szach and *Stewart J. Pierce*, for the intervener the Attorney General of Manitoba.

Nancy E. Brown and *Jonathan Penner*, for the intervener the Attorney General of British Columbia.

Nicholas James Parker and *David Kamal*, for the intervener the Attorney General of Alberta.

Barbara A. McIsaac, Q.C., and *Howard R. Fohr*, for the intervener the Canadian Constitution Foundation.

Joseph J. Arvay, Q.C., and *Brent B. Olthuis*, for the intervener the Consumers' Association of Canada.

The judgment of the Court was delivered by

BASTARACHE J.:--

1. Facts

1 Since 1988, the corporate appellants have been operating a number of night clubs in the cities of Fredericton and Moncton, New Brunswick, that are licensed to sell alcoholic beverages. They purchase their alcohol from the New Brunswick Liquor Corporation's retail stores and, in addition to the retail price, pay a user charge, as prescribed by regulation adopted pursuant to the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, s. 200(3). That user charge has varied over the years from 11 percent of the retail price to the current 5 percent: see *Fees Regulation -- Liquor Control Act*, N.B. Reg. 89-167, s. 5. The trial judge found, and the parties agree, that the appellants have paid over \$1 million in such charges. The appellants have challenged the constitutional validity of the user charge and seek by way of relief reimbursement of all amounts paid over the years with compound interest.

2 The appellants' initial argument was that the user charge constituted an indirect tax, which is *ultra vires* the Province of New Brunswick's [page9] constitutional taxing power. However, the day before the trial began, appellants' counsel forwarded a letter to the Clerk's office informing the court that he would argue in the alternative that the user charge constituted a direct tax that was illegally imposed by regulation rather than originating in the legislature. The appellants may have realized that their submission that the charge constituted an indirect tax weighed in favour of the Province's argument that the club owners had in fact passed on the cost of the charge to their customers by increasing their prices.

3 The appellants also attempted to argue that the user charge, if held to constitute a tax, was *ultra vires* in the administrative law sense. It was argued that, as a matter of statutory interpretation, the legislature authorized the imposition of a user charge and not a tax. Robertson J.A., on behalf of a majority of the Court of Appeal, concluded that this was a last-minute attempt to characterize the user charge as a misapplication of an otherwise valid statutory provision, in order to avoid the application of the general rule against the recovery of *ultra vires* taxes proposed by La Forest J. in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 ("*Air Canada*").

4 The trial judge held that the user charge constituted an indirect tax which, since it was not tailored to the cost of regulating the licensees, could not constitute a "[l]icenc[e] in order to [sic] the raising of a Revenue for Provincial, Local, or Municipal Purposes" in accordance with s. 92(9) of the *Constitution Act, 1867* ((2004), 273 N.B.R. (2d) 6, 2004 NBQB 84, at para. 4). As a matter of fact, he held that the user charge had been passed on and that it therefore qualified as an indirect tax. Accordingly, the trial judge declared the impugned regulation to be *ultra vires* the Province of New Brunswick. The Province did not appeal from this judgment. Before the Court of Appeal, the parties agreed that the user charge constitutes an unlawful [page10] tax ((2005), 285 N.B.R. (2d) 201, 2005 NBCA 56, at para. 1). Robertson J.A. rejected the appellants' attempts to recharacterize the user charge as either a direct tax which could not be imposed by way of regulation, or as *ultra vires* in the administrative law sense. I agree: the trial judge's decision that the user charge constitutes an unconstitutional indirect tax must stand.

5 As a result, this Court is only concerned with the appellants' claim for relief. The principal issue is whether money paid to a public authority pursuant to *ultra vires* legislation is recoverable. The case is argued on the basis of a claim for unjust enrichment. The Province relies on the common law bar to recovery of unconstitutional taxes articulated by La Forest J. in *Air Canada*. The Province further relies on La Forest J.'s judgment in *Air Canada*, at p. 1202, for the proposition that "[t]he law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss." It submits that where the

burden of an *ultra vires* tax has been passed on, the requirement for a corresponding deprivation has not been met.

6 By contrast, the appellants submit that La Forest J.'s common law bar to recovery for *ultra vires* taxes was *obiter* and did not win a majority of votes in *Air Canada*. They rely on Wilson J.'s dissenting opinion in that case and on this Court's unanimous decision in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 ("*Ontario (Liquor Control Board)*"), for the proposition that the responsibility of ensuring the applicability and the constitutionality of a law lies with the governmental agency in charge of administering that law, not the taxpayer. Turning to the passing-on defence, the appellants argue that it is inconsistent with basic restitutionary principles, that it is economically misconceived, and that it is fraught with practical difficulties related to proof. In their submission, the trial judge's finding that the cost of [page11] the tax was passed on to bar patrons is irrelevant to their unjust enrichment claim.

2. Judicial History

2.1 *New Brunswick Court of Queen's Bench* (2004), 273 N.B.R. (2d) 6, 2004 NBQB 84

7 Russell J. dismissed the appellants' claim for relief. The trial judge found as a matter of fact that the appellants had passed on the tax burden to their customers in the form of increased prices. On this basis, he applied the passing-on defence to the appellants' claim for unjust enrichment and denied recovery. Moreover, the trial judge applied the general rule against recovery of *ultra vires* taxes enunciated by La Forest J. in *Air Canada*, at pp. 1206-7. As in *Air Canada*, he found the regulation to be deficient only in form, insofar as it resulted from the Province's failure to tailor the charge to the cost of regulating the licensees. Finally, the trial judge emphasized that fiscal turmoil could result if restitution were allowed, and that government would be driven to the inefficient course of re-imposing the tax.

2.2 *New Brunswick Court of Appeal* (2005), 285 N.B.R. (2d) 201, 2005 NBCA 56

8 Robertson J.A., writing on behalf of the majority, noted that the distinction between monies paid under mistake of fact and monies paid under mistake of law has been abolished and that the issue must therefore be decided on the basis of restitutionary principles. He considered this Court's decision in *Air Canada* but was not prepared to immunize public authorities from restitutionary claims resulting from invalid legislation.

[page12]

9 However, he was prepared to recognize the validity of the passing-on defence, relying on La Forest J.'s statement in *Air Canada* to the effect that the law of restitution is not intended to provide windfalls to plaintiffs. He concluded that the equities lie with the Province because, when a benefit accrues to the government, it accrues to the public interest, and because to hold otherwise would cause bar patrons to pay the tax twice. Robertson J.A. acknowledged that the defence has been much criticized for being contrary to restitutionary principles, economically misconceived and fraught with practical difficulties. However, he rejected the economic argument because there is nothing preventing the plaintiffs from

proving that they are still out of pocket despite having passed on a portion of the tax -- as a result of reduced sales, for example. Turning to the practicality of the defence, Robertson J.A. considered the evidentiary difficulties and costs associated with discerning whether the tax has effectively been passed on. He resolved these concerns by placing the initial burden of proof on the Province, with the caveat that there is a rebuttable presumption of passing on in the case of an illegal indirect tax, and the further caveat that the defence would have no application in cases where monies were paid under compulsion and protest. Robertson J.A. emphasized that the plaintiffs should not be entitled to a windfall and expressed concern that the government be able to defend claims for unjust enrichment to avoid potential fiscal disruption.

10 Accordingly, the majority allowed the restitutionary claim with respect to all monies paid from the time the claimants protested by commencing legal proceedings against the Province (May 25, 2001). For monies paid prior to the commencement of legal proceedings, which were held not to have been paid under protest, the majority denied the claim on the basis of the passing-on defence. In the [page13] alternative, Robertson J.A. concluded that if he was wrong with respect to the existence of the passing-on defence in Canadian restitutionary law, then the claimants would be entitled to all monies paid subject to the six-year limitation period set down in the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8.

11 Ryan J.A. dissented and held that the appellants' claim should fail because they had recouped the cost from their customers. Ryan J.A. was of the view that the passing-on defence goes to the existence of one of the three elements of a claim for unjust enrichment, namely a corresponding deprivation. Thus, regardless of whether payments were made under protest and compulsion, if the costs were passed on, then there was no deprivation and no unjust enrichment. In his opinion, payment under protest could not alter the fact that one of the three elements of an unjust enrichment claim had not been established.

3. Introduction

12 This appeal concerns whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. For the reasons given below, I find that restitution is generally available. I agree with Robertson J.A. that there is no general immunity affecting recovery of an illegal tax. I would, however, decide the case on the basis of constitutional principles rather than unjust enrichment. An unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The Court's central concern must be to ensure the constitutionality of fiscal legislation. Moreover, the availability of suspended declarations of invalidity as ordered in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and the possibility of retroactive ameliorating legislation are sufficient to guard against the possibility of fiscal chaos. I would also reject the passing-on defence [page14] raised by the Crown in this case. Accordingly, I would allow the appeal in part.

4. Restitution for *Ultra Vires* Taxes

4.1 *Constitutional Remedy*

13 This case is about the consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes. Because of the constitutional rule at play, the claim can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation, when such a measure is deemed appropriate. As will later be discussed, no passing-on defence should be entertained.

14 The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to

our conception of democracy and the rule of law. As Hogg and Monahan explain, this principle "ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246. See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at pp. 55-16 and 55-17; *Eurig*, at para. 31, *per* Major J.).

15 When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, [page15] a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution: P. Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution* (1990), c. 6, at p. 168.

16 This Court has previously recognized this right. In *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, the Court struck down a provision that purported to bar recovery of *ultra vires* taxes. At p. 590, Dickson J. (as he then was) based his holding on constitutional principles:

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

17 In *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1993] A.C. 70, the House of Lords has also recognized a right to restitution for payments made pursuant to *ultra vires* taxes. Without even referring to unjust enrichment, Lord Goff held, at p. 172, that restitution was available as a matter of "common justice":

... the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law -- enshrined in a famous constitutional document, the Bill of Rights 1688 -- that taxes should not be levied without the authority of Parliament; and full effect can only be given to that [page16] principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.

18 However, the general availability of restitution for *ultra vires* taxes has to date not been clearly established. In *Air Canada*, La Forest J. was of the opinion that policy considerations operated to take claims for taxes paid pursuant to unlawful legislation outside of the restitutionary context. He proposed a general rule that the Crown should be immune to claims for recovery of unconstitutional and *ultra vires* levies. But La Forest J. did not command a majority in that case and so the status of his proposed immunity rule was never clear. It is necessary, therefore, to consider why such an immunity rule should be rejected before discussing the proper basis for restitution in this case.

4.2 Rejecting the Immunity Rule

19 In *obiter* statements pronounced in *Air Canada*, La Forest J. explained on behalf of three members of a six-judge panel that, while

[i]t is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery ... in this kind of case, where the effect of an unconstitutional or *ultra vires* statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area. [Emphasis added; p. 1203.]

20 Like Robertson J.A., I accept Wilson J.'s rationale for rejecting a rule which would immunize public authorities from restitutionary claims with respect to monies paid under invalid legislation. Wilson J. was of the view that "[w]here the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained" (*Air Canada*, at p. 1216). As Professor Hogg explained at p. 55-13:

[page17]

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

This very principle was recognized by a unanimous Court in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, where it was held that an *ultra vires* law cannot constitute a juristic reason for the state's enrichment.

21 As Wilson J. explained in dissent in *Air Canada*, the immunity rule proposed by La Forest J. amounts to saying that "the principle should be reversed *for policy reasons* in the case of payments made to governmental bodies" (p. 1215 (emphasis in original)). Those policy reasons, according to La Forest J., included the fact that the unconstitutional tax at issue in *Air Canada* came close to raising a merely technical issue. Relying on this passage, the trial judge in the present case held that the impugned regulation was deficient only in form, insofar as it resulted from the Province's failure to tailor the charge to the cost of regulating the licensees. In my view, privileging policy considerations in the case of *ultra vires* taxes threatens to undermine the rule of law.

22 Professor Hogg has explained that

the constitutional principle that ought to dominate all others in this context is the principle that the Crown may not levy a tax except by the authority of the Parliament or Legislature. This principle, enshrined in the Bill of Rights of 1688, ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply). To permit the Crown to retain a tax that has been levied without legislative authority is to condone a breach of one of the most fundamental constitutional principles. [Footnote omitted; pp. 55-16 and 55-17.]

[page18]

23 Professors Hogg and Monahan argue, at pp. 246-47, that permitting taxpayers to recover taxes paid pursuant to unconstitutional statutes is more consistent with the well-settled rule that the Crown may recover monies paid out of the consolidated revenue fund without legislative authority, where the expenditure was not authorized. Such has always been the case,

even if it was made under a mistake of law, and even if the recipient could have raised the defences of estoppel or change of position to an action by a private plaintiff. In this situation, the governing rule is the fundamental constitutional principle that prohibits the Crown from spending public funds except under the authority of the Parliament or Legislature. To apply the ordinary rules of restitution so as to render an unauthorized expenditure irrecoverable would in effect permit an important constitutional safeguard to be evaded. The same reasoning ought to apply when it is the subject suing the Crown to recover a payment made to the Crown, since the same constitutional principle is in issue. [Emphasis added; footnotes omitted; p. 247.]

24 If the constitutional rule requiring the Crown to only spend public funds under legislative authority has sufficient weight to compel recovery of an unauthorized expenditure by the Crown, notwithstanding the principles of unjust enrichment, then it is difficult to understand a common law bar to the recovery of unconstitutionally imposed taxes. Presumably, the constitutional limitations on the Crown's power to spend are of equal importance as the constitutional limitations on the Crown's power to raise revenue. In my view, these principles are really two sides of the same coin.

25 Another policy reason given by La Forest J. for the immunity rule was a concern for fiscal inefficiency and fiscal chaos (p. 1207). My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend [page19] the declaration of invalidity to enable government to address the issue. In *Eurig*, Major J. suspended a declaration of invalidity for six months. Because, in that case, unconstitutionally levied probate fees were used to defray the costs of court administration in the Province, he expressed concern that an immediate deprivation of this source of revenue might have harmful consequences for the administration of justice. Moreover, this Court's decision in *Air Canada* demonstrates that it will be open to Parliament and to the legislatures to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes. Obviously, such legislation must also be constitutionally sound.

26 La Forest J.'s proposed immunity rule seems to have arisen in part out of a concern that the provinces might be constitutionally barred from passing remedial legislation by the holding in *Amax Potash*. La Forest J. referred to the American case of *United States v. Butler*, 297 U.S. 1 (1936), in which the Supreme Court held unconstitutional the *Agricultural Adjustment Act*, making almost \$1 billion in invalid taxes repayable by the government. In response, Congress passed an Act which provided that no refunds for such taxes would be allowed unless the claimant could establish the burden of the tax. La Forest J. stated that, "[i]n view of *Amax*, *supra*, a province faced with a similar situation could not enact a similar measure" (p. 1205).

27 The legislation at issue in *Amax Potash* was s. 5(7) of the Saskatchewan *Proceedings against the Crown Act*, R.S.S. 1965, c. 87, which provided:

5. ...

(7) No proceedings lie against the Crown under this or any other section of this Act in respect of anything heretofore or hereafter done or omitted and purporting [page20] to have been done or omitted in the exercise of a power or authority under a statute or a statutory provision purporting to confer or to have conferred on the Crown such power or authority, which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the Legislature;

In declaring this provision to be unconstitutional, Dickson J. explained that

if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means. [p. 592]

The impugned provision in *Amax Potash* sought to immunize the Province from any claim relating to any action or omission authorized by legislation subsequently declared *ultra vires*. In this sense, the legislation attempted to attach legal consequences to acts undertaken pursuant to invalid laws. By contrast, in *Air Canada*, the Province of British Columbia enacted a new and valid tax which it imposed retroactively. It then retained the monies paid pursuant to the invalid legislation as payment for the new and valid retroactive tax. The critical distinction between these two cases is that the valid retroactive tax at issue in *Air Canada* constituted a legal basis for the taking and retaining of the monies, independently of the prior unconstitutional tax. For this reason, I find La Forest J.'s concern about the impact of *Amax Potash* on the Provinces' ability to enact retroactive legislation so as to limit recovery of unconstitutional taxes to be, with respect, unwarranted.

28 Turning to La Forest J.'s concern about potential fiscal inefficiency, I agree with Wilson J. in *Air Canada*, where she queries:

Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's [page21] mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. [p. 1215]

29 Concerns about fiscal chaos and inefficiency should not be incorporated into the applicable rule. I agree with Professor Birks that

[s]o far as concerns the fear of wholesale reopening of past transactions and the danger of fiscal disruption, the principle of legality [including that government must tax with legislative authorization and within its constitutional limitations] outweighs those dangers and requires that judges leave it to legislatures to impose what restrictions on the right of restitution they think necessary, wise and proper. At all events, a merely hypothetical danger of disruption certainly does not warrant an indiscriminating denial of restitution. [p. 204]

30 For these reasons, I would not adopt the general immunity rule proposed by La Forest J. It is important to note, however, that La Forest J. had envisioned the rule against recovery of *ultra vires* taxes as operating outside of the private law context. In his view, the special policy concerns meant that the issue of recovery of *ultra vires* taxes was outside of the normal unjust enrichment and restitution framework. As he put it, at p. 1204, "[w]hat this suggests is that there are solid grounds of public policy for not according a general right of recovery in these circumstances, and that this prohibition exists quite independently of the law of restitution" (emphasis added). As such, failure to adopt the immunity rule articulated by La Forest J. does not suggest that *within* the law of unjust enrichment policy considerations might not apply to limit the liability of public bodies in certain contexts. [page22] Because La Forest J.'s immunity rule was formulated outside of the law of unjust enrichment, its rejection should not have a bearing on the future development of this branch of the law. This being said, as I will now demonstrate, the law of unjust enrichment should not find application in cases for the recovery of illegally imposed taxes.

31 Having rejected the immunity rule, this raises the question of whether claims for the recovery of unconstitutional taxes should be analysed on the basis of the private law rules of unjust enrichment or constitutional principles. As explained above, the recovery of unconstitutional taxes is warranted on the basis of limitations to the state's constitutional authority to tax, and in particular on the fundamental constitutional principle that there shall be no taxation without representation (see Birks, at c. 6; Hogg, at p. 55-16; and Hogg and Monahan, at pp. 246-47). This would place the restitutionary right clearly within a public law context. However, there is no question that the law of unjust enrichment, although developed in the private law context, can apply to public bodies. Indeed, the present case was argued at the lower courts and before this Court on the grounds of unjust enrichment. I must therefore discuss why, in my view, an unjust enrichment analysis is inappropriate in this case before setting out the proper restitutionary basis for the repayment of *ultra vires* taxes.

4.3 *Basis for the Constitutional Remedy: Why an Unjust Enrichment Framework Is Inappropriate*

32 Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively [page23] defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions. In *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, McLachlin J. (as she then was) neatly encapsulated this normative framework: "The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted" (p. 804).

33 There are at least two distinct categories of restitution: (1) restitution for wrongdoing; and (2) restitution for unjust enrichment: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-7. This case raises the separate notion of restitution based on the constitutional principle that taxes should not be levied without proper legal authority. The first category is not readily applicable here since, in the case of *ultra vires* taxes enacted in good faith, it cannot be said that the government was acting as a "wrong-doer". The choice, then, is between restitution for unjust enrichment or restitution based on constitutional grounds.

34 The Province submits that, from a moral and public policy perspective, it cannot be said to have unjustly benefited from an enrichment as a result of the *ultra vires* charges. I would not decide this appeal as a matter of unjust enrichment. The taxpayers in this case has recourse to a remedy as a matter of constitutional right. This remedy is in fact the only appropriate remedy because it raises important

constitutional principles which would be ignored by treating the claim under another category of restitution. Claims of unjust enrichment against the government may still be appropriate in certain circumstances (see *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75). Nevertheless, it is my view that the analytical framework of the modern doctrine of unjust enrichment is inappropriate in this case.

[page24]

35 In a colloquial sense, it might be said that the retention of improperly collected taxes unjustly enriches governments. However, a technical interpretation of "benefit" and "loss" is hard to apply in tax recovery cases. Furthermore, in the context of this case, the unjust enrichment framework adds an unnecessary layer of complexity to the real legal issues. Some of the components of the modern doctrine are of little use to a principled disposition of the matter, but are rather liable to confuse the proper application of the key principles of constitutional law at issue.

36 The application of private law principles in the realm of public and constitutional law is not without its difficulties. These difficulties have in the past been resolved by a flexible application of the unjust enrichment principle. McLachlin J. had explained in *Peel* that the three-part formulation of the unjust enrichment principle was capable of going beyond the traditional categories of recovery and of allowing the law to develop in a flexible way as required to meet changing perceptions of justice. This restitutionary framework was recently restated and refined in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25. *Garland* established a two-part analysis for determining whether there was a juristic reason for the enrichment that should operate to deny recovery. First, the plaintiff is required to show that no established category of juristic reason for the enrichment exists. If no reason exists, the burden shifts to the defendant to show that there is some other reason why recovery should be denied. At this point of the analysis, the Court explicitly recognized that the juristic reasons for the enrichment had to be considered in light of the reasonable expectation of the parties and certain public policy considerations (para. 46). It is at this second stage of the test that courts would weigh the equities in the particular circumstances of each case.

[page25]

37 McLachlin J. had previously explained in *Peel* that

[t]he courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy. [p. 802]

38 The *Garland* approach is, as one can see, very complex; it requires that courts look only to proper policy considerations. By proper policy considerations, I mean those that have traditionally informed the development of restitutionary law. Otherwise, they risk turning the test into a subjective analysis that has less to do with legal reasoning than with the dispensing of "palm tree" justice. As previously explained, La Forest J. was prepared to immunize public bodies in *Air Canada* where monies were paid pursuant to

an unconstitutional statute for reasons of public policy. He explained that "[c]hief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government" (p. 1207). The question in the present case became, ultimately, whether such concerns are properly considered within the *Garland* test. In my view, they are not. Considerations related to preserving the public purse do not properly fall within the second branch of the juristic reason analysis, which is more concerned with broad principles of fairness. In *Garland*, for example, the overriding public policy concern was ensuring that criminals do not profit from their crime (para. 57). This is not to say that any and all fairness considerations are appropriate. As I said above, they must be rooted in the policy considerations [page26] that are traditionally found in unjust enrichment cases.

39 For the above reasons, I would conclude that the ordinary principles of unjust enrichment should not be applied to claims for the recovery of monies paid pursuant to a statute held to be unconstitutional. I do not therefore need to address in any length the distinction between mistake of law and mistake of fact, which used to be of significance in unjust enrichment cases for mistaken payments. Traditionally, although monies paid under mutual mistake of fact were recoverable, monies paid under mutual mistake of law were not. However, this Court has abandoned the distinction between mistake of fact and mistake of law as it applies to the law of unjust enrichment: see *Air Canada; Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; and *Pacific National Investments*. There can be no doubt that the ordinary principles of unjust enrichment now apply in cases of payments made pursuant to mutual mistake of law. While this point perhaps needed to be clarified, it is of little moment in this case given that unjust enrichment is an inappropriate framework for restitution.

40 Restitution for *ultra vires* taxes does not fit squarely within either of the established categories of restitution. The better view is that it comprises a third category distinct from unjust enrichment. Actions for recovery of taxes collected without legal authority and actions of unjust enrichment both address concerns of restitutionary justice, but these remedies developed in our legal system along [page27] separate paths for distinct purposes. The action for recovery of taxes is firmly grounded, as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law. Unjust enrichment, on the other hand, originally evolved from the common law action of *indebitatus assumpsit* as a means of granting plaintiffs relief for quasi-contractual damages (Maddaugh and McCamus, at p. 1-4; Goff and Jones, *The Law of Restitution* (4th ed. 1993), at p. 7; *Peel*, at pp. 784 and 788, *per* McLachlin J.).

41 From a comparative perspective, it is interesting to note that in Quebec our Court has expressed the view that actions for recovery of illegally collected taxes could be brought by the more simple route that I suggest. In its opinion, such claims could be brought under art. 1491 of the *Civil Code of Québec*, S.Q. 1991, c. 64, or under the predecessor provisions, arts. 1047 and 1048 of the *Civil Code of Lower Canada*, as actions for "undue payment" (*Ross v. The King* (1902), 32 S.C.R. 532; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403, at p. 423, *per* Beetz J.; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, at p. 218, *per* Gonthier J.; see also J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), at pp. 556-58; *Ville de Sept-Îles v. Lussier*, [1993] R.J.Q. 2717 (C.A.)).

5. Passing-On Defence

42 Robertson J.A. found that the only possible defence the Province could raise in the present case was that the appellants had passed on the cost of the charge (paras. 46-48). The basic premise of the passing-on defence is that if the taxpayer has passed on the burden of the tax payments to others, usually via price increases charged to its customers, the taxpayer has not suffered a deprivation, the taxing

authority's enrichment was not at its [page28] expense, and it would receive a windfall if it were awarded recovery. However, unlike Robertson J.A., I would reject the passing-on defence in the context of the recovery of taxes paid pursuant to *ultra vires* legislation.

43 La Forest J. would have applied the defence, if necessary, so as to deny recovery in *Air Canada*. He found that

the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense. [pp. 1202-3]

44 There are three major criticisms of the passing-on defence: first, that it is inconsistent with the basic premise of restitution law; second, that it is economically misconceived; and third, that the task of determining the ultimate location of the burden of a tax is exceedingly difficult and constitutes an inappropriate basis for denying relief.

45 The defence of passing on has developed almost exclusively in the context of recovery of taxes and other charges paid under a mistake of law. If, as La Forest J. suggests in *Air Canada*, "[t]he law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss" (p. 1202), then the defence ought to have arisen in other contexts as well. At the very least, the defence of passing on should also apply to mistaken payments, whether of fact or law, but such has generally not been the case in Canada (see Maddaugh and McCamus, at [page29] p. 11-46). Professors Maddaugh and McCamus suggest that the reason the defence has not been applied outside the context of *ultra vires* taxes is because it is inconsistent with the basic principles of restitutionary law. They argue that "the mere fact that the taxpayer has mistakenly paid, with its own money, the revenue authority is sufficient to establish an unjust enrichment at the plaintiff's expense. As between the taxpayer and the Crown, the question of whether the taxpayer has been able to recoup its loss from some other source is simply irrelevant" (p. 11-45).

46 It is on this same basis that the Australian High Court refused to recognize the defence in *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51. Brennan J. explained that

[t]he fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder. However that may be, no defence of "passing on" is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys. [Footnotes omitted; pp. 90-91.]

47 I note that *Royal Insurance* is a case involving the overpayment of taxes, but in my view the principle is equally applicable to the present case. As mentioned earlier, restitutionary principles provide for restoration of "what has been taken or received from the plaintiff without justification" (*Royal Insurance*, at p. 71). Restitution law is not concerned by the possibility of the plaintiff obtaining [page30] a windfall precisely because it is not founded on the concept of compensation for loss.

48 In addition to being contrary to the basic principles of restitution law, the defence of passing on has also been criticized for being economically misconceived and for creating serious difficulties of proof. In *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, 2004 SCC 38, LeBel J., writing in dissent but not on this point, commented on the inherent difficulties in a commercial marketplace of proving that the loss was not passed on to consumers. LeBel J. noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J. referred to these various figures as "virtually unascertainable" (para. 205, citing White J. in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), at p. 493). LeBel J. ultimately concluded that "[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on" (para. 206, citing Ground J. in *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214 (S.C.J.), at para. 40).

[page31]

49 Although LeBel J. was criticizing the application of the passing-on defence in tort law, his criticisms are equally appropriate, if perhaps not more so, in the context of restitution law. This is because, unlike restitution law, tort law is premised on the concept of compensation for loss, such that concerns about potential windfalls are appropriate.

50 Recognition of the defence in *Air Canada* has also led to uncertainty in its application. In *Canadian Pacific Air Lines*, released contemporaneously with *Air Canada*, the defence was applied to the claim for recovery of a beverage tax, which the Court noted was imposed on passengers, not on the airline. The airline was simply a collector of the tax. This holding is uncontentious insofar as the airline was merely collecting the tax as an agent of the Crown. In my view, the defence of passing on was not necessary to arrive at that conclusion. In the same case, the airline was allowed to recover the social services tax paid on the value of the aircraft and aircraft parts with no discussion of the defence. However, La Forest J. in *Air Canada* found the defence to be applicable to the tax on fuel so as to deny recovery. The holdings in these cases with respect to the application of the passing-on defence are difficult to reconcile.

51 For the above reasons, I would reject the passing-on defence in its entirety.

6. Application of the Doctrine of Protest and Compulsion

52 Robertson J.A. granted recovery of the illegal user charge on the basis that it was paid under

protest. This is another issue that had posed problems [page32] in the context of recovery of money paid under an *ultra vires* tax. The doctrine of protest and compulsion functions as an exception to the passing-on defence. As Professors Maddaugh and McCamus explain, "the defence [of passing on] would no longer be available once the taxpayer signaled, through protest, that the unlawfulness of the taxation measure was being challenged" (pp. 11-44 and 11-45). Thus, even though Robertson J.A. accepted the Province's argument that the appellants had passed on the cost of the tax, he found that the payments made under protest and compulsion were recoverable. Because I have rejected the passing-on defence as generally inapplicable in the context of *ultra vires* taxes, it is not necessary to deal with the doctrine of protest and compulsion. I think some general comments will, however, be useful.

53 In my view, the doctrine of protest and compulsion is simply not applicable to cases such as the present. This flows from the constitutional basis for the right of restitution in this case: that the Crown should not be able to retain taxes that lack legal authority. It therefore matters little whether the taxpayer paid under protest and compulsion. If the law proves to be invalid, then there should be no burden on the taxpayer to prove that they were paying under protest. Such a finding would be inconsistent with the nature of the cause of action in this case. As Lord Goff said in *Woolwich*, at p. 172, "full effect can only be given to that principle [that taxes should not be levied without proper authority] if the return of taxes exacted under an unlawful demand can be enforced as a matter of right". The right of the party to obtain restitution for taxes paid under *ultra vires* legislation does not depend on the behaviour of each party but on the objective consideration of whether the tax was exacted without proper legal authority.

[page33]

54 I also have concerns about the applicability of the doctrine of protest and compulsion to cases where the tax, although collected pursuant to valid legislation, was misapplied in relation to the taxpayer. The tax is valid, but the taxpayer should never have had to pay it. The problem, in my view, stems from the notion of compulsion in the context of payments made pursuant to law. Duress first found recognition as a limited ground for the recovery of damages against an intimidating party in tort. A contract entered into under duress was held to be voidable at the instance of the coerced party (see Maddaugh and McCamus, at pp. 26-2 and 26-3). The recovery of benefits conferred under duress is achieved via an action in restitution (*ibid.*, at p. 26-6.1). Duress vitiates the voluntary nature of the payment.

55 Professors Maddaugh and McCamus explain, at p. 11-20, that "if one is mistaken about the law, one pays because one believes one is obliged to do so by law. If one is responding to duress, it must be that the individual believes or strongly suspects that there is no legal requirement to pay." However, in my opinion, the absence of duress on the part of the taxpayer should not be an important factor. It is not up to the taxpayer but rather to the party that makes and administers the law to bear the responsibility of ensuring the validity and applicability of the law (see also *Ontario (Liquor Control Board)*). I agree with Wilson J. in *Air Canada* that

payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its

payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to [page34] believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so. [pp. 1214-15]

Although made in the context of *ultra vires* legislation, Wilson J.'s comments are equally applicable to the situation where a taxpayer is required to pay a levy because of an incorrect application of the law. In either case, the protest requirement is inappropriate.

56 There is a second concern which arises in cases where monies have been paid to public authorities pursuant to unconstitutional legislation or as a result of the misapplication of an otherwise valid law. In *Eurig*, for example, payment under protest and the commencement of legal proceedings was held to be sufficient to trigger the exception allowing recovery. The end result is that whenever a tax is declared *ultra vires*, only the successful litigants will be granted recovery of the unconstitutional charges. All other similarly situated persons will not benefit from the Court's holding. This raises concerns about horizontal equity that are similar to those raised by the doctrine of constitutional exemption. This Court has alluded to such concerns in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, and in *Miron v. Trudel*, [1995] 2 S.C.R. 418. In my view, constitutional law should apply fairly and evenly, so that all similarly situated persons are treated the same.

57 I would therefore discard the doctrine of protest and compulsion insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid legislation. Once the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely *ultra vires* in the administrative law [page35] sense. In all such cases, the payment of the charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.

58 In cases not involving payments made to public authorities pursuant to unconstitutional legislation or the misapplication of an otherwise valid law, my view is that courts should insist on proof of compulsion in fact. The mere fact that the payment was made in protest should be neither necessary nor sufficient to establish compulsion. Protest may accompany a voluntary payment (in order to protect a hypothetical restitutionary entitlement), and compulsion may occur without any evidence of formal protest. Insisting on compulsion in fact is more principled and ensures that all similarly situated persons will be treated equally, regardless of protest.

7. Application of Limitations Law

59 My view is that claims such as the present may be subject to an applicable limitation period. The New Brunswick *Limitation of Actions Act* provides that:

9 No other action shall be commenced but within six years after the cause of action arose.

60 Section 9 was clearly intended to cover all other actions not specifically provided for in the legislation. There is no reason why modern restitutionary claims ought not to be subject to s. 9. I agree with Robertson J.A. that such a result does not run afoul of the principles developed by this Court in *Amax Potash*:

[page36]

In my view, the reasoning adopted in *Amax Potash* has no application to cases in which the provinces are relying on a pre-existing statutory prescription period. There is a substantive difference between existing legislation that bars potential claims, unless brought within a fixed period, and legislation enacted for the specific purpose of barring restitutionary claims based on an invalid or unconstitutional tax. A prescription statute is adopted for purposes of providing a defendant with "peace of mind"; to be secure in the knowledge that he or she is no longer at risk from a stale claim accompanied by stale testimony. It is not adopted for the purpose of barring claims outright. A *Limitation of Actions Act* is valid legislation adopted for a valid purpose. It does not seek to achieve indirectly what cannot be achieved directly.
[para. 42]

61 Finally, the point at which time will begin to run must be determined. The cause of action was complete at the moment the Province illegally received the payment. For this reason, the appellants can only recover the user charges paid during the six years preceding the filing date of their Notice of Application (May 25, 2001).

8. Conclusion

62 For the above reasons, I would allow the appeal in part and dismiss the cross-appeal. The appellants are entitled to recover all user charges paid on or after May 25, 1995, with interest. However, I conclude that this is not an appropriate case for the awarding of compound interest as the appellants did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction (see *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43). The appellants are entitled to their costs in this Court and in the courts below.

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[page37]

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