

No Justice for Taxpayers: The Paucity of Restitution

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FROM SEVERAL POINTS OF VIEW the decision of the Supreme Court of Canada in *Air Canada v. The Queen in right of British Columbia*² is remarkable. Leaving aside the constitutional and tax aspects of the case, which this commentator has neither the desire nor the expertise to discuss, the case raises issues relating to the law of restitution, unjust enrichment, mistake and, even more importantly, the methodology of adjudication. In this respect the case is one of considerable jurisprudential interest. Over and above the narrow, but vital questions of substantive private law involved in the decision, there are important and complex issues relating to the role of the judiciary and the exercise of their functions.

Careful reading of the judgment of La Forest J., with whom Lamer and L'Heureux-Dubé JJ. concurred, reveals, it is suggested, a subtle and regrettably misleading interpretation of earlier decisions of the Supreme Court of Canada, as well as those of lower courts, designed to achieve a desired conclusion. Understandably, there was reluctance to accept and agree with that conclusion on the part of Beetz and McIntyre JJ.; they found it possible to concur in the majority result without commenting on La Forest J.'s judgment insofar as it dealt with recovery of money paid under a mistake of law and the doctrine of restitution or unjust enrichment.

Wilson J., who did consider the issue of recovery of money in such circumstances, disagreed with the reasoning of La Forest J., and would have permitted the plaintiffs to regain taxes, which had been paid to the Crown under British Columbia legislation.

Thus of the six judges who heard the appeal and participated in the judgment (which Le Dain J. did not), three adopted what will be sub-

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² [1989] 1 S.C.R. 1161, *aff'g* (1987), 30 D.L.R. (4th) 24 (B.C.C.A.), *aff'g* (1984) 10 D.L.R. (4th) 185 (B.C.S.C.) [hereinafter *Air Canada*]. All three courts held that the relevant legislation was *intra vires*, but the Supreme Court did not affirm the decision of the British Columbia Court of Appeal, agreeing with the trial judge that the taxes paid by the plaintiffs under that legislation were recoverable. The cross-appeal by the Crown, from the dismissal by the British Columbia Court of Appeal of the Crown's appeal from the original decision of the trial judge in favour of the plaintiffs' claim for recovery was allowed.

mitted to be an unorthodox view on the subject of the effect of a mistake of law in relation to a restitutionary claim, while the other three either ignored the issue or took an entirely opposing view. That, coupled with the unusual approach to earlier authority that was embraced by La Forest J. and those who concurred with him, leads to the conclusion that, although it is a decision of the Supreme Court, this case ought not to be regarded as authoritative on the issues relating to the law of restitution.

The plaintiffs paid taxes under legislation of British Columbia, which had been amended in 1976, to make the original *ultra vires* provisions valid and *intra vires*.³ Later legislation⁴ purported to preclude any attempt to recover those payments. Despite this the plaintiffs sought the recovery of what had been paid prior to the amendment of the earlier *ultra vires* legislation. The majority of the Supreme Court, over the dissent of Wilson J., held that the province could validly enact legislation which prevented the recovery of money paid under the taxation statute. Wilson J. disagreed. In her opinion the province could not constitutionally provide for the non-recovery of an illegally imposed tax. In permitting this, it would allow the province to achieve indirectly what it could not have legislated directly, namely the imposition of an *ultra vires* tax. Of the five judges who held that the legislation was *intra vires* and constitutionally valid, La Forest, Lamer and L'Heureux-Dubé JJ. also held, although this was not strictly necessary for their decision, that, in any event, the common law doctrine of restitution did not allow for the recovery of the money in question. From that opinion Wilson J. also dissented. The reasoning of La Forest J. and his colleagues in this regard and the contrary opinion of Wilson J. are the subject-matter of this comment.

La Forest J. began by denying that the "mistake of law" doctrine applied to the fact situation in this case.⁵ As is well known, that doctrine states that money paid under a mistake of law, not fact, is generally irrecoverable; however, certain exceptions exist when recovery is permitted despite the payment having been induced by, or made under, an operative mistake of law.⁶

3 *Gasoline Tax Act, 1948*, R.S.B.C. 1960, c. 162, s. 3, as am. *Miscellaneous Statutes Amendment Act, 1976*, S.B.C. 1976, c. 32, s. 7(1)(b).

4 *Gasoline Tax Act*, R.S.B.C. 1979, c. 152, s. 25 as am. *Finance Statutes Amendment Act, 1981*, S.B.C. 1981, c. 5, s. 20, which, by this time had become the governing enactment.

5 *Air Canada*, *supra*, note 1 at 1195-1204.

6 R. Goff & G.H. Jones, *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) c. 4, [hereinafter Goff, *Law of Restitution*], G.H.L. Fridman & J.G. McLeod, *Restitution*, (Toronto: Carswell, 1982) c. 4, [hereinafter Fridman, *Restitution*].

One might have thought that doctrine was firmly established as part of the common law in Canada by the decision of the Supreme Court of Canada in *Hydro Electric Commission of Nepean v. Ontario Hydro*,⁷ where, over the dissent of Dickson J., as he then was, and Laskin C.J., the majority refused to allow recovery of money paid by the plaintiffs under a mistake as to the effect of certain legislation. That was not the view of La Forest J. In his opinion, on the contrary, the *Nepean* case did not involve either unjust enrichment or the distinction between mistake of law and mistake of fact.⁸ The case "was argued on the basis that it fell within one of the exceptions to the mistake of law rule, that the parties were not *in pari delicto*, and they", i.e. the majority of the court, "dealt with it accordingly".⁹

To the present writer, who laboured under what apparently was the misconception that the *Nepean* case was all about mistake of law, its effects, and at least some of the exceptions to the doctrine that a mistake of law cannot ground an action for restitutionary recovery, the views expressed by La Forest J. seem extraordinary and perverse.

The judgments of the majority and of Dickson J. in the *Nepean* case appear to this commentator, as it is suggested to others, to turn entirely on the mistake of law rule and its qualifications.¹⁰ Indeed, as La Forest J. is at pains to point out in the *Air Canada* case,¹¹ the dissent of Dickson J. is founded on his attitude that, at the present time, there was no justification for making any distinction insofar as restitutionary recovery was concerned between a mistake of law and one of fact. This was so to such an extent, that La Forest J. had no hesitation in following the lead of Dickson J. and holding that the distinction between mistake of fact and mistake of law should play no part in the law of restitution. Both species of mistake, in an appropriate case, should be considered as factors which can make an enrichment at the plaintiff's expense "unjust" or "unjustified".¹² In any event, according to La Forest J., were the mistake of law rule not to be abolished, it should not be extended to the constitutional plane. The rule was "replete with technicality and difficulty". It was not appropriate to "constitutional adjudication"

7 [1982] 1 S.C.R. 347.

8 *Air Canada*, *supra*, note 1 at 1200.

9 *Ibid.*

10 See the analysis of this case in Fridman, *Restitution*, *supra*, note 5 at 172-174; compare J.D. McCamus, "Restitutionary Recovery of Money Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada" (1983) 17 U.B.C.L.R. 233 at 260-272.

11 *Air Canada*, *supra*, note 1 at 1200-1201.

12 *Ibid.* at 192.

which "invites the formulation of broad principles suitable to the accommodation and resolution of broad social and political values".¹³

Pausing there for a moment, some comments should be made. First, La Forest J. appears to have refused to accept and to apply a clear decision by the Supreme Court, albeit over a powerful and intelligent dissent, by virtue of which non-recovery for mistake of law was established as part of the common law in Canada. In what can only be described as a cavalier manner, the learned judge dismissed the decision as not amounting even to an expression of opinion let alone a definitive one. Unquestionably this is a curious attitude for a judge of the Supreme Court of Canada to adopt with respect to an earlier decision by the court. It is noteworthy that Wilson J., dissenting though she was, agreed with the views of La Forest J. in this regard¹⁴ and, had it been necessary to do so to dispose of the case at bar, would have supported the minority view in the *Nepean* case.

Abolition of the distinction between mistake of law and mistake of fact may well be a desirable end to attain, as suggested and recommended by the British Columbia Law Reform Commission in its *Report on Benefits Conferred Under a Mistake of Law*, in 1981.¹⁵ It is respectfully suggested however, that abolition can only be achieved by legislation, and not by the Supreme Court of Canada disregarding its own previous and clear-cut decision in which the mistake of law rule or doctrine was recognised, accepted and applied.

Secondly, the suggestion that, although the mistake of law rule or doctrine is a part of Canadian common law, it ought not to be applied in its strictness to situations involving a constitutional aspect, such as the imposition of unconstitutional or *ultra vires* levies, raises another problem. There may be reasons why recovery of such levies ought to be denied quite apart from the doctrine of mistake of law.¹⁶ This is not the same as arguing that this doctrine of private law has no place or function in relation to public law nor in cases where the relationship of public bodies falls to be considered.¹⁷ The language of La Forest J. on the subject of "broad social and political values" opens the door to the possibility that the courts can make different rules for public bodies from those which govern private persons, including corporations, and can treat public bodies in a different and more tolerant fashion from private persons.

13 *Ibid.* at 1201.

14 *Ibid.* at 1214.

15 Law Reform Commission of British Columbia, *Benefits Conferred Under a Mistake of Law*, (Report No. 30) (Vancouver: The Commission) at 58-66, [hereinafter Law Reform Commission, *Report on Benefits*].

16 *Air Canada, supra*, note 1 at 1201 and 1203-1208 *per* La Forest J.

17 *Ibid.*

In the British Columbia Court of Appeal's treatment of the *Air Canada* case,¹⁸ the judgments of Lamar J.A., who was in the majority, and Esson J.A. who dissented, appear to apply the general principles of restitution and unjust enrichment to the facts of this case even though constitutional issues and governmental or public bodies were involved as litigants. Although these judges differed as to the ultimate result of the action, their respective reasons were founded on the underlying principles of the law of restitution in Canada as evolved and exemplified by various decisions.

La Forest J. introduced, for the first time in this case, indeed for the first time in any case, the idea that the principle governing recovery of money paid under mistake should be reversed, in the words of Wilson J.,¹⁹ "for policy reasons in the case of payments made to governmental bodies". Such an approach, it is suggested, is a blatant and unwelcome exercise in policy making and legislation on the part of the court.

Having painted himself into a corner, by rejecting the application of the mistake of law rule, La Forest J. was obliged to discover a qualification, so as to enable him to justify the conclusion that recovery should be denied. In effect, he enunciated two different bases on which to negate the otherwise logical effect of his decision that recovery should not be allowed where a payment was made under a mistake of law. The first was founded on the argument that, in effect, the Crown had not been enriched at the expense of the plaintiffs. The theoretical justification for restitution is the enrichment of the defendant unjustly at the plaintiff's expense.²⁰

In the present case, La Forest J., adopting an argument of a leading American writer on restitution,²¹ considered that the Crown had not been enriched at the plaintiffs' expense because the plaintiffs, Air Canada and two other airlines, had passed on the burden of the tax to their passengers.²² The plaintiffs' counsel attempted to negate this argument by saying that this "passing-on" defence should only be available where a tax had been specifically charged to other identified parties, thereby making them the true taxpayers. Even though the airlines were not directly out of pocket, their increase of prices to cover the tax may have affected sales volume, thereby indirectly affecting their profit and resulting in out-of-pocket loss. La Forest J. rejected this. A restitution-

18 (1987), 30 D.L.R. (4th) 24, especially at 49-50 and 58-60; compare C.L. Pannam, "The Recovery of Unconstitutional Taxes in Australia and the United States" (1964) 42 Texas L.R. 777 at 789-797, [hereinafter Pannam, "Unconstitutional Taxes"].

19 *Air Canada*, *supra*, note 1 at 1215, the emphasis is in the original.

20 Goff, *supra*, note 5 at 12-30.

21 G.E. Palmer, *Law of Restitution* (Boston: Little, Brown and Company, 1978) at 255 (Supp. 1986).

22 *Air Canada*, *supra*, note 1 at 1202-1203.

ary claim could only be made where there was a real deprivation of wealth and that was either in the possession of the plaintiff or would have accrued for his benefit. "The law of restitution is not intended", he said,²³ "to provide windfalls to plaintiffs who would have suffered no loss".

This recalls the argument of McDermid J.A., dissenting, in *Abbey Glen Property Corp. v. Stumborg*²⁴ to the effect that the plaintiff corporation should not be entitled to restitutionary recovery because there were shareholders who were not shareholders at the time the defendants committed the acts which, otherwise, entitled such a claim to be made. To have allowed the corporation to recover would have provided a windfall for shareholders who had never been deprived of anything. That argument failed to succeed in that case. It is suggested that it should not have succeeded in the *Air Canada* case.

That argument, it would seem, has appealed to courts in the United States.²⁵ But it was rejected by the High Court of Australia in *Mason v. New South Wales*,²⁶ on the ground that it is irrelevant who ultimately bears the burden of the tax unless, possibly, it is related to the question of whether the charges were paid voluntarily or under compulsion. However, as La Forest J. went on later to state,²⁷ payment under an *ultra vires* statute did not constitute "compulsion" within the rules of "practical compulsion" developed in the Canadian courts.²⁸ In the Court of Appeal,²⁹ Lambert J.A. had espoused this idea, but it was rejected by Hinkson and Esson J.J.A.³⁰

It is worthy to note that Wilson J. did not agree with La Forest J. on this. In her opinion, payments made under unconstitutional legislation were not "voluntary" in a sense which should prejudice the taxpayer. In her words:³¹

"The taxpayer, assuming the validity of the statute..., considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislation".

23 *Ibid.* at 1202.

24 (1978) 85 D.L.R. (3d) 35 at 49-53 (Alta. S.C.A.D.).

25 Pannam, "Unconstitutional Taxes", *supra*, note 17 at 792-793.

26 (1959) 102 C.L.R. 108 (H.C.).

27 *Air Canada*, *supra*, note 1 at 1209.

28 See Fridman, *Restitution*, *supra*, note 5 at 200-213.

29 (1987) 30 D.L.R. (4th) 24 at 49 (B.C.C.A.).

30 *Ibid.* at 61.

31 *Air Canada*, *supra*, note 1 at 1214.

The first of La Forest J.'s reasons for denying recovery, even though a mistake of law should not of itself preclude recovery, is therefore one that has been questioned not only by other Canadian judges but also by a court of some considerable weight in the common-law world, the High Court of Australia. The validity and legitimacy of this argument are consequently dubious.

The learned judge's second ground for denying recovery, notwithstanding his apparent acceptance of the notion that restitution can be founded on a payment made under a mistake of law, was that an unconstitutional or *ultra vires* statute was in issue.³² Special considerations operated to take the case out of the normal restitutionary framework, and required a rule responding to the specific underlying policy concerns in this area.

In the first place, recovery of taxes paid pursuant to legislation that was unconstitutional or otherwise invalid was generally denied or refused in the United States, Australia and New Zealand. Although there might be statutory provisions governing the recovery of taxes paid by mistake arising out of an improper assessment or because of an error in the taxpayer's return or statement,³³ there seems to be no acceptance of the possibility of recovery where a tax has been illegally, i.e. unconstitutionally, imposed and paid. The rationale for this refusal of relief to the taxpayer, as indicated by La Forest J.,³⁴ is that if recovery were allowed this would require the government to impose a new tax to pay for the old, i.e. to compel a new generation to pay for the expenditures of the old. That would be, at best, inefficient.

Yet in *Mobil Oil v. Storthoaks*,³⁵ the municipality was unable to resist repayment of money paid under mistake by raising the argument that, in consequence of the payments, lower taxes had been imposed on the citizens of the municipality, so that, if repayment was compelled, the municipality would have to raise additional or new taxes to make up for what it had expended in reliance on the mistaken payments. If this was an unsuccessful defence in that case, why should it not also have been unsuccessful as an argument in the *Air Canada* case?

La Forest J. purported to reinforce his argument in this respect by stating that fiscal chaos would result if the general rule favoured recov-

32 *Ibid.* at 1203. In other words, an argument based on public policy, which may be a ground for precluding a restitutionary claim: Goff, *Law of Restitution*, *supra*, note 5 at 47-51, where public policy is discussed but only in respect of an award that would lead to the enforcement of a transaction which the law refuses to enforce.

33 As in England: Goff, *Law of Restitution*, *supra*, note 5 at 134-135; compare Law Reform Commission, *Report on Benefits*, *supra*, note 14 at 25-26.

34 *Air Canada*, *supra*, note 1 at 1204.

35 (1975), [1976] 2 S.C.R. 147.

ery.³⁶ Such chaos was dealt with on one occasion in the United States by legislation required in consequence of a decision that held a particular tax unconstitutional. The United States Treasury was obliged to repay almost one billion dollars in invalid taxes. Legislation of this nature, said La Forest J., would be impossible, both equally invalid and unconstitutional as a result of the decision of the Supreme Court of Canada in *Amx Potash Ltd. v. Government of Saskatchewan*.³⁷

In that case the court held that a province could not validly pass an enactment which precluded a remedy in respect of something that had been accomplished under other legislation that had been held to be *ultra vires* the province. The result of this would seem to be that there might be immense claims against the Crown for improperly imposed taxes: and these would be incapable of being excluded or defeated by pleas such as limitation of actions or laches. Such a situation, were it to arise, would play havoc with public finances. Hence the argument that an exception to recovery should be made where this would be the result.

La Forest J. however, considered that it would be impossible for a court to make such a determination. Because of this, the learned judge would not accord to the principle that there should be no taxation without parliamentary sanction, normally an important aspect of public law and life, the "dominant status" suggested for it by Professor Birks,³⁸ who also was prepared to make an exception for instances where to permit recovery would disrupt public finances. Consequently, La Forest J. concluded that there should be no recovery of *ultra vires* taxes at least where such taxes flowed from unconstitutional statutes.

He was prepared to make an exception where "the relationship between the state and a particular taxpayer resulting in the collection of the tax are [*sic*] unjust or oppressive in the circumstances".³⁹ That was not the situation in the present case. There was no discrimination, oppression or abuse of authority. The unconstitutionality of the statute stemmed from a mere technical issue. The statute was not enacted in the proper form. This approach involves making a distinction between technically unconstitutional or invalid taxing statutes and the imposition of taxes "unfairly". Only the latter would justify recovery. But are the courts the appropriate bodies to decide whether a tax is unfair, discriminatory, or oppressive? If so, what criteria are to be employed to make such a determination?

36 *Air Canada, supra*, note 1 at 1205-1206.

37 (1976), [1977] S.C.R. 576.

38 P. Birks, *An Introduction to the Law of Restitution*, (Oxford: Clarendon Press, 1989) at 294.

39 *Air Canada, supra*, note 1 at 1206-1207.

La Forest J. thought that it would be impossible for the courts to decide whether permitting recovery would cause disruption of public finances. Would the decision, with regard to the discriminatory, oppressive, abusive, or unfair imposition of a tax, not entail similar, if not greater difficulties? Indeed, it might be argued that it would be much more onerous and dangerous for a court to decide whether a given tax vis-a-vis a particular taxpayer or class of taxpayers, or in respect of a particular situation, should or should not be considered valid on constitutional grounds other than the purely technical or formal ones. Surely this would make the courts more "political" in the performance of their judicial, adjudicatory functions than is acceptable in our society. The approach of La Forest J., if carried to its logical conclusion, might well provide further ammunition for the Critical Legal Studies school of jurisprudence. It would enmesh the courts more and more in the daily business of political decision-making, and that is hardly their proper function.

By way of qualification, as if to indicate that he was aware of the dangers inherent in his approach, La Forest J. went on to state that the rule against the recovery of unconstitutional and *ultra vires* levies was an exceptional one, not to be construed more widely than necessary to fulfil the values which supported it, viz., the protection of the treasury, and recognition of the reality that if a tax were refunded, modern government would be driven to the inefficient course of reimposing the tax on the same or on a new generation of taxpayers to finance the operations of government.⁴⁰ Hence, recovery should be allowed where tax was extracted through a misapplication of a law, e.g., its application in error to a person to whom it did not apply.

In such situations no distinction should be made between a mistake of law and one of fact. However, recovery should not be permitted where public policy considerations required a contrary holding. If anything else was to be the general rule, it should be accomplished by legislation. That was something to be investigated thoroughly by legislatures, e.g., through the medium of studies by law reform bodies, such as that conducted in British Columbia. The courts were not the proper forum for full consideration of such policy matters.⁴¹

It is instructive to contrast the views of Wilson J., to some of which reference has already been made. She did not think it undesirable to permit a taxpayer to recover an illegally imposed tax.⁴² To not allow

40 *Ibid.* at 1207.

41 Compare *Miliangos v. Frank George (Textiles) Ltd.*, (1975), [1976] A.C. 443 at 480-482, (H.L.) per Lord Simon, *Morgans v. Launchbury*, (1972), [1973] A.C. 127 at 136-137, (H.L.) per Lord Wilberforce.

42 *Air Canada, supra*, note 1 at 1215-1217.

recovery would make an individual taxpayer bear the burden of a government's mistake. That mistake should not lead to an innocent taxpayer having to suffer loss. Such taxpayer was only guilty of paying what the legislature improperly said was due. It was ironic to describe such a person as asserting a right to disrupt government, or as creating fiscal chaos, or requiring a new generation to pay for the expenditures of the old.

In these circumstances the fault was that of the government, which had the means available to protect against its consequences. Nor did she accept the, arguably dubious, "windfall" rationale of *La Forest J.* She preferred to apply the equitable doctrine of unjust enrichment in all its glory as expounded by Dickson J. in the *Nepean* case, on whose judgment *La Forest J.* relied. There were no equitable grounds for refusing to order repayment of monies paid under a mistake in this instance.

Such, in brief, were the arguments against and for recovery of the tax money paid unconstitutionally and invalidly in this case. Where the sympathies of the present writer lie is abundantly clear. Despite the superficially persuasive and attractive reasoning of *La Forest J.* against recovery, it is suggested that to accept his argument and its conclusion is to uphold the sanctity of government against the legitimate interest of individuals.

If governments make mistakes, governments should suffer, not innocent individuals. Indeed, perhaps the law should provide that the individual legislators responsible for the mistake that creates a situation of invalidity or unconstitutionality should be held liable (as municipal councillors were in England where they exceeded their powers and imposed *ultra vires* charges).⁴³ To provide for this might force our legislators to be more careful. They, not the taxpayer, ought to bear the blame for creating fiscal chaos or casting burdens on other generations. Let us hope that this will appeal to legislators. Since it entails that they are liable, it is unlikely that legislators will willingly give birth to their own responsibility. They will not protect the taxpayer; nor will the courts. Where, then, is the innocent person to appeal for justice?

43 See *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.) (which was applied in *Prescott v. Birmingham Corporation*, (1954), [1955] Ch. 210 (C.A.) on the issue of *ultra vires*).