The Recovery of Overpaid Tax Through Unjust Enrichment

Joel Nitikman*

PRÉCIS

Bon nombre, sinon la totalité, des lois fiscales contiennent des dispositions selon lesquelles un contribuable peut, dans des circonstances très précises, demander un remboursement des impôts payés en trop. Cependant, dans certains cas, ces dispositions peuvent s'avérer inadéquates pour assurer un remboursement complet ou partiel du montant payé en trop. Un contribuable peut alors envisager d'intenter une poursuite pour enrichissement sans cause. Ce genre d'action comporte des éléments du droit en matière de contrats et du droit de la responsabilité délictuelle, mais en est entièrement indépendant.

Dans une poursuite pour enrichissement sans cause, un contribuable doit prouver 1) que le gouvernement s'est enrichi, 2) que le contribuable a été privé dans une mesure correspondante, et 3) qu'il n'existe aucun motif juridique à l'appui de l'enrichissement. Le premier élément ne pose généralement aucun problème. Le deuxième élément est en général aussi facile à prouver, bien qu'il semble que, selon la jurisprudence, le fardeau a été imposé aux contribuables, de manière incorrecte selon l'auteur, de prouver qu'ils n'ont pas fait assumer la responsabilité de payer la taxe à des tiers. Toutefois, il peut être difficile de prouver le troisième élément. Le gouvernement pourra avoir recours à plusieurs défenses, comme la défense fondée sur l'inconstitutionnalité, la défense fondée sur l'ensemble des lois applicables et la défense fondée sur l'erreur de droit, bien que cette dernière forme de défense semble maintenant avoir été discréditée, sauf dans les juridictions où elle a été expressément enchâssée.

En plus de prouver qu'il n'existe aucun motif juridique à l'enrichissement, le gouvernement peut se fier sur l'argument qu'un tribunal n'a aucune compétence pour ordonner au gouvernement de payer des sommes dans les cas où le paiement n'est pas autorisé par une loi. Cependant, dans au moins une cause récente, le tribunal a rejeté cet argument. L'auteur analyse cette cause et soutient que le tribunal a rendu la bonne décision, mais peut-être pour le mauvais motif.

* Of Fraser Milner, Vancouver.

La Cour suprême du Canada, qui a joué un rôle prépondérant dans le droit à l'enrichissement sans cause partout dans le Commonwealth, semble avoir récemment ouvert la voie aux causes invoquant l'enrichissement sans cause, même en l'absence des trois éléments traditionnels. L'auteur examine cette nouvelle approche et conclut qu'elle pourrait être appliquée aux causes où un recouvrement des impôts payés en trop est demandé.

Enfin, l'auteur remarque que, dans la plupart des cas, le remboursement des impôts payés en trop accordé par suite d'une poursuite pour enrichissement sans cause ne devrait pas lui-même être imposable, bien qu'il puisse arriver dans certains cas que ce montant doive être inclus dans le revenu pour l'année où il est reçu.

ABSTRACT

Many, if not all, taxing statutes contain provisions that permit a taxpayer, in specifically designated circumstances, to apply for a refund of overpaid taxes. In some cases, however, such provisions may be inadequate to provide either a partial or a full refund of the overpaid amount. In this situation, a taxpayer may want to consider bringing an action for unjust enrichment. Such an action partakes of elements of contract law and tort law but is legally independent of both.

In an action for unjust enrichment, a taxpayer must prove (1) that the government has been enriched, (2) that the taxpayer has been correspondingly deprived, and (3) that there is no juristic reason for the enrichment. The first element is generally not problematic. The second element also is generally easy to prove, although the case law appears to have put the onus on taxpayers—incorrectly, in the author's view—to prove that they have not passed on the burden of the tax to third parties. The third element, however, may be difficult to prove. The government will have a variety of defences available to it, such as the unconstitutional defence, the complete code defence, and the mistake of law defence, although the latter now seems to have been discredited except in jurisdictions where it has been statutorily enshrined.

In addition to showing that there is a juristic reason for the enrichment, the government may be able to rely on the argument that a court has no jurisdiction to order the government to pay money in cases where there is no statutory authorization for the payment. However, in at least one recent case, the court denied this argument. The author discusses this case and argues that the court reached the right result, although perhaps for the wrong reason.

The Supreme Court of Canada, which has played a leading role in the law of unjust enrichment throughout the Commonwealth, appears to have recently opened the door to arguing unjust enrichment even when the traditional three elements are not present. The author discusses this new approach and concludes that it could be applied to cases where a recovery of overpaid tax is sought.

Finally, the author notes that in most cases, an award of overpaid tax in an action for unjust enrichment should not itself be taxable, although cases will arise where the award must be included in income in the year of receipt.

> Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.
>
> *Romans* 13:7

INTRODUCTION[1]

In modern Canadian jurisprudence, actions for unjust enrichment were originally used to fill a perceived gap in family relations statutes. These actions were brought by unmarried women who sued to recover money or property unjustly retained by their common law partner during a long relationship. More recently, however, actions for unjust enrichment have been brought to recover money or property in many non-family situations, including commercial actions between arm's-length parties. Most significantly for present purposes, actions for unjust enrichment have been brought, and won, which have sought to recover overpaid taxes, even where the taxpayer could not or did not avail himself of the refund provisions in the relevant taxing statute.

As discussed in detail below, an action for unjust enrichment usually requires that the plaintiff prove

- that the defendant has been enriched,
- that the plaintiff has been correspondingly deprived, and
- that there is no juristic reason for the enrichment.

In cases of overpaid tax, the first element is usually not difficult to prove. Similarly, subject to a possible windfall defence, the second element is generally not problematic. The third element, however, may be difficult to prove in any particular case. Most of the defences available to a revenue authority in an action for unjust enrichment (such as the mistake of law, the unconstitutional, and the complete code defences) arise under this third heading. In addition, a revenue authority may raise an overarching

---

[1] For a list of early Canadian articles on this topic, see Peter W. Hogg, *Liability of the Crown*, 2d ed. (Scarborough, Ont.: Carswell, 1989), 181, footnote 8. More recent articles include Paul Perell, "Restitutionary Claims Against Government" (February 1995), 17 *Advocates Quarterly* 71-79; and Paul Mitchell, "Restitution, 'Passing On,' and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly" (Winter 1995), 53 *University of Toronto Faculty of Law Review* 130-79. Some of the British articles are listed in Liam Flynn, " 'No Taxation Without Restitution'—The Law Commission's Proposals on Recovery of Overpaid Taxes" [1995], no. 1 *British Tax Review* 15-32, at footnote 4. Also, a search of the British Columbia Law Reform Commission database at http://www.lawreform.gov.bc.ca/search/search.htm reveals a number of works on mistake of law and unjust enrichment.

defence (lack of statutory authority) that is not directly related to any particular element of the cause of action. Notwithstanding all of these possible defences, a taxpayer may successfully assert unjust enrichment to recover overpaid taxes or other governmental levies.

Recently, the Supreme Court of Canada has implied that a different analysis of restitution may be in order, which would ignore the traditional three elements mentioned above. So far, this doctrine has been limited to actions for a constructive trust in cases of breach of fiduciary duty. If it were extended to ordinary cases of unjust enrichment, many of the defences otherwise available to a revenue authority would disappear. This new development is explored in some detail later in the article.

Finally, where a taxpayer seeks to recover overpaid tax, the income tax consequences of a successful outcome must be considered. Some concerns in this area are briefly discussed at the end of the article.

THE ELEMENTS OF AN ACTION FOR UNJUST ENRICHMENT

The law of unjust enrichment (also called the law of restitution)[2] is concerned with forcing one person, the defendant, to repay to another, the plaintiff, "amounts" that the defendant has "improperly" received from the plaintiff.[3]

The modern Canadian[4] law of unjust enrichment may to said to have commenced in 1975 with the dissenting judgment of Laskin J (as he then was) of the Supreme Court of Canada in *Murdoch v. Murdoch*.[5] The plaintiff was the defendant's former wife, who had been married to him for 25 years before she left him. She brought an action against him claiming an ownership interest in certain lands to which he had title. Initially, she claimed the land on the basis of a true partnership between her and her husband; having had that issue decided against her at trial on the evidence, in the Supreme Court she based her action on resulting trust. While Mrs. Murdoch admitted that she had not made a direct monetary contribution to the acquisition of the land, she argued that her contribution of work on

---

[2] For a discussion of the idea that there is a substantive difference between the two expressions, see G.H.L. Fridman, *Restitution*, 2d ed. (Scarborough, Ont.: Carswell, 1992), 28 and following.

[3] *Peel (Reg. Municipality) v. Canada*, [1992] 3 SCR 762, at 787.

[4] Although there are now some fundamental differences between the law of unjust enrichment in Canada and in other Commonwealth countries, the Supreme Court of Canada has played a leading role in the development of this area of the law in those other countries. See Nicholas Rafferty, "The Role of the Supreme Court in the Development of a Canadian Law of Restitution" (1994), vol. 32, no. 3 *Alberta Law Review* 557-79. The pioneering work of the Supreme Court of Canada in this area has been recognized in *Marangos Hotel Co. v. Stone*, [1998] EWJ no. 481 (Court of Appeal (Civil Division)) (QL).

[5] [1975] 1 SCR 423. The Supreme Court discussed the principles of restitution in an even earlier case, *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] SCR 725; however, for purposes of this article, it is not necessary to discuss that case.

and in respect of the land—what these days would be called sweat equity—was sufficient to ground a claim for a resulting trust.

The majority held that there was no evidence that the parties intended to share the ownership of the land in question. Hence, there could be no resulting trust, and the action was dismissed.

Laskin J dissented. He would have held that the wife's sweat equity, over and above any "housekeeping" chores that might simply be a reflection of the marriage bond, was sufficiently like a financial contribution as to justify her claim for an interest in the land.

Subsequent to *Murdoch*, the Supreme Court of Canada applied Laskin J's reasoning in a trilogy of cases[6] that cemented the concept of unjust enrichment in Canadian law. These cases made three key contributions to the law of unjust enrichment:

1) They affirmed that the action for unjust enrichment is sui generis—that is, it is an independent cause of action, not dependent on contract or tort.[7]

2) They explained that once the cause of action for unjust enrichment is made out, a court has its choice of a range of remedies, including but not limited to a pure monetary award and the imposition of a remedial constructive trust,[8] which in a particular case might be retroactive.[9]

3) Most important, they set out three key elements of an action for unjust enrichment: there must be

a) an enrichment of the defendant,

b) a corresponding deprivation of the plaintiff, and

c) the absence of any juristic reason for the enrichment.

---

[6] *Rathwell v. Rathwell*, [1978] 2 SCR 436; *Pettkus v. Becker*, [1980] 2 SCR 834; and *Sorochan v. Sorochan*, [1986] 2 SCR 38.

[7] For recent statements of this point, see *McLean v. Grandmont* (1993), 77 BCLR (2d) 352, at 361 (CA); and *Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1998] 2 WLR 475 (HL), where the court held that unjust enrichment was sufficient to create a right to subrogation even in the absence of a contract. However, in New Zealand, it seems that unjust enrichment is not an independent cause of action: *Equiticorp Industries Group Ltd. (In Statutory Management) v. The Crown (Judgement No. 47: Summary)*, [1996] 3 NZLR 586 (HC).

[8] For a discussion of remedial constructive trusts and their possible tax effects, see Catherine Brown and Cindy L. Rajan, "Constructive and Resulting Trusts: Challenging Tax Boundaries" (1997), vol. 45, no. 4 *Canadian Tax Journal* 659-89; and Joel A. Nitikman, "Intra-Family Transfers: When Is There a Disposition?" (September 1990), 3 *Canadian Current Tax* C21-32.

[9] See *Peter v. Beblow*, [1993] 1 SCR 980, at 987, where this "choice of remedies" principle was stated as follows: " 'Unjust enrichment' in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another

(The footnote is continued on the next page.)

REASONS FOR BRINGING AN ACTION FOR UNJUST ENRICHMENT

Before we consider the three elements of an action for unjust enrichment and the possible defences, it is perhaps useful to suggest why a taxpayer would want to bring such an action rather than rely on the refund provisions of the taxing statute in question. In a given case, an action may be preferred for one or more of the following reasons:

• *Restricted application of refund provisions in the taxing statute.* The refund provisions of the taxing statute generally do not apply unless the taxpayer has been able to prove that no tax was owing by using the objection and appeal mechanisms in the taxing statute. If the taxpayer fails to bring himself within those mechanisms,[10] the refund provisions will not apply.

---

[9] Continued . . .
had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, 'if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.' Or to quote Dickson J., as he then was, in *Pettkus v. Becker* [1980] 2 S.C.R. 834, at p. 852, where there is a 'contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property].' In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed."

In *Dollar Land (Cumbernauld) Ltd. v. CIN Properties Ltd.*, July 16, 1998 (Scot. HL) [unreported], the court was asked to determine whether a tenant could sue for unjust enrichment when the landlord exercised a clause in the lease permitting an early termination of the lease. The court said no, because there was a juristic reason for the enrichment, namely, the terms of the lease. In the course of its judgment, the court noted that while there may be many remedies for unjust enrichment, and while pleadings may still be filed on the basis of one or more particular remedies, the action for unjust enrichment as a whole supersedes any particular remedy: "It is an important part of this reasoning to recognise that the obligation to redress the enrichment arises not from contract, but from the separate duty which arises in law from the absence of a legal ground to justify its retention: see Stair, Institutions, I.7.7. On the other hand it does not seem to me to be inconsistent with the broad principle of the law of unjustified enrichment for the various situations in which redress may be sought to be expressed in terms of remedies. In Shilliday v. Smith 2 April 1998, the Lord President pointed out that repetition, restitution, reduction and recompense are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way in which the particular enrichment has arisen. It may be unrealistic to expect those who practise in the courts to depart from such terminology. In the context of the written pleadings which are used in our practice the pursuer is expected to state the nature of the remedy which he seeks, as well as the legal basis for it. For my part I see no harm in the continued use of these expressions to describe the various remedies, so long as it is understood that they are being used merely to describe the nature of the remedy which the court is being asked to provide in order to redress the enrichment. The event which gives rise to the granting of the remedy is the enrichment. In general terms it may be said that the remedy is available where the enrichment lacks a legal ground to justify the retention of the benefit. In such circumstances it is held to be unjust."

[10] For instance, because a filing deadline has passed. See, for example, *The Queen v. Canadian Marconi Company*, 91 DTC 5626 (FCA), where the taxpayer had clearly overpaid
(The footnote is continued on the next page.)

• *Limited statutory time periods.* The time limits prescribed by a taxing statute may be shorter than the time limits for bringing an action for unjust enrichment. Normally, where an action is brought against the federal Crown for unjust enrichment in respect of a federal tax, the action will not arise in a province; therefore, the statutory limitation period will be six years for the bringing of the action.[11] In the unusual situation where a cause of action against the federal Crown might arise in a particular province, the statutory period will be determined by the relevant provincial law.[12]

Where the action is against a provincial revenue authority for tax paid under a provincial statute, the general law as to limitations will apply. Furthermore, such a law may have a "discoverability" rule, whereby the limitation period is considered not to have begun until the time when the plaintiff could reasonably have discovered the existence of the facts necessary to support the action.[13]

---

[10] Continued . . .
the tax owing but had failed to file a notice of objection for the relevant years. It was held that the minister had no right to pay a refund of the overpaid tax. One would have thought that this was the ideal case in which to sue for unjust enrichment, but it appears that no such action was taken.

[11] Section 39(2) of the Federal Court Act, RSC 1985, c. F-7, as amended.

[12] Section 39(1) of the Federal Court Act. This situation arose, for example, in *Regional Municipality of Peel v. Canada*, [1987] 3 FC 103 (TD), rev'd. without discussion of this point in *Peel*, supra footnote 3. The plaintiff sued the federal government in restitution for forcing it to pay certain child care costs under what turned out to be a constitutionally invalid federal statute. The money had been paid out by the plaintiff between 1976 and 1982. The legislation was struck down in 1982 as being unconstitutional. The action was commenced in 1983. The trial court noted that under section 38 of the Federal Court Act (now section 39), the law as to limitations in Ontario applied because that was where the cause of action arose. The Crown relied on section 45(1)(g) of the Ontario Limitations Act (RSO 1980, c. 240, as amended) and section 11 of the Ontario Public Authorities Protection Act (RSO 1980, c. 406, as amended). The former stated that actions "upon the case" must be commenced "within six years after the cause of action arose." The latter provided that an action against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, must be commenced "within six months next after the cause of action arose." The trial court held that section 11 did not apply but that section 45(1)(g) did. It held that with respect to section 11, the defendant was not being sued for acts done or not done through neglect or default in the execution of a duty under a statute or otherwise. Instead, it was being sued with respect to an obligation that arose as a result of the actions of others. However, the court held that unjust enrichment is an action upon the case, being historically a derivative action proceeding from quasi-contract. Nonetheless, in the court's view, the cause of action had arisen when the Supreme Court of Canada had declared the federal statute unconstitutional in 1982, so that the six-year limitation period in section 45(1)(g) was met.

[13] See, for example, *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344. In the 1940s, the Indian band surrendered its land to the federal Crown and in that surrender inadvertently gave away its valuable mineral rights. In 1987, the band sued to recover compensation, based on breach of fiduciary duty. The Crown argued that the British Columbia Limitation Act (RSBC 1979, c. 236, as amended) applied, so that the action was
(The footnote is continued on the next page.)

• *Choice of forums.* Under a taxing statute, the taxpayer must seek any recovery in the courts of the government enacting the legislation. But in an action for unjust enrichment against the federal Crown, section 21 of the Crown Liability and Proceedings Act[14] provides that the provincial courts have concurrent jurisdiction unless an action has already been started in the federal court.

While section 21 does not apply if the federal court has exclusive jurisdiction, this condition does not arise with respect to an action for unjust enrichment, because section 17 of the Federal Court Act provides that the federal court has concurrent jurisdiction in actions against the Crown.

• *Pre-trial procedures versus mandamus.* Where a revenue authority has arguably not complied with a statutory duty to refund money under a taxing statute, the only remedy appears to be a motion for mandamus to compel the payment of the money. Such a motion generally proceeds upon affidavit evidence. Although either party may cross-examine in respect of such affidavits, the scope of pre-motion discovery is still extremely limited compared to that available in either the federal court or provincial superior courts in an action for unjust enrichment.

• *Punitive damages and compound interest.* In a motion for mandamus to compel payment of a refund, no damages may be awarded, and interest may be awarded only to the extent permitted in the taxing statute. But in an action for unjust enrichment, it appears that punitive damages are

---

[13] Continued . . .
barred after 6 years and, in any case, under the ultimate limitation period of 30 years. However, the court held that the Crown had concealed facts from the band, that the limitation period had not commenced until those facts were discoverable, and hence the action was not statute-barred. It seems that there is a close enough analogy between a claim for breach of fiduciary duty and a claim for unjust enrichment that the discoverability rule would apply to the latter.

[14] RSC 1985, c. C-50, as amended. This Act will be amended by part 5 of Bill C-50, A First Act To Harmonize Federal Law with the Civil Law of the Province of Quebec and To Amend Certain Acts in Order To Ensure that Each Language Version Takes into Account the Common Law and the Civil law, first reading June 12, 1998. Under the proposed amendments, section 21(1) of the Act will provide for concurrent jurisdiction in cases of claims made against the Crown where the superior provincial court would have jurisdiction over the claim if it were made against a person subject to the court's jurisdiction. A person will be defined to exclude the federal or provincial Crown. The definition of "tort" in the Act will be repealed. Instead, "liability" will be defined to mean "liability in tort" in provinces other than Quebec. By amended section 3(b)(i), the Crown is liable in all provinces other than Quebec for a tort committed by a servant of the Crown. By amended section 3(b)(ii), the Crown is liable for a breach of duty attaching to the ownership, occupation, possession, or control of property. With respect to acts of servants, amended section 10 will provide that no action lies against the Crown for an act or omission of its servant unless the act or omission would, apart from the provisions of the Act, have given rise to a cause of action in liability against that servant or the servant's personal representative or succession. By amended section 12, no claim under section 3(b)(ii) is permitted unless notice of the claim is given within seven days after the claim arose, to a responsible official of the department or agency administering the property or the employee of the department or agency who is in control or charge of the property.

potentially available, as is compound interest. In *Air Canada v. Ontario (Liquor Control Board)*,[15] the plaintiff had for many years paid gallonage fees to the defendant for liquor purchased and used on its aircraft. It later learned that a competitor had expressly been permitted by the defendant not to pay such fees, on the basis of legal advice received by the defendant. The defendant, however, did not tell the plaintiff about this exemption. The plaintiff sued and won for a return of the fees it had paid. The trial judge held that neither compound interest nor punitive damages were appropriate awards.[16] While the Supreme Court declined to reverse that decision, it clearly left the door open for the award of either or both in a future case. The fact that punitive damages are not expressly referred to in the Crown Liability and Proceedings Act does not prohibit the awarding of such damages.[17]

• *Estoppel*. In tax law, no estoppel lies against a government where the result of the estoppel would be contrary to a statute.[18] But in an action for unjust enrichment, a misrepresentation by a government official may be the basis for a finding that there is no juristic reason for the enrichment.[19]

THE CONCEPT OF ENRICHMENT

The first element of the action for unjust enrichment is that the defendant has been enriched. It has been suggested that in a commercial setting, the word "enriched" is not the most appropriate, because the purpose of every commercial transaction is to enrich the parties.[20] One suggested alternative is the word "benefited";[21] however, in the author's view, even this word connotes some sort of unearned advantage. It would therefore be best to use as neutral a term as possible, which would simply connote that the defendant has had an increase in net wealth; then, in the third element, the issue would be whether the defendant has any juristic reason for keeping the increase in wealth.

In an action for the recovery of overpaid tax, the first element will be self-evident: the plaintiff will have either paid the tax in question or not.

---

[15] [1997] 2 SCR 581.

[16] (1994), 2 GTC 7186 (Ont. Gen. Div.).

[17] *Peeters v. Canada* (1993), 108 DLR (4th) 471 (FCA).

[18] This rule applies only to representations of law, not fact. See *Rogers v. The Queen*, 98 DTC 1365 (TCC).

[19] For a brief review of estoppel, see Patrick Boyle, "Issue Estoppel in Tax Cases" (1998), vol. 6, no. 1 *Tax Litigation* (Federated Press) 359-61. A comprehensive review of estoppel in tax law was given in *Fredericks v. CIR*, 126 F.3d 433 (3d Cir. 1997). Although based on US law, the principles set out in this case seem equally applicable to Canadian tax law.

[20] See Southin JA, dissenting, in *Atlas Cabinets & Furniture, etc.* (1990), 45 BCLR (2d) 99 (CA).

[21] George B. Klippert, "The Juridical Nature of Unjust Enrichment" (1980), 30 *University of Toronto Law Journal* 356-414.

THE CORRESPONDING DEPRIVATION

The second element of the cause of action for unjust enrichment requires the plaintiff to have been correspondingly deprived of the amount by which the defendant has had an increase in net wealth.

In an action for the recovery of overpaid tax, it should normally be easy to prove the necessary causal connection between the defendant's increase in wealth and the plaintiff's loss of it.[22] The plaintiff will have paid the tax to the revenue authority in question. However, in some cases, the revenue authority may assert that the plaintiff was able, in essence, to recoup the tax paid from his customers, so that this particular plaintiff was not deprived. This argument is known as the "windfall" or sometimes the "passing off" defence.

The Windfall Defence

As noted, the Canadian rule regarding unjust enrichment is not only that the defendant must have been enriched, but that the plaintiff must have been correspondingly deprived. The logical corollary is that if someone other than the plaintiff has been deprived, payment by the defendant to the plaintiff would result in a "windfall" to the plaintiff. If, therefore, the defendant can claim that the plaintiff was able to pass on the deprivation to others, he will have a complete defence to the action for unjust enrichment, at least as constituted by this particular plaintiff.[23]

The windfall defence was rejected in an early Australian case, *Mason v. New South Wales*.[24] The plaintiffs were husband and wife and operated an interstate carrier in Australia. They paid a fee for doing so under applicable legislation. The fee was later found by the Privy Council to be unconstitutional. They sued to recover the fees paid. In today's terms, they sued for unjust enrichment, but that doctrine had not been fully advanced at that time; accordingly, they sued on the basis of money wrongly paid out under protest. The Crown led some evidence that they had passed on the fees to their customers, and so argued that they could not recover, but the majority of the court rejected this argument. It held that there was no necessity for the plaintiffs to show a corresponding impoverishment in order to succeed in the action. The majority seems to have been of the

---

[22] In *Sorochan*, supra footnote 6, at 48, the court held that there must be a "sufficiently substantial and direct" link between the increase and decrease in wealth.

[23] Until recently, there was no rule in Canada allowing class action suits; consequently, if the plaintiff had passed on the deprivation to a large number of others, there was no practical way for that group to recover the deprivation as a whole. With the advent of class actions in Canada, this may no longer be true, and we may see in the future mass actions for unjust enrichment. See David A. Crerar, "The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments" (Winter 1998), 56 *University of Toronto Faculty of Law Review* 47-99.

[24] (1959), 102 CLR 108 (HC).

view that the mere fact that the government had illegally collected the amounts in question was sufficient reason to cause a disgorgement.

The rejection of the windfall defence in Australia was further confirmed in *Commissioner of State Revenue (Vict.) v. Royal Insurance Australia Ltd.*[25] Royal was an insurance company that had paid stamp duty on certain insurance policies. It was later determined that no such duty was exigible. Royal sued for unjust enrichment to recover the duty paid. One of the defences raised was that Royal had passed the duty on to its policy holders. Mason J engaged in an exhaustive review of English, US, and Canadian law, and held that the defence should be rejected on two grounds: first, that under the constitution any tax had to be collected under a lawful statute, so that to allow the state to keep the stamp duty would violate the constitution; second, that as a matter of restitution, where there was no proof that Royal would not pass the refund back to its customers, the defence should be disallowed.

The majority of the court, however, rejected the defence on a much broader basis. Brennan J, with whom two of the other five judges agreed, simply held that as between the plaintiff and the defendant, the plaintiff had clearly paid its own money to the defendant. Therefore, that the plaintiff may have been able to recoup such money from third parties was irrelevant to this particular action. The court did imply that the third parties might have their own cause of action for unjust enrichment or trust against the plaintiff.

Notwithstanding these Australian cases, the windfall defence is clearly established in Canada. In *Allied Air Conditioning Inc., etc.*,[26] a number of air conditioning contractors had mistakenly paid sales tax on purchases of equipment that was exempt. In a special case, based on an agreed statement of facts, they sought the opinion of the court on the question whether they were entitled to restitution. Legg JA and Taylor JA (with Proudfoot JA concurring with both) held that the plaintiff had passed on the sales tax to its customers and therefore had not borne the burden of the tax. The action failed for that reason alone.

Allied Air Conditioning was considered in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*.[27] The plaintiff obtained most of its work by being the lowest bidder on government tendered jobs. In preparing its bids, it would estimate its costs, add a profit margin, and submit the total. It paid health tax on the total bid. This was an error, because profits were not taxable and the actual costs in many cases were lower than the estimated costs. The plaintiff sued for unjust enrichment to recover the tax. The court agreed that the windfall defence is legally available but rejected it on the particular facts of the case, on the ground that the

[25] (1994), 182 CLR 51 (HC).

[26] (1994), 87 BCLR (2d) 207 (CA).

[27] (1995), 137 NSR (2d) 197 (CA).

proper inference to be drawn from the facts was that the plaintiff was the actual taxpayer that had paid the tax, and not merely a vendor (as in *Allied Air Conditioning*) that had passed the tax on. The court noted that the evidence showed that the plaintiff had lost jobs by overbidding on account of the increased tax, and that these overbids indicated that the tax had not in fact been passed on.

It will be seen from a comparison of the Australian cases with the Canadian cases that the different results stem from a different understanding of the purpose of an action for unjust enrichment. The Australian cases take the position that the purpose is to force the defendant to pay back his ill-gotten gains; the Canadian cases take the position that the purpose is to restore to this particular plaintiff the money, if any, of which he has been deprived. The Canadian cases have largely ignored the argument that to allow a government to keep overpaid tax, even in a case where the plaintiff has passed on the burden of the tax, would be to sanction illegal taxation.[28]

Until *Soulos v. Korkontzilas*,[29] one would have to concede that the Australian approach was unlikely to be adopted in Canada. However, *Soulos*, while not directly related to unjust enrichment, evidences a preference for the Australian approach in an action for restitution based on breach of fiduciary duty. It may therefore be that in an appropriate case, there is room to argue that the traditional Canadian approach to the windfall defence should be reviewed.[30]

The Onus of Proof in a Windfall Defence

It is clear that the onus of proving the three main elements of unjust enrichment lies on the plaintiff.[31] Assuming that the windfall defence is available in Canada, the next issue is whether the plaintiff must show affirmatively that he did not pass on the tax to others, or whether the onus of proof for that issue is on the defendant. The general rule is that he who

---

[28] One of the few Canadian judges to make this point is Wilson J, in dissent, in *Air Canada v. British Columbia*, [1989] 1 SCR 1161.

[29] [1997] 2 SCR 217. This case is discussed in detail in the text below at footnote 109 and following.

[30] In *Peel*, supra footnote 3, at 788, the majority said, "At the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain." This comment implies that the court took the Australian view of the purpose of an action for unjust enrichment. On the other hand, the majority also said (at 804), "Thus, restitution, more narrowly than tort or contract, focuses on re-establishing equality as between two parties, as a response to a disruption of equilibrium through a subtraction or taking," implying a preference for the traditional Canadian view. It therefore seems that in a subsequent case, the Supreme Court would be free to adopt either view. It appears that the windfall defence has been incorporated into England's value-added tax legislation. See *R v. C & E Comrs, ex p Kay & Co*, [1996] STC 1500 (QB).

[31] See, for example, *Toronto-Dominion Bank v. Carotenuto* (1998), 154 DLR (4th) 627, at 636 (BC CA).

asserts must prove.[32] The defendant will be the one asserting that the tax was passed on by the plaintiff. One would think that as passing on is an affirmative defence, the onus of proving it should be on the defendant. For example, there is no suggestion that the plaintiff must prove that a taxing statute is constitutional in order to negate that particular defence.[33] Yet the jurisprudence appears to take the view that the onus of proof in a case where the windfall defence is asserted is on the plaintiff. The justification for this view appears to be that the plaintiff must prove that he bore a loss (as is clearly correct); therefore, as part of that proof, he must show that he did not pass on the tax to anyone else. For example, in *Coho Creek Estates v. Maple Ridge*,[34] the Court of Appeal rejected any notion that there is a presumption that the plaintiff has passed on the tax or fee in question, but nonetheless held that as part of its duty to prove all the elements of the action, the plaintiff must affirmatively prove that it did not pass on that tax or fee.

It is submitted that this reasoning is incorrect. The windfall defence is an affirmative defence raised by the defendant in his pleading. While the plaintiff should have to prove the payment of the disputed amount to the defendant, he should not have to prove that he was not subsequently reimbursed for that amount by some third party. Notwithstanding the author's view, the rule that the onus is on the plaintiff to disprove a passing on appears to be firmly established.[35]

One of the most recent cases on this point is *Johnson et al. v. Nova Scotia (Attorney General)*.[36] In earlier proceedings,[37] it had been held that the plaintiffs, as wholesale purchasers of tobacco products, had wrongly been charged tax. The Court of Appeal remanded the case for a decision on whether they could recover the amounts paid on the basis of unjust enrichment. On the issue of onus of proof, the trial court on remand noted, "It is the submission of the plaintiffs that the burden of tax is a defense, and the burden of proving this defense is on the defendant."[38] But the appeal court did not agree. On the basis of a review of previous cases, it held that the onus was on the plaintiff to prove all elements of

---

[32] See Joel A. Nitikman, "The Onus of Proof in Tax Litigation and Other Litigation Matters Affecting GAAR," in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 7:1-38, for a discussion of this topic.

[33] The unconstitutional defence is discussed below.

[34] (1995), 27 MPLR (2d) 129 (BC SC), aff'd. (1996), 25 BCLR (3d) 355 (CA).

[35] See, for example, *Air Canada*, supra footnote 28; *Allied Air Conditioning*, supra footnote 26; and *Sobeys Inc. v. A-G of Nova Scotia* (1992), 5 TCT 4233 (NS SC) and the cases cited therein, rev'd. on another point (1993), 1 GTC 6117 (NS CA).

[36] (1998), 168 NSR (2d) 20 (SCTD).

[37] (1990), 92 NSR (2d) 25 (SCTD), rev'd. (1990), 96 NSR (2d) 140 (CA). It is not clear why the plaintiffs waited eight years to bring the matter on for trial again.

[38] Supra footnote 36.

the case, including disproving any passing on of the tax. As stated above, it is suggested that this approach violates normal rules of pleadings and onus of proof, and it should be reviewed by the Supreme Court of Canada if the opportunity arises.

NO JURISTIC REASON FOR THE ENRICHMENT

An action for unjust enrichment will lie only if the defendant has "improperly" retained the amount received from the plaintiff. The word "improperly" simply means that there is no legal reason for the defendant to retain the money. That is, there is no juristic reason for the enrichment.

There are guides but no set rules as to when an enrichment will be unjust. This absence of rules is necessary to prevent defendants from arguing that the categories of cases in which unjust enrichment will be found are closed.

As noted at the beginning of this article, the modern law of unjust enrichment developed from family law situations. The recovery of overpaid tax arises in a commercial context. The circumstances in which a defendant's retention of money may be considered unjust are not necessarily the same in the two contexts. In *Atlas Cabinets*,[39] the majority said that in an action for unjust enrichment in a commercial case, it is both necessary and sufficient that the defendant's retention of the amount be against sound commercial conscience. For example, there would be a juristic reason for the retention of the amount if there was a gift, or a common law, equitable, or statutory obligation to pay the amount; if there was a compromise of claim; if the defendant received the amount only indirectly while the plaintiff performed services for a third party; if the plaintiff was acting in his own self-interest; if the plaintiff conferred a benefit unknowingly or unasked on the defendant; if the defendant was a bona fide purchaser without notice; or if it is impossible to remedy the unjust enrichment.[40]

Three of the most common defences to an action for recovery of overpaid tax relate to the issue of whether there is a juristic reason for retention of the tax. These are the mistake of law defence, the unconstitutional defence, and the complete code defence.

The Mistake of Law Defence

The first traditional defence designed to show that there is a juristic reason to retain any overpaid tax is the mistake of law defence. Before the *Air Canada* case,[41] it was generally a complete defence to any claim for unjust enrichment for the defendant to show that the enrichment occurred

[39] Supra footnote 20.

[40] Fridman, supra footnote 2, at 31.

[41] Supra footnote 28.

because of a mistake of law on the plaintiff's part. On the other hand, a mistake of fact was a good ground for an action for unjust enrichment.

As in other areas of the law, the policy behind the defence is that ignorance of the law is no excuse,[42] so that a mistake of law leading to an overpayment will not ground an action for unjust enrichment. While the basic principle of the defence was followed for many years, it often led to injustices and so came to be encrusted with many exceptions and variations. In the case of an overpayment of tax, the mistake of law defence is very attractive because such overpayments often occur through a misinterpretation of a statute or simply through a long-held understanding of what a statute requires, which through a subsequent court case turns out to be wrong.

The mistake of law defence in Canada now appears to be widely discredited. In *Air Canada*, a majority of the court stated that there should be no distinction drawn between a mistake of fact and a mistake of law, because both lead to an "unfair" retention by the defendant of the overpaid tax. It cannot be doubted that these comments were made in obiter,[43] in that the ultimate disposition of the case was to deny recovery to the airlines on grounds discussed below.[44] Furthermore, two of the judges expressly reserved on the mistake of law defence. Nevertheless, courts in Australia[45] and Canada[46] have followed the lead set in *Air Canada*, to the point where it would come as a complete shock for the Supreme Court to resurrect the defence in a future case. For example, in *D.C.B. v. Zellers Inc.*, the court was content to say simply:

> The old rule that monies paid under a mistake of fact could be recovered and monies paid under a mistake of law could not, has now been abandoned in this country. Proof of a mistake of fact or law is enough. See *Air Canada and Pacific Western Airlines Ltd. v. British Columbia*, [1989], 1 S.C.R. 1161.[47]

---

[42] It is sometimes said that every person is deemed to know the law. This is wrong. No person is deemed to know the law, not even judges. However, it is true that in many cases the fact that a person was ignorant of a specific legal rule will not afford a defence.

[43] On the issue of whether a lower court is bound to follow obiter dicta in the Supreme Court of Canada, see *Sellars v. The Queen*, [1980] 1 SCR 527, applied in *The Queen v. Neuman*, 96 DTC 6464 (FCA), rev'd. on another point May 28, 1998 (SCC).

[44] However, in the companion case of *CP Air v. British Columbia*, [1989] 1 SCR 1133, the court allowed recovery of a tax overpaid by reason of an incorrect legal interpretation, which is clearly a mistake of law. It therefore seems that the abolishment of the mistake of law defence was part of the ratio of the case.

[45] See *Royal Insurance Australia*, supra footnote 25, following the decision in *David Securities Pty. Ltd. and Others v. Commonwealth Bank of Australia* (1992), 175 CLR 353 (HC).

[46] But not, so far at least, in England (*Guinness Mahon v. Kensington BC*, [1998], 2 All ER 272 (CA)), although it appears that the House of Lords is open to the possibility of reversing this rule (*Kleinwort Benson v. Glasgow Council*, infra footnote 64).

[47] (1996), 111 Man. R (2d) 198, at 204 (QB), leave to appeal refused [1996] 10 WWR 689 (Man. CA).

Similarly, in *Air Canada v. LCBO*,[48] the court held that a mistake of law could not prevent an action for unjust enrichment. In *Crown Life Properties Inc. v. Ontario (Minister of Revenue)*,[49] the taxpayer had overpaid tax under the Commercial Concentration Tax Act. That statute provided that tax was payable on buildings or groups of buildings over a certain size. The taxpayer paid the tax as assessed but then claimed for a refund on the ground that its buildings were to be classified as separate buildings and therefore fell below the threshold on a per building basis. The court agreed with the taxpayer on both the tax issue and the refund issue. In particular, the court accepted that even if the error was one of law, the tax was recoverable.

Notwithstanding that the distinction between mistakes of fact and of law appears to have been abolished in Canada as a common law rule, it has been enshrined statutorily in some jurisdictions. In British Columbia, all the commodity tax statutes have been amended to present a shorter limitation period for actions for the recovery of overpaid taxes in cases of a mistake of law than for such actions based on a mistake of fact. The difference in limitation periods was recently considered in *Labatt Brewing Co. v. British Columbia*.[50] The taxpayer had filed to claim an exemption for bottled beer under the Social Service Tax Act.[51] Labatt applied for a refund of taxes paid during the 23-month period beginning May 1992 and ending March 1994. It was common ground that the taxes paid by Labatt during that period had been paid "by mistake." Sections 39(1) and 39.1 (now section 82) of the Social Service Tax Act effectively stated that in cases where a corporation paid tax under a mistake of law, the action to recover the tax had to be brought within six months of the day the tax was paid (as compared to the six-year period for mistakes of law by individuals). The term "mistake of law" is defined in section 1 to include any mistake that is not solely a mistake of fact.[52]

---

[48] (1995), 24 OR (3d) 403 (CA). This issue was not dealt with on appeal, supra footnote 15, because there the government conceded that it was required to make restitution for the gallonage fees paid in error.

[49] (1997), 39 OTC 194 (Gen. Div.).

[50] (1997), 154 DLR (4th) 256 (BC CA). For a comment, see Brian C. Pel, "The Problematic Distinction Between Mistake of Fact and Mistake of Law," *British Columbia Tax Reports*, no. 363 (Toronto: CCH Canadian, September 9, 1996), 4-5.

[51] British Columbia Social Service Tax Act, RSBC 1979, c. 388, now RSBC 1996, c. 431, as amended.

[52] The history of this definition, which was intended to prevent a court victory for the taxpayer, is set out in *London Drugs Limited v. The Queen* (1996), 5 GTC 7036 (BC SC). For subsequent proceedings, see *London Drugs Limited v. The Queen*, January 29, 1997 (BC SC), Meredith J [unreported]. For a comment on the trial decision, see Brian C. Pel, "PST Refund on Tax Paid on Printing and Shipping Costs of Advertising Flyers," *British Columbia Tax Reports*, no. 371 (Toronto: CCH Canadian, May 12, 1997), 2-3. On appeal, London Drugs argued that its mistake was purely one of fact, but the Court of Appeal held that a mistake of statutory interpretation as applied to undisputed facts is a mistake of law. The court also held that the legislator had the right to take away London Drugs' vested rights to the refund through retroactive legislation. See *London Drugs Limited v. The Queen in Right of BC*, June 5, 1998 (BCCA) [unreported].

The Court of Appeal in *Labatt* held that the mistake in issue (as to the interpretation of an exempting provision) was one of law, so that the action was brought out of time. The court further rejected the taxpayer's argument that when the mistake of law is the fault of the government, the six-month limitation period should not apply. In the court's view, the legislation simply did not permit that interpretation.

The Unconstitutional Defence

The unconstitutional defence says, quite simply, that if a tax was overpaid, not because of a mistake in application or interpretation of a taxing statute, but because the statute is unconstitutional, then the tax may not be recovered through an action for unjust enrichment.

To summarize the more detailed discussion below, an apparent minority of the Supreme Court of Canada has held that unconstitutionally collected taxes may not be recovered. The rule appears to have been upheld in Ireland and the United States,[53] but rejected in Australia. It has been heavily criticized.[54] It seems to have little to recommend it. The notion that a government's financial position will somehow be different in the case of a mistakenly applied statute than in the case of an unconstitutional one seems intuitively suspect. In either case, the government has two choices: to recover the taxes through a new statute or to make the refund. As Wilson J said in *Air Canada*,[55] there seems little to recommend a rule that will impose the entire burden of a tax on a person who mistakenly paid it in the belief that the law was constitutional, when the benefit of the tax will accrue to all taxpayers. The rule seems designed to force taxpayers to refuse to pay under suspect statutes, for fear that any payment will later be irrecoverable. There does not appear to be any case in Canada subsequent to *Air Canada* which has directly addressed the unconstitutional defence. It is to be hoped that, as stated in *Peel*, the Supreme Court will reject this rule in a future case.[56]

---

[53] But see *Newsweek Inc. v. Florida Department of Revenue*, (1998), 139 L. Ed. 2d 888 (SC), holding that the plaintiff could seek recovery of an unconstitutionally collected tax under a refund provision in Florida's taxing statute, notwithstanding that the plaintiff had an effective prepayment deprivation remedy.

[54] Peter W. Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough, Ont.: Carswell) (looseleaf), section 55.7.

[55] Supra footnote 28, at 1215.

[56] Supra footnote 3, at 805. There is an ironic interaction between this defence and the windfall defence. Under the Constitution Act, 1867, a province may impose only direct taxes—that is, taxes that are not intended to be passed on. Thus, if in an action for unjust enrichment a province were to argue that the tax had been passed on, so as to bring up the windfall defence, this argument would imply that the tax was unconstitutional. Normally, a finding of unconstitutionality would be a serious negative to the province, but because of the rule in *Air Canada* barring the recovery of unconstitutional taxes, it would be a positive. The fact that a province can prevent recovery by arguing that its own taxing statute is unconstitutional seems so ludicrous as to imply that the rule in *Air Canada* must be wrong.

In *Air Canada*, La Forest J and two other judges held that tax paid under an unconstitutional law could not be recovered. Wilson J expressly dissented. Beetz J held that the statute was not unconstitutional and therefore did not have to decide the issue. McIntyre J said, "I agree with the reasons for judgment of my brother, Justice La Forest, subject to the qualifications expressed by my brother, Justice Beetz, which I would adopt."[57] It is difficult to know whether, in so saying, McIntyre J was agreeing with Beetz J that the law was constitutional, or whether he agreed with La Forest J that it was unconstitutional and accordingly tax paid under the statute could not be recovered. Looked at the first way, the decision on the issue of recovery under an ultra vires law was made by a minority of the court; looked at the second way, it was made by a majority.

In *Peel*, the occasion for the action seeking recovery of the amounts paid was that the law requiring the payments had been found to be unconstitutional. One would have thought that the "easy" answer was that recovery is not permitted in such a case. But the majority did not deal with the unconstitutional defence. It held that the federal Crown had not been enriched. It further noted that its decision left for another day a review of the unconstitutional defence, and in doing so clearly implied that McIntyre J did not side with La Forest J in *Air Canada* on this point.

In Australia, there does not appear to be any rule limiting the recovery of amounts paid under unconstitutional law. In *Mason*,[58] the occasion for the recovery was the decision of the Privy Council that the law in question was invalid.[59]

The Irish courts also have addressed the issue of the recovery of tax under a statute found to be unconstitutional. In *Murphy v. The Attorney General*,[60] an income tax statute requiring a husband and wife to pay a higher rate of tax combined than they would have had to pay if they had been single was declared unconstitutional. The plaintiffs then brought an action to recover the overpaid tax. The majority of the court made two holdings. First, it held that the declaration of invalidity operated retrospectively to the time the statute was enacted. This decision was based on the wording of the Irish constitution, and any analogy to US cases where the opposite result was reached was rejected. Second, the majority held that the plaintiffs could recover the tax only for the period during which they protested the payment thereof. No true juridical reason for this conclusion was given other than practical expediency. The majority appear to have taken the view, though no evidence was offered (or at least cited) on

---

[57] Supra footnote 28, at 1172.

[58] Supra footnote 24.

[59] In *Mutual Pools & Staff Pty. Ltd. v. The Commonwealth* (1994), 179 CLR 155 (HC), a swimming pool tax was found to be unconstitutional. The taxpayer sued to recover overpaid tax. The court appears to have been of the view that such tax was recoverable in unjust enrichment, but for the fact that the government passed a law limiting the refund payable.

[60] [1982] IR 241, at 292 (SC).

the point, that the government had so changed its position after collecting the tax as to make restitution impossible.[61] Perhaps this view was based on the fact that there were tens of thousands of similar potential plaintiffs waiting in the wings. In any event, the court did say that its disposition of the case might not apply in special circumstances, without elaborating on what those might be.

Murphy was considered in the Irish case of *O'Rourke v. Revenue Commissioners*.[62] A taxpayer in a particular situation was found not to have been required to pay income tax. There were 80 or 90 other taxpayers in similar situations, leading to 900 possible reassessments for the years in question. An agreement was reached with the revenue authorities that these assessments would not be issued and the revenue authorities would simply refund the money. This was done but without interest. The plaintiff sued for the interest. No statutory interest could be paid because no assessments had been issued. After reviewing *Murphy* and holding that, apart from *Murphy*, interest could clearly be paid under restitutionary principles, the court asked whether the principle in *Murphy* would preclude payment, essentially on grounds of public policy. The court said no, because in that case there were tens of thousands of potential plaintiffs; here there were only 90.

The court also suggested that *Murphy* might be distinguishable on another ground, namely, that in that case the tax was unconstitutional and the government would have to enact new laws to recover it. In the case of *O'Rourke*, however, the government could pass a law preventing other taxpayers from suing for the interest.

In England, the issue of repayment under invalid legislation has recently been dealt with. Starting in the 1980s, many local councils entered into interest rate swaps with banks and others. In 1992, the House of Lords declared these transactions to be ultra vires the authority of the councils.[63] Many actions were commenced to recover from the councils the net payments made to them by the other parties to the swaps.[64] In two test

---

[61] In *Air Canada*, supra footnote 28, three members of the court referred to the "change of position" defence, but it is difficult to see how a government could change its position in a way that would make repayment of an overpaid tax impossible. Even if the government could somehow show that it had spent the particular tax collected, this would not amount to a change of position, since other funds would be available.

[62] December 18, 1996 (Ire. HC) [unreported].

[63] *Hazell v. Hammersmith LBC*, [1992] 2 AC 1 (HL).

[64] It is estimated that over 100 writs were filed following *Hazell*. At least three lines of authority have developed so far from these cases. First, it has been held that unjust enrichment is permitted as a cause of action even where there is a complete failure of consideration on a contract. See *Westdeutsche Landesbank Girozentrale*, infra footnote 65. Second, it has been held that the windfall defence, whatever its merits may be in a public law setting, does not apply to private litigation. See *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] QB 380 (CA) (it appears that leave to appeal has been granted: see *Kleinwort*

(The footnote is continued on the next page.)

cases, the trial judge found that the councils were liable to repay the money obtained.[65] The decision was affirmed by the Court of Appeal.[66] On appeal to the House of Lords, the only issue was whether interest was payable on the damages ordered to be paid by the defendants to the plaintiffs. The court said that simple interest could be paid but not compound interest.[67] It appears from *Kleinwort*[68] that the substantive issue of whether recovery could be had for the principal paid under the swap may be decided in the near future by the House of Lords, which may also review the mistake of law defence in England. In *Guinness Mahon*,[69] the court held, in a similar case against a council for an invalid swap, that recovery of the principal would be permitted, although there was considerable doubt as to the reason why. If a council is a local government, as it appears to be, and if recovery may be had against a council that entered into an ultra vires swap, it seems that at present the law in England is that the *Air Canada* rule against recovery of unconstitutional tax would not apply. Indeed, in the Court of Appeal in *Westdeutsche*, Leggatt LJ said essentially what Wilson J said in dissent in *Air Canada*:

> The parties believed that they were making an interest swaps contract. They were not, because such a contract was ultra vires [the council]. So they made no contract at all. [The council] say that they should receive a windfall because the purpose of the doctrine of ultra vires is to protect council taxpayers whereas restitution would disrupt [the council's] finances. They also contend that it would countenance "unconsidered dealings with local authorities." If that is the best that can be said for refusing restitution, the sooner it is enforced the better. Protection of council taxpayers from loss is to be distinguished from securing a windfall for them. The disruption of [the council's] finances is the result of ill-considered financial dispositions by [the council] and its officers. It is not the policy of the law to require others to deal at their peril with local authorities, nor to require others to undertake their own inquiries about whether a local authority has power to make particular contracts or types of contract. Any system of law, and indeed any system of fair dealing, must be expected to ensure that [the council] do not profit by the fortuity that when it became known that the

---

[64] Continued . . .
Benson v. Glasgow Council, [1997] 4 All ER 641 (HL)). Third, it has been held that unjust enrichment is not a delict or a quasi-delict for purposes of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968, so as to displace the general rule in that convention that a defendant must be sued in his country of domicile. See *Kleinwort Benson v. Glasgow Council*, supra.

[65] *Westdeutsche Landesbank Girozentrale v. Islington London BC; Kleinwort Benson Ltd. v. Sandwell BC*, [1994] 4 All ER 890 (QB).

[66] [1994] 4 All ER 890 (CA).

[67] *Westdeutsche v. Islington BC*, [1996] 2 All ER 961 (HL). The court said that the money paid could not be impressed with a resulting trust, but that at some future date the court might follow Canada and impose a remedial constructive trust in cases of unjust enrichment.

[68] Supra footnote 64.

[69] Supra footnote 46.

contract was ineffective the balance stood in their favour. In other words, in circumstances such as these they should not be unjustly enriched.[70]

The Complete Code Defence

Perhaps the most difficult defence to consider in a case of overpaid tax is the complete code defence. This defence says, in essence, that the statutory scheme in question is so comprehensive as to the plaintiff's rights that the court should infer[71] a legislative intent to abolish any common law rights that the plaintiff would have had but for the statute. An example will illustrate the defence. In *Rawluk*,[72] the defendant argued that a claim for unjust enrichment could not be maintained because Ontario had recently enacted legislation relating to the division of property in the context of a separation or divorce.[73] In essence, the defendant argued that although the statute did not specifically oust the right to bring a claim for unjust enrichment, the statute was such a complete code that it could be read as being exhaustive and as not leaving any room for the common law to fill.

The court rejected that argument. In its view, the legislation permitted the claim for a remedial constructive trust based on unjust enrichment. This conclusion was derived from both the preamble to the statute and the terms of the legislation itself.

In the context of recovery of overpaid tax through an action for unjust enrichment, the complete code defence has met with mixed results.[74] The Australian cases have indicated a predisposition for finding that the taxpayer's statutory rights are exhaustive and oust any residual common law right to an action for unjust enrichment. For example, in *Mt. Gibson Manager Pty Ltd. v. DFC of T*,[75] the taxpayer paid fringe benefits tax in respect of meals provided for its employees at a mine site in 1988 and 1989.

---

[70] Supra footnote 66, at 967. See also *Woolwich*, discussed in the text below at footnote 77 and following.

[71] The plaintiff is usually reduced to asking the court to draw an inference because it is rare for the statute to speak directly to the question whether common law rights are preserved or abolished. But see the discussion below regarding section 312 of the goods and services tax (GST) legislation, contained in parts VIII and IX of the Excise Tax Act, RSC 1985, c. E-15, as amended.

[72] *Rawluk v. Rawluk* (1990), 65 DLR (4th) 161 (SCC).

[73] Family Law Act, 1986, SO 1986, c. 4.

[74] In *Deep Six Developments Inc. v. Kassam et al.*, 98 GTC 6109 (BC SC), the plaintiff sold the defendant some bare land. The contract was silent on GST. Both parties believed that no GST was owing. Revenue Canada reassessed the plaintiff for GST. The plaintiff paid the GST and sued the defendant to recover it under section 224 of the Excise Tax Act. This claim was denied. The plaintiff also sued for unjust enrichment (although this was not specifically pleaded). The court held that section 224 was the sole remedy for recovery of GST, because that section evidenced a clear intention that it was to be the sole basis for a cause of action so as to protect the plaintiff's rights to recover only when he had complied with the notice provisions of section 223.

[75] 98 ATC 4012 (FC).

The payments were made pursuant to assessments issued by the commissioner of taxation for those years. In 1995, the company lodged objections to the assessments and submitted applications that the objections be treated as duly lodged even though they were filed out of time. The applications were refused. The company appealed to the Administrative Appeals Tribunal, which affirmed the commissioner's decision. It was common ground between the company and the commissioner that if the extension of time had been granted, the objections would have been allowed.

The taxpayer argued that the general law of restitution continued to apply notwithstanding the statutory scheme for dealing with late objections. The commissioner, it was said, was unjustly enriched at the expense of the company. It would be unjust if he were to be allowed to retain amounts paid under a mistake which would be recoverable under the general law of restitution.

The commissioner relied upon the reasoning of the Full Federal Court in *Chippendale Printing Co. Pty Ltd. v. FC of T & Anor*.[76] That case was a recovery action by a taxpayer for overpaid sales tax. It failed on the basis that the statutory regime in place for repayment of overpaid sales tax was exhaustive and precluded recovery under the general law.

The court in *Mt. Gibson* agreed with the commissioner, holding that the scheme of recovery in the legislation was exhaustive. The court held that the legislation reflected an intention to bring finality to suits for recovery of overpaid tax.

In England, by contrast, the case law is more disposed to finding that the remedy of unjust enrichment continues to exist notwithstanding the statutory scheme. In *Woolwich Bldg. Soc. v. IRC (No. 2)*,[77] the plaintiff building society had paid to the Inland Revenue Commissioners almost £57 million pursuant to demands made under certain tax regulations. They did so under protest that the money was not due because the regulations in question were ultra vires and void. They immediately began proceedings for judicial review to challenge the validity of the 1986 regulations, which were successful. The Inland Revenue repaid the capital sum involved with interest from the date of the order finding the regulations ultra vires but refused to pay interest from any earlier date. A majority of the House of Lords held that the building society was entitled to interest in respect of the earlier period. The court held that the absence of a provision limiting the recovery of interest implied that a common law restitutionary right to interest continued to exist. The effect of this decision is to put the onus on the Crown to show that the legislation in question expressly or by necessary implication prevents an action for unjust enrichment.

[76] 96 ATC 4175 (Full FC).

[77] [1992] 3 All ER 737 (HL).

Canadian cases have not followed any clear path in determining whether the statute in question is so comprehensive as to imply that unjust enrichment is ousted as a cause of action. In *Crown Life*,[78] section 12(6) of the applicable legislation[79] stated:

> A proceeding may be brought under this section at any time, but the court may only alter an assessment to affect taxes imposed and payable with respect to that assessment in the year in which the proceeding is commenced and any subsequent year.

The Crown argued that this provision precluded any recovery for years before the action was filed. But the court held that an action for unjust enrichment is not an action to alter an assessment and was not therefore precluded by section 12(6).

On the other hand, in *The Queen v. Consumers Glass Company Ltd.*,[80] the issue was whether the plaintiff was entitled to a refund of $322,563.64 as overpaid customs duty. There were two questions to be resolved:

1) Were moneys paid under mistake of law recoverable pursuant to the restitutionary principle of unjust enrichment?

2) Was recovery by Consumers barred by the provisions of the Customs Act?[81]

The trial judge had held that the answers were yes and no, respectively. But the Court of Appeal reversed on the second question. Sections 46(1) to (3) of the Customs Act, as it then read, stated:

> 46.(1) Subject to this section, a determination of the tariff classification or an appraisal of the value for duty of any goods, made at the time of their entry, is final and conclusive unless the importer, within ninety days of the date of entry, makes a written request in prescribed form and manner to a Dominion customs appraiser for a re-determination or a re-appraisal.
>
> (2) A Dominion customs appraiser may re-determine the tariff classification or re-appraise the value for duty of any goods made at the time of their entry
>
> (a) in accordance with a request made pursuant to subsection (1), or
>
> (b) in any other case where he deems it advisable, within two years of the date of entry.
>
> (3) Subject to subsection (4), a decision of a Dominion customs appraiser under this section is final and conclusive unless the importer, within ninety days of the date of the decision, makes a written request in prescribed form and manner to the Deputy Minister for a re-determination or a re-appraisal.

---

[78] Supra footnote 49.

[79] Commercial Concentration Tax Act, SO 1989, c. 75.

[80] (1990), 3 TCT 5112 (FCA).

[81] RSC 1970, c. C-40, as amended.

The Court of Appeal held that section 46 did not merely add to existing common law remedies but replaced them. The section provides that the tariff classification and appraisal at the time goods entered into Canada were final and conclusive, if not otherwise modified in accordance with the Customs Act. Hence, whether those classifications were right or wrong, there was no unjust enrichment because there was a legal obligation to pay.

Consumers Glass was purportedly applied in *Sunbeam*.[82] The plaintiff alleged that it overpaid customs duty because other taxpayers had the benefit of certain longstanding administrative concessions that were not made to Sunbeam. The court held that *Consumers Glass* was applicable. However, it is suggested that the issue in *Consumers Glass* did not arise in *Sunbeam*: the court in *Sunbeam* expressly held that there was no enrichment because Sunbeam had failed to prove that the customs duty paid by it was more than that actually owed under the Customs Act.[83]

Another case in which the complete code defence was upheld is *Reference Re GST*.[84] One of the arguments was that deemed agents under the Excise Tax Act have a restitutionary right to compensation for their services in collecting and remitting GST. The court held that this "novel" idea was without merit. The Excise Tax Act provided for agency status without any, or with only limited, compensation. Thus, while there was clearly enrichment and deprivation, the statute itself provided the juristic reason for the enrichment. The court also noted that there was a transitional credit in section 346 of the Excise Tax Act,[85] which indicated that Parliament had turned its mind to the compensation issue and thus implied that the Excise Tax Act was a complete code on the issue of compensation.

More recently, however, the complete code defence was rejected in *Forest Oil*.[86] It was there held that the relevant section of the statute did not contain the words "final and conclusive" and that, using rules of statutory interpretation, it could be said that there was no parliamentary intent to oust an action for unjust enrichment.

It is apparent from this selective review of the case law that whether the complete code defence will apply to any given statute depends on both the wording of the statute and (in the absence of an express indication that no common law actions are permitted) the inference that the court is prepared to draw from that wording. Some cases have in essence put the onus on the plaintiff to show that the statute is not so comprehensive as to exclude a common law cause of action; others have put the

---

[82] *Sunbeam Corporation (Canada) Limited v. The Queen* (1993), 2 GTC 7013 (FCTD).

[83] The court also suggested that the windfall defence was available to the Crown, although there is no review by the court of the evidence that led to this conclusion.

[84] [1992] 2 SCR 445.

[85] It seems that this credit was intended to be paid to small businesses on their own account and not, as the court thought, as limited compensation for collecting GST.

[86] *Forest Oil Corp. v. Canada*, [1997] 1 FC 624 (TD).

onus on the defendant to show that the legislative intent was clearly to oust such actions.

Is there then any *process* that a court should apply to determine this issue? In *Zaidan Group Ltd. v. London (City)*,[87] the court in a brief judgment held that where interest was not paid on taxes refunded because the defendant, in accordance with its statutory right, did not pass a bylaw for the recovery of interest, unjust enrichment could not apply. In *2747-3174 Québec Inc. v. RPAQ*, L'Heureux-Dubé J referred to *Zaidan* in proposing an approach for determining, in any particular case, whether the complete code defence was applicable:

> *Zaidan Group* thus supports the following methodological proposition. To determine what interaction there is between the common law and statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law, after which the statute law's effect on the common law must be specified by determining what common law rule the statute law codifies, replaces or repeals, whether the statute law leaves gaps that the common law must fill and whether the statute law is a complete code that excludes or supplants all of the common law in the specific area of law involved.[88]

While this methodology might seem obvious, it is important to remember the presumption on which it is based, namely, that statutes replace the common law only to the extent necessary. Thus, it is presumed that an action for unjust enrichment will survive a statute unless the statute expressly or by necessary implication states otherwise.[89]

It should also be noted that certain statutes in Canada expressly eliminate an action for unjust enrichment. For example, section 312 of the Excise Tax Act[90] states:

> Except as specifically provided in this Part, the *Customs Act* or the *Financial Administration Act*, no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.

It seems that an adverse inference could be drawn where the applicable statute did not have a similar section. That is, the absence of a similar section could lead to the inference that no interference with the right to bring an action for unjust enrichment was intended. Even where, as in *Consumers Glass*, a statute states that the assessment is deemed to be final and conclusive, the argument can be made that the intention is merely to validate otherwise erroneous assessments for purposes of that legislation alone, and not to eliminate an action for unjust enrichment.

---

[87] [1991] 3 SCR 593.

[88] [1996] 3 SCR 919, at 978.

[89] *Forest Oil*, supra footnote 86.

[90] See also section 39.1(1) of the British Columbia Social Service Tax Act, supra footnote 51.

In *The Queen v. Regina Shoppers Mall Limited*,[91] the issue was whether a taxpayer had made a misrepresentation so as to allow the reassessment of an otherwise statute-barred year by filing a tax return that was not in accordance with a previous assessment. The Crown argued that the previous assessment was deemed to be correct, so that the later filing was by definition a misrepresentation. The Crown relied on subsection 152(8) of the Income Tax Act,[92] which stated:

> An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

The court rejected the Crown's argument. In interpreting subsection 152(8), the court held that its purpose is to validate a defective assessment and to deem the assessment to be binding in a proceeding under the Act. The court noted that the filing of the subsequent tax return was not a proceeding under the Act, so that subsection 152(8) had no application.

Given that an action for unjust enrichment would not be a proceeding under the Act, and that the action would not involve an error in the assessment but the lack of any applicable charging provision in the Act (or perhaps the failure to file a relevant form on time), subsection 152(8) should not be interpreted as removing an action for unjust enrichment, especially when the Income Tax Act does not contain a provision equivalent to section 312 of the Excise Tax Act.[93]

A somewhat different view of subsection 152(8) was expressed in *The Queen v. Erasmus et al*.[94] The plaintiffs were native Indians who sought a declaration in Federal Court that they were exempt from tax in respect of certain income on a certain area of land. The Crown moved to strike out the statement of claim. In support of the motion, the Crown filed an affidavit of an employee of the Department of National Revenue establishing that, for most of the years in question, the income tax liability of the plaintiffs had been determined by assessments pursuant to section 152 of the Income Tax Act. The Crown argued that the court lacked the jurisdiction to entertain the action by virtue of section 29 (now section 18.5)

---

[91] 91 DTC 5101, at 5104 (FCA).

[92] RSC 1985, c. 1 (5th Supp.), as amended.

[93] In fact, the Excise Tax Act contains the equivalent of subsection 152(8) of the Income Tax Act in subsections 299(3) and (4). If these provisions had the effect of removing an action for unjust enrichment, section 312 would be superfluous. The conclusion reached in the text is also supported by *1037618 Ontario Inc. v. Thunder Bay (City)* (1998), 57 OTC 138 (GD), where the court held that a taxing statute is presumed not to displace the right to sue for unjust enrichment absent express language to that effect.

[94] 92 DTC 6301 (FCA). *Erasmus* was applied in *Shilling v. The Queen*, May 26, 1998 (FCTD), Giles ASP [unreported], where the court refused to strike out an action for a declaration that certain income was tax-exempt under section 87 of the Indian Act, RSC 1985, c. I-6, as amended.

of the Federal Court Act and that the statement of claim or portions thereof disclosed no reasonable cause of action or were frivolous, vexatious, and an abuse of the process of the court.[95]

In dismissing the motion, the Trial Division[96] had refused to take the affidavit into account, on the ground that a motion to strike must be decided strictly on the pleadings. On this point, the Court of Appeal held that the affidavit cannot be taken into account in determining whether there is a reasonable cause of action but must be taken into account in determining whether the court has jurisdiction.

With respect to the jurisdictional issue, the court held that former section 29 of the Federal Court Act applied only when the plaintiff sought to challenge an assessment. Here the plaintiffs were seeking a declaration, so that, contrary to the Crown's reasoning, section 29 was not applicable. Specifically, the court said:

> This reasoning would be compelling if the plaintiffs were seeking by their action to set aside or vary income tax assessments. But that is not what they claim. They merely pray for a declaration that certain kinds of income be declared to be exempt from tax and that the tax they paid on that income be refunded. As they are not attacking any assessments, section 29 has no application here.[97]

---

[95] In the alternative, the Crown argued that the inherent structure of the Income Tax Act was sufficient to oust the jurisdiction of the court. The court rejected this argument, ibid., at 6304, in words that appear to support an action for unjust enrichment: "I do not see anything in that Act which limits the jurisdiction of the Trial Division, in an appropriate case, to issue a declaration as to the taxability of certain revenues or to order the repayment of taxes that the Minister unduly retains." However, the court's subsequent reasoning cancelled out such support. It held that under subsection 164(1), the minister is entitled to retain all taxes paid to him until he issues an assessment, at which time a taxpayer may make an application for a refund of any overpayment. Given that for the years in question the minister had issued assessments but no application had been made for a refund, the action in the present case could not succeed: "Until an assessment is made, therefore, a court may not order the refund of the sums paid as income tax because, until that time, the Minister is entitled to retain them whether or not they have been unduly paid. It is only after the assessment that the Minister has the obligation to refund the taxes that have been paid in excess of the amount determined by the assessment. It follows that the Trial Division may not order the Minister to reimburse taxes unduly paid unless it be shown that the Minister, after determining by an assessment that the sums paid by the taxpayer exceeded his tax liability, illegally refuses to refund the overpayment." Ibid., at 6304-5. It is suggested that the court misinterpreted the scope of section 164. First, for individuals and testamentary trusts, paragraph 164(1.5)(a) provides that for taxation years after 1984, the minister may refund an overpayment even if the conditions of subsection 164(1) have not been met. While that paragraph uses the word "may," it is doubtful that the minister would have the discretion to refuse an application for a refund where there was a true overpayment of tax (see the discussion of *Herdman*, infra footnote 108). Second, for other taxpayers, subsection 164(1) does not by its terms invalidate other means of obtaining a refund; it merely sets out one such possible method. There is nothing in the language of subsection 164(1) that goes as far as section 312 of the Excise Tax Act.

[96] 91 DTC 5415 (FCTD).

[97] Supra footnote 94, at 6304.

At first glance, this statement seems to be an invitation to bring an action for unjust enrichment to recover overpaid income tax, notwithstanding section 29. However, the court then appeared to withdraw this possibility on the basis of subsection 152(8) of the Income Tax Act. The court held that under that subsection, once an assessment is issued, "an income tax assessment is deemed to be valid and binding as long as it has not been vacated or varied under the provisions of that Act."[98] In other words, the court appears to have held that in light of subsection 152(8), a proceeding other than one brought under the Act to recover tax could not succeed, because that proceeding would in essence challenge an assessment that is deemed to be binding. Indeed, the court said as much:

> This does not mean that the plaintiffs' action could succeed for the taxation years where their income tax liability has been determined by an assessment. Obviously, it could not. The reason for this, however, is not that the Court has no jurisdiction to grant the relief sought for those years, but rather, that, in those years, the plaintiffs are not entitled to that relief since under subsection 152(8) of the *Income Tax Act*, an income tax assessment is deemed to be valid and binding as long as it has not been vacated or varied under the provisions of that Act.[99]

THE LACK OF STATUTORY AUTHORITY DEFENCE

In addition to the defences discussed above, which relate to the specific elements of unjust enrichment, a revenue authority may be able to assert a separate defence that does not relate to any of the elements of unjust enrichment. For purposes of this article, the term "lack of statutory authority" has been coined to describe this defence.

In simple terms, the lack of statutory authority defence asserts that even if a revenue authority has been unjustly enriched through the overpayment of taxes or other amounts, there is no statutory authority to repay the enrichment. In general, a revenue authority or a government agency must act only as permitted by statute; if there is no statutory authority to repay the money, a court should not and cannot order the repayment.

This defence is probably unique to cases involving attempts to recover overpaid taxes; when an action for unjust enrichment involves private parties, there is no necessity to look for statutory authority for the repayment of unjustly retained amounts. Furthermore, in tax cases, although the statute in question will generally have a refund provision, the fact that the case is being brought in unjust enrichment presupposes that that provision does not apply. Since the statute does not provide for repayments of amounts beyond those covered in the refund provision, there will generally be a lack of direct statutory authority for the repayment of overpaid taxes on the basis of unjust enrichment.

---

[98] Ibid.

[99] Ibid.

Notwithstanding its apparent technical attractiveness, the lack of statutory authority defence has not met with success in the few Canadian cases in which it has been raised. Likely, the reason lies largely in a court's inherent revulsion to having its hands tied by the lack of an adequate remedy to redress a wrong. The saying "there is no right without a remedy"[100] is deeply embedded in Canadian law and has been applied to cases of unjust enrichment.[101]

In *Union Gas Limited v. The Queen*,[102] the taxpayer paid money to the Crown on account of its 1978 taxation year, which by an agreement reached in 1978 with the minister was partially allocated to its 1979 year. This allocation left a shortfall in the taxpayer's 1978 year, for which it was assessed interest. One of the taxpayer's arguments was that the 1978 agreement was invalid since it in effect provided for a payment of tax by agreement rather than by statute, contrary to section 26 of the Financial Administration Act.[103] The court rejected this argument, holding that the agreement did not call for a payment out of the consolidated revenue fund.

The court in *Union Gas* appears to have left open the possibility that a payment made from the consolidated revenue fund without statutory authority would be prohibited. This implication was raised by the Crown in *Forest Oil*.[104] The taxpayer claimed a refund of money paid under the Petroleum and Gas Revenue Tax Act, even though it had filed its claim for refund outside the statutory period provided for in that Act. The claim was for unjust enrichment. The Crown argued that even if the plaintiff made out its case, the Crown was barred by section 26 of the Financial Administration Act from paying the money, and therefore the court should not

---

[100] Ubi jus, ibi remedium.

[101] *Ashby v. White et al.* (1703), 92 ER 126, at 136, per Holt CJ: "it is a vain thing to imagine a right without a remedy." For a recent example of a court's application of this maxim to fashion a remedy, even though perfect restitution was not possible, see *Leacock v. Whalen Beliveau & Associes Inc.*, May 20, 1998 (BC CA) [unreported].

[102] 90 DTC 6659 (FCA).

[103] Section 26 of the Financial Administration Act, RSC 1985, c. F-11, as amended, states, "Subject to the *Constitution Acts, 1867 to 1982*, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament." The consolidated revenue fund of Canada was established by section 102 of the Constitution Act, 1867. Section 103 of the Constitution Act states that the fund is charged with all costs of raising tax. In *Reference Re GST*, supra footnote 84, it was argued that section 103 requires the government of Canada to compensate people who are deemed to be agents in the collection of GST. The court held that section 103 is not a charging section but a permissive section allowing the government to incur certain costs without parliamentary approval. Accordingly, section 103 cannot be the basis for a payment under section 26 of the Financial Administration Act.

[104] Supra footnote 86. This case was distinguished in *Mathew & Co., Limited v. MNR*, 98 GTC 5007 (CITT), on the ground that the CITT has no equitable jurisdiction and therefore could not allow a claim for unjust enrichment in respect of federal sales tax. For a case comment on *Forest Oil*, see the Current Cases feature (1997), vol. 45, no. 1 *Canadian Tax Journal* 119-22.

make the order sought. The court, however, rejected this argument. In essence, the court held that there is no right without a remedy, so that the obligation was on the executive arm of the government to find a way to comply with section 26.

While it may be true that there is no right without a remedy, a better answer[105] to the Crown's argument might have been that under section 17(2)(a) of the Federal Court Act, the Federal Court has concurrent jurisdiction in all cases in which money is in possession of the Crown. As section 17(2)(d) refers to the Crown Liability and Proceedings Act, it is apparent that section 17(2)(a) refers to causes of action other than those listed in the latter Act. Accordingly, even if the Crown Liability and Proceedings Act cannot be read to include unjust enrichment as a cause of action,[106] it seems that such an action is permitted by section 17(2)(a) of the Federal Court Act, thus providing the authority of Parliament required by section 26 of the Financial Administration Act.[107]

It is interesting to note that the court in *Forest Oil* did not refer to section 23(2) of the Financial Administration Act, which states:

> The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

One might argue that as this provision expressly refers to the unjust collection of tax, it confers a discretion on the government to refund a tax in cases of unjust enrichment. But it is doubtful that a government would have the discretion to avoid refunding a tax that a court has found to be unjustly paid.[108]

---

[105] The Crown Liability and Proceedings Act, supra footnote 14, permits the Crown to be sued in tort and defines tort to include delict and quasi-delict. Originally, this definition applied only to cases in Quebec, but now it applies throughout Canada. However, it appears that unjust enrichment cannot even be classified as a quasi-delict. See *Kleinwort Benson v. Glasgow Council*, supra footnote 64.

[106] See Hogg, supra footnote 1, at 180-81; and David Sgayias, Brian J. Saunders, Donald J. Rennie, and Meg Kinnear, *The Annotated Crown Liability and Proceedings Act 1995* (Scarborough, Ont.: Carswell, 1994), 15.

[107] In *Wong v. Minister of National Revenue* (1995), 105 FTR 276 (TD), the applicant lent his car to a friend. The car was subsequently seized by customs officers when the friend tried to smuggle cigarettes without paying duty. The applicant paid $4,800 as security for the release of his car. He subsequently obtained a declaration under the Customs Act that he was innocent in the whole affair and an order that the car be returned to him. But the Crown refused to release the $4,800 on the ground that there was no provision allowing it to do so. The court held that the authority lay in section 17(2)(a) of the Federal Court Act.

[108] Although the word "may" confers a discretion on the Crown (Interpretation Act, RSC 1985, c. I-21, as amended, section 11), it does not mean that the discretion may be exercised arbitrarily. Where the plaintiff shows that the tax was overpaid because of some

(The footnote is continued on the next page.)

ANOTHER APPROACH?

The traditional three elements of unjust enrichment attempt to give a detailed legal basis for the more general notion that a defendant should repay money to the plaintiff whenever it is just that he should do so. The three elements put some meat on the bones, so to speak. But as in many such situations where the law prescribes detailed legal rules to accomplish a broader objective, it is sometimes easy to get lost in the details and forget the broader rule. The purpose of the action for unjust enrichment is to remedy an unjust situation. If the details of the rule prevent that from happening, perhaps it is time to revisit the details.

That, essentially, appears to have been the thinking of the Supreme Court of Canada in *Soulos*.[109] As discussed in more detail below, the court in *Soulos* prescribes a broad remedial approach to cases of breach of fiduciary duty and the enforcement of constructive trusts. If future cases are able to merge the traditional unjust enrichment elements with the *Soulos* "good conscience" principle, it is apparent that defences such as the windfall defence, the mistake of law defence, and the unconstitutional defence will fall away. Even if these elements were present, it would still be a breach of good conscience to allow a government to retain overpaid tax.[110]

---

[108] Continued . . .
mistake, the Crown would need to show reasons of equal or greater weight to refuse to exercise its discretion. See *Jack Herdman Limited v. MNR (No. 2)*, 83 DTC 5283, at 5278 (FCA). Cases subsequent to *Herdman* have gone further, holding that in the context of a claim for the recovery of overpaid tax, the plaintiff has a right to a refund regardless of a statutory provision that uses the word "may." See *AMOCO Canada Petroleum Company Ltd. v. MNR*, 85 DTC 5169, at 5171 (FCA).

[109] Supra footnote 29. This case has already been cited in other jurisdictions, again showing the lead of the Supreme Court in the area of restitution. See *Marangos Hotel*, supra footnote 4; and *Maguire v. Makaronis* (1997), 188 CLR 449 (HC). As noted in footnote 14, supra, the Crown Liability and Proceedings Act will be amended by Bill C-50. Under amended section 3(b), the Crown is liable only in respect of torts of its servants or actions in respect of the ownership, possession, or control of property. Unjust enrichment is not a tort, and therefore amended section 3(b)(i) will not apply. On the other hand, it might be said that unjust enrichment is an action "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property [that is, money]" within the meaning of amended section 3(b)(ii). That provision does not say whose possession or control is relevant. Clearly, in unjust enrichment, the breach lies in the Crown's having unjust possession of the taxpayer's money and failing to fulfil its duty to return it. On the other hand, this interpretation would mean that the seven-day limitation period in amended section 12 would apply to such actions.

[110] It seems, however, that the complete code defence would still be available. In *Marangos Hotel*, supra footnote 4, the plaintiffs asked the court to impose a remedial constructive trust over assets governed by a statutory scheme of insolvency, the purpose of the request being to give the plaintiffs priority over the assets to which they would not have been entitled under the scheme. The plaintiffs cited *Soulos* as an instance where a court could fashion a trust to do justice in the circumstances. However, the court rejected the application, on the ground that the statutory scheme for priority was complete and left no room for determining priority under a remedial constructive trust: "In brief, the position is that there is no prospect of the court in this case granting a remedial constructive
(The footnote is continued on the next page.)

In *Soulos*, the Supreme Court appears to have broadened considerably the situations in which a remedy may be fashioned for restitution. The defendant was a real estate agent. He found a commercial building and asked if the plaintiff was interested in buying it. The plaintiff was. The plaintiff, through the defendant, offered the owner $250,000. The owner counteroffered at $275,000. The plaintiff counteroffered at $265,000. It was found as a fact at trial that the last amount was the fair market value of the property.

The owner accepted. The defendant did not tell the plaintiff that his latest offer had been accepted. Instead, the defendant arranged for the owner to sell the property to the defendant's wife's company. The defendant, when asked, told the plaintiff that the sale did not go through and that the collapse of negotiations was not caused by the defendant.

Later, the plaintiff found out the truth and sued for damages and a constructive trust over the property. Subsequently, he abandoned his claim for damages because the market value of the property had decreased from the time of the purchase; in other words, the plaintiff had not been deprived in any economic sense.

The Supreme Court asked itself this question:

> [W]hat remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?[111]

At trial, the judge had dismissed the action on the basis that the plaintiff had suffered no damages. The Court of Appeal reversed on the basis that a constructive trust could be imposed even where no damages were suffered. The Supreme Court agreed with the Court of Appeal. The Supreme Court held that the issue to be decided was the purpose of imposing a constructive trust. If it was merely to create restitution, clearly no such trust would be imposed in this case. However, the Supreme Court held that a constructive trust could also be imposed when, in "good conscience," it was necessary to do so to "condemn a wrongful act" and to "maintain the integrity" of a fiduciary relationship.

In contrast to a constructive trust imposed to remedy an unjust enrichment, the plaintiff need not prove the three traditional elements to be awarded a *Soulos* trust. Rather, the plaintiff must show the following:

---

[110] Continued . . .
trust to the applicants in respect of the proceeds of sale of the shares held by PPI in its subsidiaries, since the effect of the statutory scheme applicable on an insolvency is to shut out a remedy which would, if available, have the effect of conferring a priority not accorded by the provisions of the statutory insolvency scheme. In her eloquent address Miss Dohmann submitted that "the law moves." That is true. But it cannot be legitimately moved by judicial decision down a road signed 'No Entry' by Parliament. The insolvency road is blocked off to remedial constructive trusts, at least when judge-driven in a vehicle of discretion."

[111] Supra footnote 29, at 225.

• The defendant must have been under an equitable obligation—that is, an obligation of the type that courts of equity have enforced—in relation to the activities giving rise to the assets in his hands.

• The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff.

• The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties.

• There must be no factors that would render imposition of a constructive trust unjust in all the circumstances of the case; for example, the interests of intervening creditors must be protected.

Soulos has already had an impact in Canadian law. For example, as noted above, a gift is generally thought of as a juristic reason for the conferral of a benefit on a defendant, hence negating an action for unjust enrichment. But in *Gusto Estate v. Whyte*,[112] this principle was not applied. The plaintiff and the defendant were engaged to be married. They bought a house in joint tenancy, with the plaintiff paying in the equity and the parties jointly borrowing the balance. The plaintiff terminated the engagement shortly before her untimely death. The estate brought an action to recover the house, which was now in the defendant's name as a result of his right of survivorship. The estate claimed a constructive trust over the house. The defendant argued that a gift defeats a constructive trust, but the court said:

> It may be argued on the basis of *Soulos* that there may be situations where even if there is a gift to the defendant it would be against good conscience to allow the defendant to keep the equity in the house.

Although this was a case of unjust enrichment, the court applied the "good conscience" criterion from *Soulos* to impose a constructive trust. *Gusto Estate* implies that there should be no difference between the criteria needed to impose a constructive trust in unjust enrichment and those needed to impose a trust where one or more elements of unjust enrichment is absent. It is interesting to note that the criterion of "good conscience" was also held to be the guiding principle in *Atlas Cabinets*[113] for the determination of whether there is a juristic reason for a defendant to retain the amounts paid to him in a commercial unjust enrichment case.

THE TAXATION OF AN AWARD FOR UNJUST ENRICHMENT IN THE CASE OF OVERPAID TAX

In the absence of paragraph 12(1)(x) of the Income Tax Act, a refund of overpaid tax would result in income if it related to an expense previously

[112] (1998), 125 Man. R. (2d) 108 (QB).

[113] Supra footnote 20.

deducted and would be taxable in the year in which the expense was deducted even if that year was statute-barred from reassessment.[114] However, effective for amounts received after 1990,[115] subparagraph 12(1)(x)(iv) of the Act states that a person must include in income any amount received from a government, municipality, or other public authority where the particular amount can reasonably be considered to have been received as a "refund" in respect of an amount included in, or deducted as, the cost of property, or an outlay or expense. The amount is included in income in the year of receipt. In *Canada Safeway*,[116] the court held that the primary meaning of "refund" is restitution. It therefore seems clear that a government payment for unjust enrichment will be caught by subparagraph 12(1)(x)(iv) if the conditions of clause (A) or (B) thereof are met.

As income tax is not a deductible amount, it seems that there would be no tax on amounts received in an action for unjust enrichment to recover such tax. Other taxes, duties, or fees, however, may be either deductible or at least added to the cost base of an asset. It appears that any recovery of these amounts in an action for unjust enrichment would be taxable.

An election may be made to reduce otherwise deductible expenses by the amount recovered, thereby eliminating the amount recovered from income.[117] Similarly, where the recovery automatically reduces the capital cost of an asset under paragraph 53(2)(k), it will be removed from income under subparagraph 12(1)(x)(vi). Alternatively, the taxpayer could elect to reduce the capital cost of an asset, with the same effect.[118]

CONCLUSION

While the courts have not yet determined the exact theoretical underpinnings of the doctrine of unjust enrichment, the rule allowing a taxpayer to sue for unjust enrichment in respect of overpaid tax appears to be well established in Canadian and Commonwealth law. The Crown will have a number of potential defences open to it, including the argument that the law is unconstitutional, that there was a passing on of the deprivation, that it is impossible to restore the money, or (remotely) that there was a

---

[114] *The Queen v. Canada Safeway Limited*, 98 DTC 6060 (FCA).

[115] See the amendments to subparagraph 12(1)(x)(iv) of the Income Tax Act in Bill C-28, An Act To Amend the Income Tax Act, the Income Tax Application Rules, the Bankruptcy and Insolvency Act, the Canada Pension Plan, the Children's Special Allowances Act, the Companies' Creditors Arrangement Act, the Cultural Property Export and Import Act, the Customs Act, the Customs Tariff, the Employment Insurance Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the Income Tax Conventions Interpretation Act, the Old Age Security Act, the Tax Court of Canada Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act, the Western Grain Transition Payments Act and Certain Acts Related to the Income Tax Act, as passed by the House of Commons April 21, 1998.

[116] Supra footnote 114.

[117] Subsection 12(2.2) in combination with subparagraph 12(1)(x)(vii).

[118] Subparagraph 12(1)(x)(vii) and paragraph 53(2)(s).

mistake of law involved. The facts of each case will determine whether the action has been made out and whether any one or more of the defences will apply. But it may be that unjust enrichment will become the weapon of last resort to recover overpaid tax when all else fails.

ADDENDUM

On October 29, 1998, the Appellate Committee of the House of Lords released its decision in *Kleinwort Benson Ltd. v. Birmingham City Council*.[119] The three main issues were

1) whether England would recognize the right to recovery of money paid under a mistake of law,

2) whether Kleinwort had been operating under a mistake in making the payments to the City Council when the case that invalidated those payments[120] was decided only after Kleinwort had made the last payment, and

3) whether the statute of limitations started to run from the time Kleinwort made the payments or from the date *Hazell* was decided.

First Issue

The committee held that the law in England, which for so long had not recognized a right to recover money paid under a mistake of law, should be changed to bring it into line with the law in Canada, Australia, and other jurisdictions. The previous rule was based on the fiction that every person was presumed to know the law, and hence it was impossible to recover money paid under a mistake of law. The committee in *Kleinwort* held that there is a coherent principle of law known as restitution founded on unjust enrichment. There was no longer any justification for the committee to continue the previous blanket exception against recovery in cases of mistake of law. Rather, the committee held, it was more appropriate to allow for a general right of recovery, whether the mistake was of fact or of law, subject to certain well-defined defences created to mitigate any harshness that the new rule might entail. Furthermore, the committee was prepared to overrule the previous law without waiting for legislative approval, this position being based on a "robust" view of the powers and duties of the House of Lords in respect of common law developments.

Second Issue

The committee held that when the committee released its decision in *Hazell*, it retroactively changed the law. Therefore, although Kleinwort had made the payments before *Hazell*, it had made the payments under a mistake of law, and the mistake existed at the time it made the payments.

---

[119] See the discussion of the lower court decision at footnote 64, supra.

[120] *Hazell*, supra footnote 63.

The committee drew a distinction between cases (such as *Woolwich*)[121] in which taxes and similar payments are involved and the present case in which the litigation is among private parties. In the former case, the committee said, recovery is "as of right," without the need to show that there was a mistake of law. However, in tax cases, where there is a retroactive change in the law, there may (the committee did not say must) be elements of public interest that would prevent recovery of overpaid taxes based on the change in the law. Such public interest elements do not arise in private litigation (even, it appears, when one of the parties is the government). In fact, nothing in *Woolwich* says that recovery was "as of right"; in that case, as the committee in *Kleinwort* acknowledged, Woolwich had paid the taxes under protest and had never been under any mistake that the payments were due. Although recovery was allowed, this is not the same as saying that a taxpayer who paid tax under a mistaken belief in the law is entitled to recover the money as of right. It is difficult to see any true difference between tax cases and any other case, especially when—as in *Kleinwort*—the defendant is a government entity.

Third Issue

The committee held that Kleinwort had six years from the date of *Hazell* to sue for recovery, even though it had made some or all of the payments more than six years before *Hazell*. Time started to run from the date of *Hazell*, said the committee, because that was the earliest date on which Kleinwort could have reasonably discovered that the previous payments were made in error. The committee recognized that this position would entitle a taxpayer to possible recovery of payments made many years ago but found no escape from this consequence except through legislation.

Defences

The committee in *Kleinwort* also addressed the issue of what defences might be available to a defendant who received the money thinking the law was in his favour, only to discover later by a judicial decision that it was not. The committee approved, without much discussion, the defence of "change of position" (for example, the defendant had already spent the money). However, the committee rejected the notion (arising from a comment by Brennan CJ in *David Securities*)[122] that a defendant who honestly believed at the time of payment that he was entitled to the money is entitled to keep the money even though his honest belief later turns out to have been mistaken. The committee in *Kleinwort* held that such a defence would in effect wipe out the right to recover at all. Rather, said the committee, it would be more appropriate to decide on a case-by-case basis when a court would not allow recovery. Unfortunately, the committee

[121] Supra footnote 77.

[122] Supra footnote 45.

did not propose even a tentative guiding principle (other than "public policy") to use in deciding such case-by-case situations.

The committee also rejected the defence of "completed transaction." This rather complicated defence asserts that the real basis for recovery in the interest swap cases was failure of consideration, not unjust enrichment. Where there is a completed transaction, there is in effect no failure of consideration, even though the contract itself is void. Therefore, there should be no recovery. However, the committee held that this argument would be true only if the plaintiff were required to plead failure of consideration rather than unjust enrichment, and that is not the case. Furthermore, the effect of this defence would be incompatible with the decision in *Hazell* itself, which declared all interest swaps to be void whether or not they were complete.