The Recovery of Unlawful Tax in Canada:

Re-evaluating the *Kingstreet* Cause of Action in light of Developments in the Law of Unjust Enrichment in Canada and England

by

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Abstract

A decade after Kingstreet Investments Ltd v New Brunswick, this thesis re-evaluates the Supreme Court of Canada’s rejection of unjust enrichment in favour of a standalone public law restitutionary cause of action for the recovery of unlawful tax. I argue that the recognition of the Kingstreet cause of action threatens the coherence of the Canadian law of restitution and is inconsistent with more recent jurisprudence permitting unjust enrichment claims against the Crown in other contexts. I also argue that the Supreme Court’s doubts about whether the levying of unlawful tax constitutes an enrichment in the Crown’s hands (and a deprivation on the taxpayer’s part) are largely misplaced. Analyzing recent developments in both Canadian and English law, I contend that the law of unjust enrichment is perfectly capable of providing an adequate route to recovery while protecting the important constitutional principles at stake in unlawful tax cases.
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Introduction

While the idea that the government must not retain tax that was not legally due commands widespread support at a high level of abstraction, it has proven more difficult to find similar widespread consensus about the appropriate legal framework for classifying, analyzing and responding to claims by taxpayers for the recovery of unlawfully levied tax. That this subject is fraught by conceptual controversies is evidenced by the rich case law and academic commentary that has developed in both Canada and England over the past forty years as taxpayers and revenue authorities have waged battle in court – with legislatures occasionally stepping in with retroactive remedial legislation to shield governments from substantial claims when they otherwise face defeat.

Unsurprisingly, a number of controversies have emerged in the literature about the nature of the problem posed by unlawful taxation and the remedies that should be available to taxpayers who seek recovery. One of the central debates concerns whether the problem of unlawful taxation should be seen as a fundamentally constitutional or public law issue that requires a concomitant public law remedy, or whether private law causes of action and remedies – such as a claim in restitution for unjust enrichment, or a claim for damages – can provide an adequate response. This debate is more than just about addressing an important conceptual question; the appropriate classification can have a profound practical impact on what a taxpayer needs to prove in order to substantiate a claim, the remedies available to a taxpayer if it succeeds and the defences and limitation periods upon which the government can rely.
In Canada, the leading judgment on the recovery of unlawful tax is the Supreme Court of Canada’s unanimous decision in *Kingstreet Investments Ltd v New Brunswick.*¹ *Kingstreet* concerned a user charge on the sale of liquor imposed by regulations made by the New Brunswick government under the *Liquor Control Act.*² Under s. 5 of the *Fees Regulation — Liquor Control Act,*³ the plaintiff paid over $1 million in user charges over the years on alcohol that it purchased for re-sale in its nightclubs. In 2004, it brought a claim in unjust enrichment against New Brunswick seeking restitution of the user charges on the basis they were an unconstitutional indirect tax and thus *ultra vires* the legislative competence of the province under s. 92(2) of the *Constitution Act, 1867.*⁴

The first instance judge held that the user charges were an *ultra vires* indirect tax but denied the plaintiff’s claim for restitution on the basis it had passed on the burden of the charges to its patrons. The Court of Appeal allowed the appeal in part, denying recovery of the charges paid before the date on which proceedings were commenced but permitting recovery of the charges paid after that date on the basis the plaintiff had continued to pay them under protest and compulsion. On further appeal, the Supreme Court of Canada partly upheld the plaintiff’s claim for recovery but on an entirely different basis. Bastarache J, who delivered the Supreme Court’s unanimous judgment, held that unjust enrichment was an “inappropriate framework”⁵ and “of little use to a principled disposition of the matter.”⁶ Instead, he held that the plaintiff was entitled to

¹ *Kingstreet Investment Ltd v New Brunswick*, 2007 SCC 1, [2007] 1 SCR 3 [*Kingstreet SCC*].
² *Liquor Control Act*, RSNB 1973, c L-10, s 200(3) [*Liquor Control Act*].
³ *Fees Regulation — Liquor Control Act*, NB Reg 89-167 [*Liquor Control Fee Regulation*].
⁴ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(2) reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].
⁵ *Kingstreet SCC*, supra note 1 at para 39.
⁶ *Kingstreet SCC*, supra note 1 at para 35.
restitution as a matter of “constitutional right”, subject only to the 6-year limitation period prescribed by the New Brunswick Limitation Act. In so holding, he recognized restitution on “constitutional grounds” as a third branch of the Canadian law of restitution, standing alongside restitution for unjust enrichment and restitution for wrongdoing.

This thesis critically evaluates Bastarache J’s rejection of unjust enrichment as a cause of action for the recovery of unlawful tax on two fronts. First, I examine the soundness of Bastarache J’s conclusion that a claim to recover unlawful tax must be treated differently because it raises fundamental constitutional issues – such as ensuring respect for the rule of law and legislative control over the executive – that would be overlooked if the claim for recovery were to proceed by way of a claim in unjust enrichment. In circumstances where unjust enrichment is recognized as a viable cause of action for the recovery of money from the government in other contexts, is the existence of a standalone and exclusive cause of action on “constitutional grounds” solely for unlawful tax cases taxonomically logical, normatively justifiable and coherent from the perspective of the Canadian law of restitution’s internal coherence? I seek to answer these questions in Part II.

Next, I turn my attention to the concept of an “enrichment” and a “corresponding deprivation” as the foundational bases for a claim in unjust enrichment. In Kingstreet, Bastarache J suggested that unjust enrichment would be an unsuitable cause of action in part because it may be difficult for a taxpayer to show that the government has been enriched by the receipt of unlawful tax and that the taxpayer has been correspondingly deprived (especially if it passes on the burden of the unlawful tax to third parties). In Part III, I seek to critically evaluate these propositions on two fronts: first, by examining how the Canadian law of unjust enrichment deals with the questions of “enrichment” and “corresponding deprivation” in contexts other than taxation; and secondly,
by undertaking a comparative study that analyzes recent developments in the English law of unjust enrichment on the question of what it means for the government to be “enriched” by the receipt of unlawful tax.

English law is a particularly useful comparator jurisdiction for this purpose because English courts have regularly grappled with the question of what it means for the government to be “enriched” as taxpayers have vigorously pursued restitutionary claims in unjust enrichment to recover unlawful tax. Ground-breaking developments in English law – particularly on the question of whether the time value of money constitutes an enrichment – should therefore offer illuminating insights to potentially aid the future development of Canadian law in this area.

I will focus primarily on what English law teaches us about the concept of an “enrichment” in Part III (rather than on the concomitant need for the plaintiff to be “deprived”) for three main reasons. First, the requirement to show that the defendant has been enriched has been described as the most “under-theorised aspect of the law of unjust enrichment [despite being]… arguably the most important element for the future direction and consideration of the subject.”7 Because it is the whole basis for the law of unjust enrichment, it is right to specifically focus on it when considering the viability of unjust enrichment as a cause of action for the recovery of unlawful tax.

Secondly, while the decision in Kingstreet (and its rejection of the defence of passing-on) has already been the subject of considerable academic scrutiny elsewhere, comparatively little attention has been directed at Bastarache J’s observation that the government will not necessarily be “enriched” by the receipt of unlawful tax. Because Bastarache J’s observation on this issue is

particularly counterintuitive, I seek to test it directly. More importantly, I seek to draw upon recent developments in the English law of unjust enrichment regarding the recognition of the time value of money as a possible “enrichment” to assess whether the *Kingstreet* cause of action is, by comparison, unduly restrictive in the remedy it makes available to taxpayers.

Lastly, Bastarache J’s concern that a taxpayer will be unable to show that it has been “correspondingly deprived” if it has passed on the economic burden of an unlawful tax to a third party has now largely fallen away following the Supreme Court of Canada’s rejection of the defence of passing-on in *Pro-Sys Consultants Ltd v Microsoft Corporation*.⁸ Accordingly, it is in relation to the question of what constitutes an “enrichment” for the purpose of a claim to recover unlawful tax where there is perhaps the greatest scope for future development in the Canadian law of unjust enrichment. I will therefore direct most of my attention to the concept of an “enrichment” and how it applies in the context of a claim in unjust enrichment to recover unlawfully levied tax.

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⁸ *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [*Pro-Sys*].
2 Part I: Putting the Problem of Unlawful Tax into Context

2.1 Defining the problem of unlawful taxation

It is important to make clear at the very outset what this thesis is not about. There are various statutory provisions in both Canada and England that establish a procedure for resolving disputes between a taxpayer and revenue authorities, including by way of an appeal to a tax court. Usually, these disputes concern the correct interpretation of a taxing provision and the application of the law to the facts of a particular case. As such, they invariably proceed on the basis that the underlying taxing provision is constitutionally valid or otherwise legally effective.

The issue in such cases is that an otherwise legally valid taxing provision has been misconstrued or misapplied, or there has been some other type of mistake that has led to an overpayment of tax. Indeed, the mistakes that a taxpayer (and a revenue authority) can make are many and varied: the mistake might be a straightforward mathematical error in computing tax liability, or a simple mistake of fact (such as where a taxpayer makes a payment of tax forgetting that the amount lawfully due had already been paid). This thesis is not concerned with overpayments of tax that occur in this way or with the statutory provisions that govern the resolution of disputes that arise in the ordinary course of the tax code’s administration.

Rather, it is concerned with a different sort of problem: a case where tax is paid pursuant to a statutory provision – whether contained in primary or secondary legislation – that is valid on its face, but which is later declared to be unconstitutional, void or otherwise legally ineffective. In both Canada and England, it falls to the common law to work out the consequences both to the taxpayer and government of such an event. The nub of the problem here is that the government
has collected tax to which it was not lawfully entitled and the taxpayer has parted with money that it was never legally required to pay.

Although the academic literature and case law refers to this sort of problem by different names ("ultra vires taxation", "improperly collected taxes" and "overpaid tax" are the most commonly used terms), this thesis primarily uses the term "unlawful tax". The reasons for this are largely pragmatic: although (as I discuss below) the problem of unlawful tax in Canada arises primarily as a constitutional vires issue, in England, the problem tends to arise most commonly because a domestic taxing provision is found to be incompatible with directly effective provisions of European Union law (which, in the current UK legal order, takes precedence over incompatible domestic legislation). It therefore seems more accurate to refer to the problem in general as one of "unlawful taxation" rather than "ultra vires" taxation: the crux of the problem in both jurisdictions is that the government has collected tax without any legal authority to do so.

2.2 Defining “restitution” and “unjust enrichment”

Two other key terms I will use regularly throughout this thesis are “restitution” and “unjust enrichment”. As these terms are often used loosely and interchangeably in the literature and case law, it is important to be as clear as possible about their meaning.

I start first with the term “restitution”. According to Graham Virgo, restitution is “a generic group of remedies … which have one common function, namely to deprive the defendant of a gain rather than to compensate the claimant for loss suffered.”

Andrew Burrows echoes this view,

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defining restitution simply as “the reversal of a benefit” conferred on the defendant.\(^{10}\) In this regard, the key point to note is that restitution is (at least in theory) different from the “compensatory” remedy that is typically awarded to a successful claimant in a case concerning a breach of contract or the commission of a tort. As Virgo explains the distinction: “Since restitutionary remedies are assessed by reference to the defendant’s gain, they operate in a very different way from compensatory remedies, where the measure of relief is assessed by reference to the claimant’s loss.”\(^ {11}\) A restitutionary remedy seeks to reverse what the defendant has gained rather than what the claimant has lost – although in many cases, the two will directly correspond.

With respect to the difference between “restitution” and “unjust enrichment”, the key point to note is that “unjust enrichment” is a cause of action for which restitution – the reversal of the defendant’s gain – is the remedy. Although the two terms are often used interchangeably in the case law, restitution is not synonymous with unjust enrichment. As Peter Birks observed: “Restitution is not mono-causal … Unjust enrichment is a distinct causative event, while restitution is a multi-causal response.”\(^ {12}\) As a remedy, restitution can therefore respond to other types of civil wrongs as well.

In this thesis, I use the terms “restitution” and “unjust enrichment” in the senses described above. For example: in England, claims for the recovery of unlawful tax are regarded as claims for restitution (the remedy) for the government’s unjust enrichment (the cause of action). In


\(^{11}\) Virgo, *supra* note 9 at 4. He continues: “Despite this, in many cases the effect of a restitutionary remedy will be to restore to the claimant what he or she has lost, because the extent of the defendant’s gain will reflect precisely what the claimant lost.”

**Kingstreet**, claims for the recovery of unlawful tax are regarded as claims for restitution (the remedy) but for a different cause of action: a standalone “constitutional” cause of action that is available only in this context.

As to what “unjust enrichment” as a *cause of action* means, its constituent components and conceptual boundaries are defined slightly differently in both Canada and England. In England, unjust enrichment as a cause of action is comprised of four elements: 13 (i) the defendant must be enriched; (ii) the enrichment must be at the claimant’s expense; (iii) the enrichment must be ‘unjust’; 14 and (iv) there must be no legal defences available to the defendant. In Canada, the cause of action comprises four similar (but not identical) elements: 15 (i) the defendant must be enriched; (ii) there must be a corresponding deprivation on the part of the plaintiff; (iii) there must be no juristic reason for the defendant’s enrichment; and (iv) there must be no legal defences available to the defendant. As noted above, the main focus of this thesis is on the first limb of the test: the need for an “enrichment” (although I also address the need for a “corresponding deprivation” when necessary given that it is closely tied to the need for the defendant to be “enriched”).

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14 The question of whether the enrichment is “unjust” in the third limb of the test does appear to introduce some circularity and hark back to general notions of “injustice”. However, the enquiry of whether the enrichment is “unjust” is more principled than that: Burrows, supra note 10 at 86. Burrows observes: “the decision on the unjust question is not a matter for a judge’s (or commentator’s) individual discretion …. The traditional common law approach to the unjust question has required the claimant to establish an ‘unjust factor’. As regards the cause of action of unjust enrichment, the main unjust factors can be listed as follows: mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality and public authority ultra vires exaction and payment.”

2.3 The problem of unlawful taxation in Canada

I now turn to briefly outline how the problem of unlawful taxation arises in Canada. The first way the problem can arise is when the government – either federal or provincial – imposes tax by way of a regulation or other secondary legislation without the corresponding enabling power to do so in primary legislation. In this situation, the government acts without proper legislative authority contrary to section 53 and 90 of the Constitution Act, 1867,\(^\text{16}\) and its regulations are unconstitutional and of no force or effect.\(^\text{17}\)

The problem can also arise in a second way: when a provincial legislature exceeds the limits of its constitutional powers to impose taxes under sections 92(2) and 92(9) of the Constitution Act, 1867.\(^\text{18}\) While the federal Parliament essentially has the power to impose all kinds of taxes under section 91, a provincial legislature can only impose “direct taxes” under section 92(2) and certain types of license fees under section 92(9). The difference between a “direct tax” and an “indirect tax” – and between a prohibited “indirect tax” and permitted licence fee or levy – is of critical importance and has been the subject of considerable litigation in the past. In Kingstreet\(^\text{19}\) itself, for example, the impugned provision concerned regulations made by the New Brunswick government under the provincial Liquor Control Act\(^\text{20}\) pursuant to which Kingstreet Developments Ltd paid a user charge on alcohol purchased from the New Brunswick Liquor

\(^{16}\) Constitution Act, 1867, supra note 4, ss 53 and 90. The problem can also arise when a municipality, which derives its powers from enabling provincial legislation, exceeds its powers by purporting to charge a tax without having the appropriate legislative authority under primary legislation to do so.

\(^{17}\) Ibid, s 52(1). See also Peter Hogg, Constitutional Law of Canada (Toronto: Carswell, 2007) (loose-leaf 5th edition supplement) at 58-1 [Hogg].

\(^{18}\) Constitution Act, 1867, supra note 4, ss 92(2), 92(9).

\(^{19}\) Kingstreet SCC, supra note 1.

\(^{20}\) Liquor Control Act, supra note 2.
Corporation for resale to the customers of its nightclubs. Initially, Kingstreet brought an action against New Brunswick challenging the validity of the user charge on the basis that it was either an unconstitutional indirect tax prohibited by section 92(2) of the Constitution Act, 1867\(^\text{21}\) or, alternatively, a direct tax that was unlawfully imposed by regulation rather than primary legislation. At first instance, the trial judge held that the user charge was an indirect tax contrary to s. 92(9) of the Constitution Act 1867\(^\text{22}\) and therefore ultra vires the constitutional competence of the province. This finding was upheld all the way up to the Supreme Court.\(^\text{23}\)

A full analysis of the difference between a “direct tax” and “indirect tax” is outside the scope of this thesis (although it has been the subject of discussion elsewhere).\(^\text{24}\) For present purposes, it suffices to simply note how the first instance judge in Kingstreet (Russell J) dealt with the difference. At paragraph 40 of his judgment, he cited from Major J’s judgment in Re Eurig Estate\(^\text{25}\) for the proposition that: “A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.”\(^\text{26}\)

According to Russell J, the user charge in Kingstreet was an indirect tax because it was clearly

\(^{21}\) Constitution Act, 1867, supra note 4, s 92(2).

\(^{22}\) Kingstreet Investments Ltd v New Brunswick (Department of Finance), 2004 NBBR 84, 2004 NBQB 84 at para 55 [Kingstreet NBQB], rev’d Kingstreet SCC, supra note 1.

\(^{23}\) Kingstreet SCC, supra note 1 at para 4. Perhaps more accurately, the province did not appeal this finding. Bastarache J observed: “The Province did not appeal from this judgment. Before the Court of Appeal, the parties agreed that the user charge constitutes an unlawful tax. Robertson J.A. rejected the appellants’ attempts to recharacterize the user charge as either a direct tax which could not be imposed by way of regulation, or as ultra vires in the administrative law sense. I agree: the trial judge’s decision that the user charge constitutes an unconstitutional indirect tax must stand” (footnotes omitted).


\(^{26}\) Kingstreet NBQB, supra note 22 at para 40.
passed on to the clubs’ patrons (“the user fee is finally paid by patrons when they purchase alcoholic beverages by the glass.”)\textsuperscript{27} However, the question of whether a tax is direct or indirect in any given case can give rise to fierce debate and divergent views.

2.4 The problem of unlawful taxation in England

In England, the problem of unlawful taxation can also arise in one of two main ways. On the one hand, the problem can arise when the government imposes tax pursuant to a regulation or other secondary legislation in the absence of an appropriate provision in primary legislation empowering it to do so. Such \textit{ultra vires} subordinate legislation is, as in Canada, a legal nullity. Indeed, the seminal case of \textit{Woolwich Equitable Building Society v Inland Revenue Commissioners}\textsuperscript{28} is such a case, as it concerned a demand for payment of tax under secondary legislation that was later found to be \textit{ultra vires} the powers granted to the then Inland Revenue under the Finance Act 1985. While the empowering Act gave the Inland Revenue the power to make regulations altering the mechanics of the collection of income tax on deposits held by building societies, the regulations were struck down because they effectively amounted to a new tax.

\textsuperscript{27} \textit{Ibid} at para 44. Russell J contrasted with the gasoline charge in issue in \textit{Air Canada v British Columbia}, [1989] 1 SCR 1161, [1989] SCJ No 44 [\textit{Air Canada}], which was held to be a direct tax because, although Air Canada passed on the gasoline charge to customers through increased prices they charged for air travel, the customers were ultimately purchasing air travel, not gasoline. Air Canada was itself the purchaser and user of the gasoline, and the gasoline tax was therefore a direct tax.

\textsuperscript{28} \textit{Woolwich Equitable Building Society v Inland Revenue Commissioners}, [1993] AC 70 (HL) [\textit{Woolwich}].
As regards the constitutional competence of the legislature to enact legislation that imposes (or authorizes the imposition of) direct or indirect taxation, the United Kingdom is not a federal country in the same way as is Canada and does not have a written constitution that allocates taxing jurisdiction amongst its constituent countries (of which England is one). However, as I have already alluded, EU law possesses a somewhat quasi-constitutional status in the UK because the European Communities Act 1972 – which incorporates directly effective EU law into the UK domestic legal order – provides (by way of section 2) that all primary and secondary legislation is subject to directly effective provisions of EU law.

This means that where EU law applies, it takes precedence over incompatible domestic laws, which must be read down in order to achieve conformity with EU law or otherwise dis-applied. Tax legislation is no exception, and many of the most significant tax recovery cases in

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29 In the UK, the Westminster Parliament is, at last as a matter of constitutional theory, entirely sovereign and can enact whatever laws it wishes: see paragraph 43 of the majority of the UK Supreme Court’s decision in R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583.

30 See Thoburn v Sunderland City Council, [2002] EWHC 195 (Admin); [2003] QB 151 at paras 62-63, describing the European Communities Act 1972 (UK), c 68 as a special type of constitutional statute that cannot be impliedly repealed (“[The Act] incorporated the whole corpus of substantive [EU] rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of [EU] law It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The [Act] is, by force of the common law, a constitutional statute”).

31 European Communities Act 1972 (UK), c 68.

32 The significance of the concept of “directly effective” EU law is outside the scope of this thesis, but in essence, the term refers to provisions of EU law that may be immediately relied upon or invoked before a national or European court without further domestic implementation measures.

33 Section 2(1) of the European Communities Act 1972 (supra note 31) provides: “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...”). It is envisaged that this Act will be repealed immediately upon the UK’s withdrawal from the European Union in 2019 (see Bill 5, European Union (Withdrawal) Bill, 2017-2019 sess, 2017 (1st reading 13 July 2017).

England in recent times have come about because a taxing provision that Parliament enacted has been held to breach fundamental freedoms guaranteed by EU law (such as the free movement of capital, goods, services and people, the freedom of EU nationals to establish their businesses, trades and professions outside their home states, and the prohibition on discrimination on grounds of nationality). Indeed, since the 1990s, there has been an explosion in such litigation in the UK, with numerous direct and indirect tax provisions being successfully challenged on the basis that they are incompatible with EU law. The sums at stake are also significant: for example, in one piece of group litigation that commenced in 2003 and continues to this day, the value of all claims has been estimated at £5 billion, with the issues having already been considered by the Court of Justice of the European Union (the “CJEU”) on three occasions, the High Court and Court of Appeal twice, and the Supreme Court once.

Having established the background, I now turn to the substance of this thesis. In Part II, I examine the extent to which Kingstreet’s recognition of a standalone cause of action on constitutional grounds – to the exclusion of a cause of action in unjust enrichment – is taxonomically logical, normatively justifiable and coherent from the perspective of internal consistency within the Canadian law of restitution. In Part III, I turn my focus to the concept of an enrichment and examine to what extent the government is enriched when it receives unlawful tax in both Canada and England.

Part II: The recognition of a cause of action on ‘constitutional grounds’ and implications for the Canadian law of restitution

In paragraph 13 of his judgment, Bastarache J held that: “because of the constitutional rule at play, [a claim for the recovery of unlawful tax] can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation…”37 As for the “constitutional rule at play”, it appears that Bastarache J was particularly concerned with two principles: (i) the prohibition on the Crown levying tax except with Parliament’s or a provincial legislature’s authority; and (ii) the need to respect the rule of law (which would otherwise be infringed if the Crown were permitted to retain taxes pursuant to ultra vires legislation).

Few would doubt the importance of these constitutional principles or dispute that a taxpayer should, in principle, be able to recover amounts of unlawful tax it has paid pursuant to ultra vires legislation. To this end, Bastarache J’s definitive rejection of any rule immunizing the government from such claims is to be welcomed.38 However, does it necessarily follow that these principles can only be protected through the recognition of a standalone restitutionary cause of action on “constitutional grounds”? In this Part, I argue that Bastarache J’s recognition of a standalone “constitutional cause” of action to the exclusion of unjust enrichment is an unwelcome development for the Canadian law of restitution. This is for three main reasons: (i) first, it is incoherent from a taxonomical point of view; (ii) secondly, it is normatively unjustifiable because it overrides the general principle that the Crown should be subject to the same private law causes of action and remedies as private citizens; and (iii) thirdly, it leads to internal inconsistency within

37 Kingsstreet SCC, supra note 1 at para 37.
38 Ibid at paras 19-20. Bastarache J rejected La Forest J’s obiter dicta in Air Canada (supra note 27) that sought to immunize public authorities from restitutionary claims for the recovery of money levied under ultra vires legislation.
the Canadian law of restitution. In addition, the growing availability of claims in unjust enrichment against the Crown in an array of other contexts – even where the allegation raises underlying constitutional questions – suggests that the protection of fundamental constitutional principles does not necessarily require a concomitant constitutional cause of action. It is therefore time to question whether the Kingstreet cause of action continues to serve any useful juristic purpose.

3.1 The Kingstreet cause of action: positioning it within the legal taxonomy

While some maintain there is no distinction between “public law” and “private law”, it is clear the law treats public bodies in very different ways from private citizens. Not only are public bodies (many of which are creatures of statute) empowered to act in ways that can have a substantial impact on the lives of private citizens, but there is also a whole body of law – administrative law – that controls the way in which public bodies carry out their activities. In a very real sense, public law grants powers, imposes duties and confers remedies that are not available under the ordinary private law that governs relationships between private citizens. For this reason, Bastarache J’s recognition of a new ground for restitution – restitution on constitutional grounds – raises important questions about where the Kingstreet cause of action fits in taxonomically.

This discussion raises an equally important preliminary question: why does taxonomy matter? Although the functional and normative utility of legal taxonomy is open to debate, it is hard to deny that it serves a useful purpose at least insofar as it “facilitate[es] use and discussion of law, support[es] critical evaluation of law, and influenc[es] the outcomes of legal decision-
In other words, legal taxonomy matters because it forces us to identify the underlying rationale for different legal rules and promotes legal certainty by making it easier to identify commonalities between cases so that similar ones can be treated alike.

From that perspective, where does the cause of action recognized in *Kingstreet* fit in? Should it be classified as a public law or private law cause of action? On the one hand, because restitution is traditionally regarded as a private law remedy, it might be thought that the *Kingstreet* cause of action belongs in the private law sphere. However, Bastarache J’s express statement that the cause of action should be placed “within a public law context” suggests otherwise.

The difficulty is that Bastarache J gives us few clues about the ingredients of the *Kingstreet* cause of action or any explanation as to how the “public law remedy” available under it (i.e., the return of the unlawful tax) is any different from the restitutionary remedy that would be awarded to a taxpayer who is successful in a claim for unjust enrichment. Indeed, his description of the *Kingstreet* cause of action as a third branch of the law of restitution and (simultaneously) as a public law remedy creates taxonomical confusion and does little to promote certainty. As Lionel Smith observes, it makes no sense to speak of a public law of restitution when we do not, for example, speak of a public law of compensation whenever the government is sued in tort. He notes:

40 *Kingstreet SCC*, supra note 1 at para 31.
41 Maddaugh and McCamus make a similar point more pointedly: “There is simply no body of “public law” concerning the obligations of the Crown in these sorts of cases to which one might turn in order to discern the features or boundaries of the Kingstreet principle. More particularly, it is not at all clear what would be different about the nature of the liability imposed under “public” rather than “private” law” (Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Aurora, ON: Canada Law Book, August 2007) (loose-leaf 2015 supplement) at 22-35 [Maddaugh & McCamus].
“Claims for compensation against public bodies must be founded on some statute, or else on the law of tort or contract…. There are actually some torts that only public office holders can commit; misfeasance in public office is a clear example. We do not call this a public law remedy; we call it a tort.”42

As a cause of action, it should give us cause for concern that Kingstreet is difficult to classify taxonomically. Even if the best answer is that it straddles the private and public law divide, this still leaves its scope and boundaries – and its relationship with other private and public law causes of action – uncertain. At the very least, this should give us cause to question the strength of its conceptual foundations and its merits as a standalone cause of action.

3.2 Kingstreet’s rejection of a claim in unjust enrichment: normative perspectives

The difficulties with the Kingstreet cause of action are not just taxonomical: it is problematic for the further reason that it is inconsistent with the principle that the government should (in general) be subject to the same private law causes of actions and remedies as ordinary citizens. Indeed, the idea that the government should be subject to the same substantive and procedural rules as apply to private defendants has long been recognized as an important feature of the rule of law.43 Modern legislation relating to the commencement of civil proceedings against the Crown in every Canadian jurisdiction take this proposition as the starting point.44 While some

43 See, for example, Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Collen Flood and Lorne Sossin, Administrative Law in Context, 2nd ed (Toronto: Emond Montgomery Publications Limited, 2013), ch 2, which provides a concise overview of the different conceptions of the rule of law by jurists such as Albert V. Dicey and Joseph Raz.
44 See Peter Hogg and Patrick Monahan, Liability of the Crown, 4th ed (Toronto: Carswell, 2011) at 30-31 for a list of the Crown proceedings statute that apply in each Canadian jurisdiction [Hogg and Monahan].
exceptions remain, “the idea of equality has become the presumption, and special rules, however ancient in their origin, are preserved only if modern statutes say so.”

Today, the idea that the government should be accountable for wrongs in the same way as private citizens has arguably achieved normative status as a fundamental requirement of the rule of law.

Unsurprisingly, Kingstreet has been criticized in the literature for being inconsistent with this fundamental principle. Michell McInnes, for example, calls Kingstreet “troubling” because it completely bars a taxpayer from relying on the private law cause of action of unjust enrichment in order to seek recovery of unlawfully levied tax. While the trade-off is the recognition of a new restitutionary cause of action on constitutional grounds (which Bastarache J considers will give a taxpayer a more direct route to recovery) the point nevertheless remains that a taxpayer’s choice to rely on the cause of action that it considers best suits its interests has been taken away. Smith makes a similar criticism: “It is not clear why we should have “constitutional restitution”, as opposed to using the ordinary private law of unjust enrichment …. The private law, as it applies against the Crown, has a crucial constitutional role to play in our system.”

The ability to deploy private law causes of action against the government can also provide a valuable means for holding the government to account and a path to securing certain remedies – especially monetary remedies – as a matter of right. Indeed, as Rebecca Williams points out, “[Public law] cannot satisfactorily explain why the remedy for ultra vires taxation must take the form of [the return of money].” Because public law is primarily about ensuring that the

45 Hogg and Monahan, ibid at 31.
47 Smith, supra note 42 at 28.
government acts within its constitutional remit, there is necessarily no presumption that a monetary award should or will be available in all cases. Only private law causes of action can secure a monetary award as of right at common law.

By requiring a taxpayer to rely on a ‘public law’ restitutionary cause of action to the exclusion of a claim in unjust enrichment, Kingstreet infringes the principle that a private citizen should ordinarily have access to the full range of private law causes of actions and remedies against the government. To that extent, Kingstreet heralds in an unwelcome development.

Moreover, to the extent it might be thought that a constitutional right to restitution will provide taxpayers with better safeguards from interference with their claims for restitution, that too is misconceived. Just over four months after the Supreme Court’s judgment in Kingstreet, the New Brunswick legislature passed legislation to amend the Liquor Control Act in a way that effectively defeated claims for restitution by licensees who, like Kingstreet, had paid the ultra vires user charge.\(^49\) In particular, pursuant to the Act to Amend the Liquor Control Act,\(^50\) the province retroactively imposed a direct tax on individuals who had purchased alcohol from licensees in an amount equal to the user charges that the licensees had previously paid. The amendment deemed the licensees to have collected (and to have remitted) the tax as the province’s agent, with the user charges previously paid being treated as satisfying the amounts that were now deemed to have become due as a new direct tax.

\(^{49}\) It appears, however, the Kingstreet itself was spared: see New Brunswick, Public Safety Department, Communications and Public Awareness Branch, News Release, “Government To Amend Liquor Control Act” (7 February 2007), online: Communications New Brunswick <http://www.gnb.ca/cnb/news/ps/2007e0159ps.htm>. The press release states: “The minister noted that Kingstreet Investments, at great expense to itself, presented the case to the courts, which identified the fee as an illegal indirect tax, and he said the government would reimburse the appellant in line with the court decision.”

\(^{50}\) Act to Amend the Liquor Control Act, RSNB 2007, c 23.
The use of remedial retroactive legislation in this way gives rise to a number of issues.\(^\text{51}\) Although the Supreme Court affirmed in both *Air Canada v British Columbia*\(^\text{52}\) and *Kingstreet*\(^\text{53}\) that the enactment of a valid tax with retroactive effect is permissible as a means for the government to retain tax that was previously collected pursuant to *ultra vires* legislation, such actions have clear implications for the rule of law. Indeed, it seems odd that Bastarache J so readily accepted the prospect of retroactive remedial legislation in a situation such as this despite the great lengths to which he otherwise went to emphasize that allowing the government to keep *ultra vires* tax would infringe the rule of law.

This is not to say that retroactive legislation is never permissible. However, absent exceptional circumstances, there is at the very least a serious question as to whether the rule of law, upon which Canada is said to be founded in the preamble to the *Charter*,\(^\text{54}\) makes it unacceptable for the government to use the legislature as a vehicle for reversing adverse litigation when the result is undesired.\(^\text{55}\) If the sums at stake in a future case are sufficiently high, a taxpayer who finds its claim defeated in this way may well be incentivized to grasp the nettle of pursuing a challenge against the constitutionality of this legislation, especially on the basis that it infringes the overarching supremacy of the rule of law recognized in the *Charter*. Although further consideration of this issue is outside the scope of this thesis (and a taxpayer pursuing such a claim will almost certainly face a steep uphill battle), the important point to note for present purposes is

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\(^{51}\) See, for example, the discussion in Ian Blue, “Snuff Acts and the Rule of Law”, 2008-2009 5 Advoc Q 418 at 52 *Air Canada, supra* note 27, 53 *Kingstreet SCC, supra* note 1 at paras 13 and 27. 54 Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*]. 55 New Brunswick estimated that reimbursement of all the charges levied would have set New Brunswick back by approximately $12 million (excluding interest) (see *supra* note 49). It seems fair to observe that New Brunswick would not have faced a fiscal catastrophe if it had allowed the result in *Kingstreet* to stand.
this: not only does Kingstreet deny a taxpayer the right to *choose* to bring a claim in unjust enrichment, but the constitutional right to restitution recognized in *Kingstreet* offers taxpayers little by way of extra assurance that their claims will be respected and upheld by the executive and the legislature.

3.3 Preserving the internal coherence of the Canadian law of restitution: *Kingstreet’s impact*

Finally, I turn to consider what impact *Kingstreet* has had on the internal coherence of the Canadian law of restitution. In light of more recent Supreme Court authority regarding the availability of claims in unjust enrichment against the government, the time is ripe to reconsider whether the *Kingstreet* cause of action continues to serve any useful purpose.

3.3.1 Unjust enrichment against the Crown following *Elder Advocates of Alberta Society v Alberta*

My starting point is the 2011 judgment of the Supreme Court of Canada in *Elder Advocates of Alberta Society v Alberta*. Elder Advocates concerned the certification stage of a proposed class action by elderly patients of Alberta’s nursing homes and long-term care facilities who had been required to contribute to the costs of their accommodation and meals. The plaintiffs argued that the government of Alberta had artificially inflated the accommodation and meal fees in order to subsidize the costs of their medical care, which was prohibited under statute. The plaintiffs sought recovery of the overpayments (or damages of an equivalent amount), alleging that the

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government’s conduct constituted a breach of fiduciary duty, negligence or bad faith in the exercise of discretion. The plaintiffs also alleged that the excess charges violated their equality rights under s. 15(1) of the *Charter* on the grounds of their advanced age and/or mental or physical disabilities, and sought damages under s. 24(1) of the *Charter* (as well as a declaration that the provisions imposing the charges were of no force or effect). Finally – and most relevantly for present purposes – the plaintiffs also claimed restitution of the excess charges on the basis that the government had been unjustly enriched by the amount of those charges.

The Supreme Court of Canada struck out the plaintiffs’ claims for breach of fiduciary duty, negligence and bad faith in the exercise of discretion. However, it allowed the s. 15(1) *Charter* equality claims and the claims in unjust enrichment to proceed to trial. Delivering the Court’s judgment, McLachlin C.J rejected Alberta’s argument that the plaintiffs were barred from bringing a claim in unjust enrichment in light of *Kingstreet* (Alberta had argued that *Kingstreet* limited the plaintiffs to bringing public law claims against the government – such as a claim for misfeasance in public office – which would invariably be harder to prove). McLachlin C.J. held instead that *Kingstreet* was confined solely to claims for the restitution of *ultra vires* taxes, meaning that claims in unjust enrichment against Alberta for restitution of the excess accommodation and meal fees could proceed. As she observed:

“*Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating to restitution of taxes levied under an ultra vires statute … However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid

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57 *Ibid* at para 2.
58 *Charter, supra* note 54, s 24(1).
59 *Ibid* at s 15(1).
60 *Elder Advocates, supra* note 56 at para 90.
under an ultra vires statute. It is not therefore precluded by this Court’s decision in *Kingstreet*.61

*Elder Advocates* is significant for a number of reasons. First, it appears to circumscribe the *Kingstreet* cause of action to a very narrow basis, limiting it to claims for the recovery of *taxes*62 exacted pursuant to constitutionally *ultra vires* legislation. However, when the claim relates to *other* sorts of exactions – such as fees, levies or similar user charges paid pursuant to *ultra vires* legislation or legislation that infringes the *Charter* – *Kingstreet* does not apply: a claim for the restitution of such payments can proceed by way of a claim in unjust enrichment.63

Secondly, *Elder Advocates* appears to limit the scope of *Kingstreet* in one further significant respect. In light of McLachlin C.J.’s holding that *Kingstreet* applies only to unlawful taxes levied pursuant to *ultra vires* legislation, it is unclear how taxes levied pursuant to municipal by-laws (or other administrative schemes) that are unlawful in the administrative law sense can be recovered. Are they recoverable under the *Kingstreet* cause of action or by way of a claim in unjust enrichment?

In this regard, a tax will be unlawful in the administrative law sense when: (i) a municipality collects tax pursuant to a by-law that exceeds the limits of its powers under provincial empowering legislation or (ii) when such a by-law is held to be unreasonable.64 In both cases, the

61 *Ibid* at para 91.
62 In general, it has been held that a “tax” is a levy that is: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose (see *Re Eurig Estate*, *supra* note 25 at para 15).
64 See *Catalyst Paper Corp v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5, where the taxpayer unsuccessfully challenged the rates established in a tax by-law on the basis they were unreasonable having regard to objective factors such as the rate of consumption of municipal services.
provision imposing the tax can be quashed, meaning that any tax already collected will have been exacted without lawful authority.

These administrative law challenges are different from challenges to a taxing provision on constitutional grounds, where the argument is that the taxing provision is unconstitutional because it is *ultra vires* the provincial legislature’s constitutional competence or because it is imposed by executive order rather than by the legislature. Nevertheless – and despite the fact that in both situations the tax will have been exacted unlawfully – *Elder Advocates* suggests that the *Kingstreet* cause of action applies *only* where the tax been was paid pursuant to constitutionally *ultra vires* legislation. Where the tax was levied unlawfully in the administrative law sense, it seems that a taxpayer is left to pursue a claim in unjust enrichment.

This state of affairs has caused confusion amongst litigants with respect to which cause of action to plead. Indeed, even courts have found themselves caught up in the conceptual confusion. In at least two cases decided before *Elder Advocates*, taxpayers who challenged municipal taxing by-laws on the ground that they were unlawful in the administrative law sense were permitted to pay the disputed sums into court (rather than to the municipality itself) pending the outcome of their administrative law challenge. This was because of the uncertainty as to whether the plaintiffs would need to bring a claim in unjust enrichment or under *Kingstreet* to recover the tax from the municipality if their administrative law challenge ultimately succeeded.

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65 Highlighting the distinction, Voith J said in *Port Alberni (City) v Catalyst Paper Corp*, 2010 BCSC 402, [2010] BCWLD 3882 at para 19 that: “While an unreasonable decision can give rise to an error which is jurisdictional in nature… I do not consider that a challenge to a bylaw on the grounds of unreasonableness gives rise to a “constitutional case of action” [Port Alberni].

66 Ibid and *TimberWest Forest Corp v Campbell River (City)*, 2009 BCSC 1862.
For these reasons, it is difficult to see what justification there can be for treating claims to recover money exacted in breach of the *Charter*, or claims to recover tax that was paid pursuant to a by-law that is unlawful in the administrative law sense, any differently from claims to recover tax that was paid pursuant to constitutionally *ultra vires* legislation. In all these cases, equally important constitutional principles are at stake. Nevertheless, while the law of unjust enrichment is seen as capable of adequately responding to the mischief in the first two cases, it is seen as incapable of dealing with the mischief in the last case. As Robert Chambers observes in reference to *Elder Advocates*: “Why is the distribution of taxing powers in a federal system too important a constitutional principle to be left to the law of unjust enrichment, when the constitutional protection of the aged and infirm is not…?”

The time is ripe to consider options for rationalization. The proliferation of two separate causes of action to deal with what is fundamentally the same problem is unsustainable in the long run and threatens to disturb the internal coherence of the law of restitution. Given its confinement to a very narrow basis, it is difficult to see what useful purpose the *Kingstreet* cause of action can continue to serve, especially when unjust enrichment is the preferred cause of action in other cases where the government has collected money without any lawful basis. For these reasons, dispensing with the *Kingstreet* cause of action would not only serve to rationalize the Canadian law of restitution, but would also help to ensure that like cases are treated alike. Conceptually, this has much to commend it.

68 Maddaugh and McCamus share this view (*supra* note 41 at 22-43).
4 Part III: The Law of Unjust Enrichment and the Recovery of Unlawful Tax

Having examined the conceptual soundness of the *Kingstreet* cause of action in Part II, I now turn my attention to the concepts of an “enrichment” and a “corresponding deprivation” as the foundational bases for a claim in unjust enrichment. In *Kingstreet*, Bastarache J observed that unjust enrichment would be an unsuitable cause of action in part because it may be difficult for a taxpayer to show that the government has been enriched by the receipt of unlawful tax and that the taxpayer has been correspondingly deprived (especially if it passes on the burden of the unlawful tax to third parties).

In this Part, I critically evaluate Bastarache J’s observations on two fronts. First, I begin by examining the theoretical underpinnings of the concepts of an “enrichment” and a “corresponding deprivation” in the law of unjust enrichment. For this purpose, I focus on the straightforward case of a direct payment of money from one plaintiff to one defendant, which can broadly be analogized with the payment of tax by a taxpayer to the government. Secondly, I consider how the concept of an enrichment has been applied in the specific context of a claim to recover unlawful tax in England. The English case law on this subject is in a rapid state of development and so offers fertile ground for comparative study. In particular, the Court of Appeal in England has recently considered in what way – and by how much – the government is enriched by the receipt of unlawful tax in two important decisions handed down in May 2015 and November 2016. I will spend some time considering what they have to say.

I conclude that Bastarache J’s observations that there was no enrichment and no corresponding deprivation on the part of the taxpayer in *Kingstreet* are misconceived. Under the law of unjust enrichment in *both* Canada and England, it is clear that the government would be
treated as “enriched” by the principal amount of the unlawful tax received as at the moment of receipt. Moreover, under English law (and likely under Canadian law as well), the government would be treated as enriched by the time value of the unlawful tax such that a taxpayer would be entitled to a further award of restitution to reflect the time value of that money (in addition to the principal amount of the overpaid tax).

As regards the need for the taxpayer to be ‘correspondingly deprived’, the rejection of the passing-on defence, both in Kingstreet itself and now throughout the entire law of unjust enrichment, puts it beyond doubt that a taxpayer in Kingstreet’s situation would be correspondingly deprived despite having passed on the burden of the unlawful tax to third parties. As a result, Bastarache J’s rejection of unjust enrichment as a viable cause of action in Canada must be reconsidered in light of more recent jurisprudential developments that definitively address some of his concerns.

4.1 Introduction to the law of unjust enrichment in Canada

Tracing its origins as a cause of action to the Supreme Court of Canada’s decision in Pettkus v. Becker, the law of unjust enrichment in Canada was reformulated and restated by the Supreme Court in its 2004 decision in Garland v Consumer’s Gas Co. Garland concerned a claim by the customers of a gas utility service for the restitution of late payment penalties that exceeded the limit on interest rates set out in section 347 of the Criminal Code. The claims were advanced on the basis that the utility service had been unjustly enriched by the amount of the

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70 Garland, supra note 15,
71 Criminal Code, RSC, 1985, c C-46, s. 347.
excessive fees. Finding the utility service liable to make restitution, Iacobucci J held that the law of unjust enrichment in Canada comprised four elements: (i) the defendant must be “enriched”; (ii) there must be a corresponding “deprivation” on the part of the plaintiff; (iii) there must be no juristic reason for the defendant’s enrichment; and (iv) the defendant must have no defences.  

4.2 The need for an “enrichment”

The first limb of the Garland test requires us to ascertain not only if a defendant has been enriched by whatever it has received from the plaintiff, but also to what extent it has been enriched. According to McLachlin J in an earlier unjust enrichment case, “the word ‘enrichment’ … connotes a tangible benefit” that is capable of having a market value. Similarly, Goff & Jones observe that a “benefit can only form the basis of a personal claim in unjust enrichment if it has financial value. The law pays no attention to the cultural, religious, intellectual or emotional value of a benefit, unless these affect its financial value.”

Cases involving the transfer of money from a plaintiff to a defendant are straightforward examples of an enrichment because money is, by its very nature, inherently enriching. It is also enriching to the extent of its face value: money is “always valuable” and “equally valuable.” Moreover, as McInnes observes, “the receipt of money is doubly enriching. In addition to being beneficial in itself, money can be used to generate more wealth. The recipient accordingly enjoys

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72 Garland, supra note 15 at para 30.
73 Peel (Regional Municipality) v Canada, [1992] 3 SCR 762, 98 DLR (4th) 140, at 155 [Peel cited to DLR].
75 Mitchell McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham, ON: LexisNexis Canada, 2014), at 101 [McInnes, Restitution].
both the principal sum and its time value. The modern commercial world generally understands that time value as compound interest.”

However, the position is less straightforward so far as other types of enrichment are concerned. A commonly cited example is the provision of a service. Ascertaining by what amount the defendant has been enriched by a service case can prove exceedingly difficult. Moreover, the difficulty is compounded when the defendant claims to have never requested the service. Should it be forced to make restitution of the value of the service if it did not ask for it but has nevertheless been incontrovertibly enriched? Ernest Weinrib captures the problem by way of a simple example: C contracts with A to clean his shoes, but A mistakenly cleans B’s shoes instead. B is enriched by now having clean shoes. Should B liable to compensate A under the law of unjust enrichment for a service he did not request? Intuitively, the answer is “no”: what can B do but put his shoes – clean or dirty – back on?

To deal with this situation, the common law in both Canada and England recognize the principle of “subjective devaluation” – the principle that the law should respect individual autonomy and freedom of choice by being “attentive to the possibility that, regardless of the market’s perception of the purported enrichment, the defendant never choose to place value upon it and therefore should not be held liable.” Thus, although the ordinary rule is that a defendant should make restitution of the objective value of the enrichment it has received, the principle of subjective devaluation will provide a safety valve when the defendant is an involuntary recipient.

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76 Ibid at 102.
78 Ibid.
79 See, generally, McInnes, Restitution, supra note 75 at 96-98 ; Goff and Jones, supra note 74 at paras 4-08 to 4-25. But see Lodder, supra note 7 at 152:
80 McInnes, Restitution, supra note 75 at 97.
of an enrichment. Although an examination of the principle of subjective devaluation is outside the scope of this thesis, I will return to it briefly below as it has come up even in the context of a claim in unjust enrichment to recover unlawful tax in some of the most recent English cases.

4.3 The need for a “corresponding deprivation”

The second limb of the test for establishing a claim in unjust enrichment requires the defendant to show that it has been “correspondingly deprived” (or, to use the terminology in England, that the defendant’s enrichment has come at the “plaintiff’s expense”). The need for the plaintiff to be deprived is, in many respects, the necessary corollary to the defendant’s enrichment: it establishes the necessary nexus between the plaintiff and the defendant and is relevant (but not necessarily determinative) of the quantum of the restitution the defendant must make to the plaintiff. As Rothstein J observed in Professional Institute of the Public Service of Canada v. Canada (Attorney General):

“While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in Sorochan v. Sorochan, [1986] 2 S.C.R. 38, cited by Cory J. in his concurring reasons in Peter v. Beblow, at p. 1012, the enrichment and the detriment are “essentially two sides of the same coin.”

81 The significance of the different terminology is outside the scope of this thesis, although it is interesting to note that McInnes suggests the different formulation of this limb of the test in Canada is an “accident of bijuridicalism” (ibid at 143).

82 McInnes, Restitution, supra note 75 at 143.

Although Canadian case law does not always deal with the need for a corresponding deprivation consistently (and complications can arise when the enrichment takes the form of a service or involves multiple parties), in a case involving a direct transfer of money from one claimant to one defendant, it will be obvious that the plaintiff is the source of the defendant’s enrichment and that the latter’s enrichment directly corresponds to the former’s enrichment. As Cory J put it in Peter v Beblow: “once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.” Similarly, in England, the UK Supreme Court expressly recognized in Commissioners for HM Revenue & Customs v The Investment Trust Companies that the requirement for the defendant’s enrichment to be “at the expense of” the plaintiff will be satisfied when there is a direct transfer of value from the plaintiff to the defendant.

The view expressed in the literature is consistent with the position taken in the cases. Goff and Jones remark on the general lack of discussion in the case law about the second limb of the test in simple two-party cases involving the transfer of money “because it seems to be obvious that the defendant’s enrichment must have been gained ‘at the claimant’s expense’ on any sensible view of what this term means.” Similarly, McInnes calls it “trite” that, in a two-party situation, the fact that “the benefit received by the defendant was subtracted from the plaintiff [is what] explains why the former is strictly liable to the former.”

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84 McInnes’ survey of relevant Canadian cases shows that the principles in this area are far from settled (see McInnes, Restitution, supra note 75 at 155-169).
86 Commissioners for Her Majesty’s Revenue & Customs v The Investment Trust Companies (in liquidation), [2017] UKSC 29, [2017] 2 WLR 1200 at paras 46-66 [ITC]. Interestingly, however, this case concerned a claim against the Revenue for restitution by an indirect transferee. The claim was ultimately unsuccessful.
87 Goff & Jones, supra note 74 at para 6-02.
88 McInnes, Restitution, supra note 75 at 144.
Nevertheless, in Kingstreet, with respect to the second limb of the Garland test, Bastarache J observed that the concept of “loss” is “hard to apply in tax recovery cases.” Although this seems an odd proposition on its face – not least because a requirement to part with a sum of money will be inherently impoverishing to the payer – it is clear that what concerned Bastarache J was the impact of the so-called “passing-on defence”: the notion that “where the claimant incurs a loss by transferring a benefit to the defendant, but then makes good this loss by shifting it to a third party, the claimant cannot recover in an unjust enrichment action against the defendant.”

In Kingstreet, for example, the province sought to argue that Kingstreet had not suffered a corresponding deprivation because although it had initially paid the user charges when purchasing alcohol from the New Brunswick Liquor Corporation, it later recouped those user charges through the increased prices it charged to its own customers. As a result, the province argued that Kingstreet was not entitled to restitution under the law of unjust enrichment. Against this background, Bastarache J appears to have rejected unjust enrichment as a viable cause of action in part because of what he perceived to be Kingstreet’s difficulty in showing that it had been “correspondingly deprived” if it passed on the economic cost of the user charges to its customers by way of increased prices.

The legitimacy of recognizing a defence of passing on (or “disimpoverishment”, as it is sometimes called) is debated at length in the literature. In Kingstreet, Bastarache J rejected the defence because: (i) it was inconsistent with the basic premise of restitution law; (ii) it was

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89 Kingstreet SCC, supra note 1 at para 11.
“economically misconceived”; and (iii) it would often be exceedingly difficult to ascertain who had ultimately suffered the ‘deprivation’.\(^91\) Moreover, in *Pro-Sys Consultants*, the Supreme Court of Canada went further and rejected the defence throughout the entire law of unjust enrichment. As Rothestein J said: “the rejection of the passing-on defence in Kingstreet is not limited to the context of the imposition of ultra vires taxes. There is no principled reason to reject the defence in one context but not another: the passing-on defence is rejected throughout the whole of restitutionary law.”\(^92\)

The rejection of the defence of passing-on should be seen as a welcome development for a number of reasons. First, and perhaps most importantly, it avoids an unprincipled bifurcation of the question of whether a plaintiff has been deprived into two sub-questions: whether the plaintiff suffered an initial deprivation *and* whether its deprivation continues.\(^93\) The focus should properly be on the first question: if the plaintiff suffered an initial deprivation at the moment of the defendant’s enrichment, it is (or should be) irrelevant that it later recouped that loss from a third party. In *Kingstreet*, the taxpayer clearly suffered a deprivation at the very moment it paid the user charges when purchasing alcohol from the New Brunswick Liquor Corporation. Likewise, the Corporation was enriched at that very moment. For the purposes of making out a claim in unjust enrichment, Kingstreet’s cause of action should be treated as having crystallized at that very moment.

Secondly, the rejection of the defence of passing on prevents the unnecessary and unprincipled introduction of mitigation principles into the law of restitution. Although the steps a

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\(^91\) *Kingstreet SCC*, *supra* note 1 at para 44.  
\(^92\) *Pro-Sys*, *supra* note 8 at para 29.  
plaintiff takes to mitigate its loss may very well be relevant when the plaintiff’s claim is for compensation for a loss arising from the commission of a tort or breach of contract, restitution for unjust enrichment is not about compensation for a loss: it is about the *reversal* of an unjust enrichment. As Saville LJ observed in the English case of *Kleinwort Benson Ltd v Birmingham City Council*:

“The payee has been unjustly enriched by receiving and retaining money he has received from the payer and to which he has no right. He does not cease to be unjustly enriched because the payer for one reason or another is not out of pocket. His obligation to return the money is not based on any loss the payer may have sustained, but on the simple ground that it is unjust that he should keep something to which he has no right and which he only received through the payer’s performance of an obligation which did not in fact exist.”

Thirdly, focusing on who ultimately suffered the deprivation as a matter of “economic reality” is to ask the wrong question. In *Kingstreet*, Bastarache J considered that the defence of passing-on was “economically misconceived” and liable to give rise to “serious difficulties of proof” because even if Kingstreet increased its prices to recoup the user charges, this may have adversely impacted its overall sales and profitability. While this is a valid point, the more important point remains that the purpose of a claim in restitution for unjust enrichment is not to compensate for economic losses, but to reverse an unjust transfer. As Lord Reed observed in *ITC* (albeit in the different context of whether an indirect transferee who *had* ultimately borne the deprivation in economic terms could bring a claim for restitution in unjust enrichment):

“Looking to see who has suffered an economic loss is therefore not, in principle, the correct way of identifying the appropriate claimant. Indeed, even in tort law, which is concerned with compensation for loss, the court is not concerned with where the economic burden of the tort may ultimately have fallen as a matter of economic reality.”

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94 *Kleinwort Benson Ltd v Birmingham City Council*, [1996] 4 All ER 733 at 744d (CA).
95 *Kingstreet SCC*, *supra* note 1 at 48.
96 *ITC*, *supra* note 86 at para 60.
Of course, this will not apply in a case where the person who remitted the tax to the government merely acted as a tax collection agent. However, where a taxpayer suffers the burden of the tax initially, as did Kingstreet, it is both economically and juridically deprived as at that very moment.

The rejection of the defence of passing on in Canada should be seen as a welcome development. Its rejection also means that there is no juridical barrier to finding that a taxpayer in Kingstreet’s position has been deprived for the purposes of bringing a claim for restitution in unjust enrichment. Indeed, it is difficult to comprehend why Bastarache J observed that it would be “too difficult” to show that Kingstreet was deprived when he was prepared to discard the defence of passing on in its entirety. For these reasons, it follows that perceived difficulties with satisfying the second limb of the Garland test can no longer be a legitimate reason for rejecting unjust enrichment as a viable cause of action for the recovery of unlawful tax.

4.4 Unlawful taxation and the government’s “enrichment”

I now return to the main focus of this Part: whether – and if so, to what extent – the government is enriched by the receipt of unlawful tax. In Kingstreet, Bastarache J observed that “[while] it might be said that the retention of improperly collected taxes unjustly enriches governments … a technical interpretation of ‘benefit’ and ‘loss’ is hard to apply in tax recovery cases.”97 This perceived difficulty was one of the reasons why Bastarache J rejected unjust enrichment as a viable cause of action for the recovery of unlawful tax in Canada.

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97 Kingstreet SCC, supra note 1 at para 35.
As a matter of intuition, it is difficult to see how this statement can be correct. Why should money paid as unlawful tax to the government be treated differently from other cases involving the transfer of money from a plaintiff to a defendant (where the finding of an enrichment follows virtually automatically)? Given that money is inherently enriching, should it not follow that the government is enriched (and the plaintiff is correspondingly deprived) by the face value of unlawful tax as at the time of payment? Indeed, McInnes calls Bastarache J’s conclusion on this point “unconvincing: [the first two limbs of the Garland test are] easier to apply in tax recovery cases than in almost every other case. The loss is a payment of money, and the benefit is the receipt of that money”.98

In the remainder of this thesis, I focus on the question of whether (and if so, in what way) the government is enriched by the receipt of unlawful tax. I start first by considering the position under the English law of unjust enrichment. Recent English jurisprudence is helpful because it directly addresses two key questions: (i) in what way is the government enriched when it receives unlawful tax; and (ii) what are the relevant principles for computing the quantum of its enrichment? As the most recent judgments are lengthy and complex, I spend some time analyzing them in order to extract the relevant principles and identify where the conceptual difficulties lie.

My purpose is this: to identify whether there is any merit in Bastarache J’s observation that it would be too difficult to establish that the government is enriched when it receives unlawful tax. The approach taken by the English cases should offer illuminating insights to help answer this question, and may even offer a useful template for the future development of Canadian law in this area. My goal in this Part is to challenge Bastarache J’s ultimate conclusion that the Canadian law

98 Smith, supra note 42 at 23.
of unjust enrichment provides an inappropriate framework for dealing with claims for the recovery of unlawful tax. Although space precludes considering each and every one of his objections to unjust enrichment’s viability as a cause of action, by focusing on his concerns about the very essence of a claim in unjust enrichment – the need for the defendant to be ‘enriched’ – I hope to make some important headway.

4.4.1 The extent of the government’s enrichment: the position under English law

As the discussion below will demonstrate, the answer to the question of whether – and if so, to what extent – the government is enriched when it receives unlawful tax can give rise to a number of conceptual and practical difficulties. In England, the High Court’s and Court of Appeal’s recent judgments in the long-running litigation in *FII Test Claimants*\(^9\) and *Littlewoods*\(^1\) – both of which are presently on appeal to the UK Supreme Court – provide one of the most recent and comprehensive restatements of the applicable English law principles in this area. As both judgments are on appeal to the UK Supreme Court, we can expect yet further refinement of the principles over the next couple of years.

Although there are a large number of issues in each case raising complicated questions of UK tax law and EU law, these cases are relevant for present purposes because they establish two fundamental principles: when the government receives unlawful tax, it is enriched not only by the face value of the tax at the date of receipt, but also by the time value of money (that is, by virtue

\(^9\) *FII ChD 2* and *FII CA 2*, *supra* note 13.
\(^1\) *Littlewoods Retail Limited (and others) v The Commissioners for Her Majesty’s Revenue & Customs*, [2014] EWHC 868 (Ch), [2014] STC 1761 [*Littlewoods ChD 2*], aff’d [2015] EWCA Civ 515, [2015] STC 2014 [*Littlewoods CA*].
of being able to use the unlawful tax it has received). I will examine what these cases have to say about these issues in more detail below, but first, I will set out the pertinent facts of each insofar as they are relevant for present purposes.

I start first with the Court of Appeal’s most recent judgment in Littlewoods. The main claimant (Littlewoods Limited) carried on a home shopping business, distributing catalogues and selling goods through networks of agents who earned commissions on sales they made. Between 1973 and 2004, these commissions were mistakenly treated as consideration for services provided by the agents to Littlewoods and were therefore wrongly treated as subject to value added tax (“VAT”). VAT is an indirect tax that has its basis in EU directives transposed into domestic law. On this occasion, the relevant UK statutory provisions incorrectly transposed the EU directives, as a result of which Littlewoods made overpayments of VAT during a 31-year period of some £204 million.

Pursuant to the reclaim procedure set out in the Value Added Tax Act 1994, Littlewoods successfully reclaimed the principal amount of VAT it had overpaid with simple interest at the statutorily prescribed rates. The simple interest component of the repayment – amounting to some £268 million – exceeded the principal amount of overpaid VAT by some margin. However, Littlewoods took the position that an award of simple interest did not adequately reflect the time value of the VAT it had wrongly paid to the Revenue. It therefore claimed, by way of restitution, a further amount of interest computed on a compounded basis – to the tune of £1 billion.

The litigation in FII Test Claimants is more complex. It involves claims against the UK government for restitution in unjust enrichment following a determination that a number of provisions of the UK’s corporation tax regime in force between 1973 and 1999 were incompatible with EU law. In particular, two features of the regime were successfully challenged: (i) the
requirement for UK-resident companies to pay UK corporation tax on dividends received from foreign subsidiaries (in circumstances where dividends received from other UK subsidiaries were tax exempt) ("Case V corporation tax"); and (ii) the requirement for UK-resident companies to pay advance corporation tax ("ACT") when making distributions to their non-UK shareholders (in circumstances where a more advantageous regime applied when distributions were made to UK shareholders). Two further features of the ACT regime are important to note for present purposes:

(1) Shareholders receiving the distributions received a tax credit equal to the rate of ACT by way of set-off against their own UK tax liability (and, in some years, a tax-exempt shareholder could claim repayment of the tax credit in cash); and

(2) The ACT paid was later set-off against the corporation’s other corporation tax liabilities for the accounting period in question (often referred to as “mainstream corporation tax”). However, because there could be well over a year between the payment of ACT and its final set-off (or utilization) against mainstream corporation tax, corporations paying ACT found themselves at a cash flow disadvantage as compared with other corporations. Moreover, in certain cases, corporations found themselves accumulating a so-called “ACT mountain” because they were unable to fully utilize all the ACT against their mainstream corporation tax for the accounting period in question.

Against this background, the plaintiff corporations in FII claimed restitution of: (i) the principal amounts of unlawful Case V corporation tax and unutilized ACT they had paid; and (ii) the time value of the utilized ACT, computed from the date on which the ACT was paid to the date on which it was ultimately utilized against mainstream corporation tax.
4.4.2 Restitution of the principal amount of unlawful tax

Having established the relevant factual background, I start off by considering how the court in *FII Test Claimants* dealt with the plaintiffs’ claim for restitution of the principal amounts of Case V corporation tax and unutilized ACT. In many respects, these were the most straightforward claims for the High Court and Court of Appeal to deal with. This is because the Revenue appears to have conceded that it was, in principle, enriched by the principal amounts of the unlawful Case V corporation tax and unutilized ACT. At first instance, Henderson J observed as follows:

“the Revenue were clearly enriched by the monetary value at the date of receipt of the sums of unlawful [corporation tax] which were paid to them. Those sums were all paid in money. As the current editors of [Goff & Jones] … state at paragraph 4-12: ‘….Money is a universal means of exchange and defendants invariably desire things that money can buy. Hence they are invariably benefited by the receipt of money, and its face value is a reliable measure of their enrichment at the time when they received it’.” 101

Under the English law of unjust enrichment, it is therefore clear that a direct payment of tax to the Revenue will ordinarily lead to the conclusion that the government has been enriched by the principal amount of the payment as at the date of receipt. This is consistent with the discussion above about the ease with which an enrichment will ordinarily be established when the transfer from the plaintiff to the defendant takes the form of money: a sum of money is inherently enriching, and is worth the same amount in whoever hands it may be.

However, as the discussion below demonstrates, the position becomes more complex – and increasingly fraught with controversy – when the enrichment is said to take the form of the time value of money. As Lord Hope observed in *Sempra Metals*, “the availability of money to use is

101 *FIID ChD 2 supra* note 13 at para 266 (see, also, para 249 for the Revenue’s concession).
not unequivocally enriching in the same degree as the receipt of money.”102 It is this issue I now turn to consider.

4.4.3 Restitution of the time value of unlawfully levied tax

I will start with the Court of Appeal’s judgment in Littlewoods, which was handed down before the Court of Appeal’s judgment in FII Test Claimants.103 As a matter of precedent, the Court of Appeal in England is bound by its own previous decisions. Accordingly, it makes sense to start with the Court of Appeal’s reasoning in Littlewoods, as it will have heavily influenced how the Court of Appeal in FII Test Claimants dealt with many of the same issues.

4.4.3.1 The Court of Appeal’s judgment in Littlewoods

As I have already mentioned, Littlewoods claimed (by way of restitution at common law) an award of compound interest for the time value of the unlawfully levied VAT it had paid to the Revenue. This was on the basis that the Revenue had been unjustly enriched by having had the benefit of the money represented by the unlawful VAT from the date of its original payment to the date of its eventual repayment.

As a result of the House of Lords’ judgment in Sempra Metals, it has been settled law in England for nearly a decade that a court can make an order for compound interest to reflect the time value of money. As the Court of Appeal observed in Littlewoods: “Sempra was a historic decision …It is important to note that the House was unanimous that compound interest could be

102 Sempra Metals v Inland Revenue Commissioners, [2007] UKHL 34, [2008] 1 AC 561 at para 33 [Sempra].
103 As already mentioned, both cases are on further appeal to the UK Supreme Court.
recovered in restitution to reflect the time value of corporation tax which, as in that case, was mistakenly paid prematurely.”

However, *Sempra Metals* left a number of questions unanswered with respect to how the restitutionary award should be computed. Accordingly, the key question that the High Court and Court of Appeal faced in *Littlewoods* and *FII Test Claimants* was this: at what rate of interest should the compounding take place? Should the rate be determined on some objective basis (for example, by using the rates at which the government could borrow equivalent sums on the open market) or another basis that reflected the actual benefit the government derived from the overpaid tax (which the government argued was much lower)?

In this regard, it is interesting to note that Littlewoods’ starting point was that the rate of compounding did not have to be determined on the basis of the time value of the money in its *own* hands (e.g., the internal rate of return which it could have achieved had it not paid the unlawful VAT in the first place). Although it took the position that the time value of the money in its own hands was the correct measure *conceptually*, it nevertheless conceded that “the Government’s loss of use value provides a convenient minimum measure of, or proxy for, [Littlewoods’] own loss” (even though the use value would likely have been much higher in its own hands). Littlewoods’ concession on this point is significant in that it obviated the need for the High Court and Court of Appeal to resolve an important conceptual question: the extent to which the quantum of the defendant’s enrichment should be determined by the higher (or lower) of the plaintiff’s loss or the defendant’s gain. The question therefore remains open for another day.

104 Littlewoods CA, *supra* note 100 at paras 151-152.
105 Littlewoods ChD 2, *supra* note 100 at para 304.
4.4.4 Computing the award of restitution for the time value of money

This leads on to the next important question: if the government’s enrichment is to be computed by reference to the time value of the overpaid tax in its own hands, how should the quantum of that be computed?

The position taken by the taxpayers in both Littlewoods and FII starts from what is (on its face) a compellingly straightforward premise. They argued that the government must make restitution of the objective value – or market value – of the sum of money represented by the unlawful tax. For this purpose, this would mean treating the government as though it had received a “massive interest free loan” (to use Lord Nicholls’ terminology from Sempra Metals). The market value of that loan – and thus the computation of the restitution owed to the taxpayers – was to be determined on the basis of rates of interest that the government would have had to pay if it had borrowed the same amounts of money in the open market.

The Revenue, on the other hand, argued that this approach was inappropriate because the principle of subjective devaluation meant that the actual benefit the government derived from having had use of the unlawful tax was the correct measure of its enrichment. In advancing this argument, the government sought to rely on expert evidence to show that the receipt of unlawful tax did not necessarily correlate with a reduction in government borrowing (or, to put it another way, the government was not “saved” from having had to pay interest on commercial borrowings just because it had received the unlawful tax receipts). The government argued that because annual borrowing targets were fixed according to macroeconomic factors, the unlawful tax receipts would

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106 Sempra, supra note 102 at para 102.
(if anything) have led to increased government expenditure or a reduction of taxes. As a result, it was wrong in principle to compute the government’s enrichment on the basis that it would have had to borrow the sums that it received by way of unlawful tax in the open market at the interest rates then prevailing.

At first instance, Henderson J accepted the government’s expert evidence that its actual benefit from the unlawful tax receipts was lower than the objective market value of that money (as measured by market rates of interest on a loan to the government of an equivalent amount). This finding of fact was potentially very significant: the difference in the quantum of the government’s enrichment as calculated on the basis of actual benefit versus objective benefit was staggering – approximately £70 million versus £1 billion. Nevertheless, Henderson J held that the government could not, as a matter of principle, run an “actual benefit” argument. Instead, he held that the objective use value was the only correct measure. As he put it: “it could not be argued, with any degree of plausibility, that money is somehow less valuable to the Revenue, or to the Government, than it is to other commercial borrowers. Money may cost the Government less to borrow, but its value is the same, and is reflected in all different forms which Government expenditure may take.”

The Court of Appeal, however, took a slightly different view. Disagreeing with Henderson J, it held that because the Revenue had proved on a balance of probabilities that the actual benefit it obtained from the unlawful tax receipts was less than the market value of the time value of those

107 Littlewoods ChD 2, supra note 100 at para 400.
108 Ibid at paras 407 and 414; see also Littlewoods CA 2, supra note 100 at paras 144-145.
109 Littlewoods ChD 2, supra note 100 at para 414.
110 Ibid at para 374.
sums, its actual benefit could, in principle, be relevant to determining the quantum of its enrichment. Nevertheless, it ultimately took the view that objective value was the correct basis for computing the government’s enrichment in this case for the simple reason that the government was no ordinary defendant. In particular, the Court of Appeal noted that the purpose of the actual benefit principle was to recognize that, in certain cases, a defendant might find itself being an “involuntary recipient” of an enrichment:

“Given that the aim of a claim for repayment of money … is to make the defendant restore the gain he has made, and not to confer some windfall on the claimant, or to compensate him for his loss, the starting point in principle ought in our judgment to be that an innocent recipient of an overpayment should not have to make restitution of more than he actually received, not knowing it was an overpayment, unless he freely accepted the benefit of having an overpayment and the obligation to pay for it at market rates.” 111

However, it would be inappropriate to regard the Revenue as an ‘involuntary recipient’ in this case for two main reasons. First, even though the Revenue would not necessarily have known that the VAT was not lawfully due as a matter of EU law when it first received it (given that the incorrect transposition of the relevant EU directive into domestic law was only discovered at a later time), this was not enough to make HMRC an involuntary recipient: “It is obvious that, under a system of self-assessment, tax will from time to time be paid in error and that tax will have to be repaid. That is an inherent risk of a system of self-assessment.” 112

Secondly, the Court of Appeal considered that it would be inappropriate to treat the government as an involuntary recipient for the simple reason that the government was “well able to make a decision as to whether to use the money.” 113 As the Court of Appeal put it:

\[\text{Littlewoods CA, supra note 100 at para 193.}\]
\[\text{Ibid at para at 195.}\]
\[\text{Ibid at para 196.}\]
“196. [The government] is not compelled to use the money for government spending or reducing taxation. It was free to use the money for greater financial benefit by repaying borrowings or (subject to any restrictions on government investment) by placing the money on deposit. No doubt it would have repaid government borrowings if government borrowing rates were particularly high. The fact that it did not do so suggests that the rates may have been particularly favourable to government at the time.

197. In any event, if the money was spent on public projects, the court is entitled to take the view that it was well spent. It is difficult to value the benefit which the government obtains by spending the money for others' benefit. In those circumstances the court should err in favour of applying the objective use value to the benefits obtained by government. HMRC has not sought to prove that the money was not well spent or that there was some particular reason on the facts why it would be unfair to impose on government the burden of repayment with interest reflecting the savings in government borrowings.”

In *FII Test Claimants*, the Court of Appeal adopted largely the same reasoning in rejecting the government’s argument that “actual benefit” was the appropriate measure of the government’s enrichment with respect to the time value of the unlawful Case V corporation tax and ACT. As in the case in *Littlewoods*, the Revenue was regarded as having freely accepted the overpayments of tax and so its enrichment fell to be determined on the basis of the objective use value of that money (measured by compound interest at the rates at which the government could have borrowed in the open market).

In any event, it is interesting to note that Henderson J (who was the same judge at first instance in both cases) took a different view of the expert evidence the Revenue had adduced on this occasion to show that its actual benefit was lower than objective value. He held that the expert evidence was insufficient to show that the “actual benefit derived by the Revenue from the overpayments of tax was anything other than the opportunity to use and spend the money in the

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114 *Littlewoods CA*, supra note 100 at 197.
public interest.” Thus, even if it had been open to the Revenue to argue that its enrichment could be determined on the basis of the actual benefit it derived from the unlawful tax, it had failed to make out a case on the evidence that its actual benefit was lower than objective value.

This review of the most recent English authorities makes two things clear. First, under the English law of unjust enrichment, the government is ordinarily to be regarded as having been enriched by the face value of unlawful tax it receives as at the date of receipt. The fact that it may have used that money on public expenditures, to pay down the national debt, or to reduce its future borrowings does not detract from this proposition.

Secondly, and equally importantly, English law also recognizes that the government is enriched by the time value of the unlawful tax it has received until such time as it repays the principal amount. In FII Test Claimants and Littlewoods, the plaintiffs and the government agreed that the time value should be computed by reference to the average rate of interest of the yield on 10-year government bonds compounded every six months. It may therefore be that the time value of the unlawful tax will exceed the principal amount by a considerable margin, especially if many years have passed since the unlawful tax was first collected and/or interest rates during that period were particularly high. Littlewoods is a good example of such a perfect storm, with the time value of the unlawful tax exceeding the principal amount by a factor of four.

115 FII ChD 2, supra note 13 at para 421.
116 Ibid at para 449.
4.5  The “enriching” nature of unlawful tax under the Canadian law of unjust enrichment

Having examined the position under the English law of unjust enrichment in some detail, I now turn to consider the position in Canada. As I mentioned above, one of Bastarache J’s reasons for rejecting unjust enrichment as a viable cause of action in Canada was because he perceived there would be difficulty in showing that the government is “enriched” in the ordinary course when it receives unlawful tax. Although Bastarache J did not explain why this would necessarily be the case, it seems that he was concerned that the government’s legally unique position might give way to arguments that it could not be “enriched” because it was not free to benefit from money in the same way as could an ordinary private defendant.

In the section below, I consider to what extent the Canadian law of unjust enrichment would treat the government differently in so far as concerns the question of whether it is enriched by the receipt of money that so happens to be unlawful tax (as opposed to anything else). Following the lead of the English cases, I will consider two issues in particular: (i) whether the government would be enriched by the principal amount of the unlawful tax; and (ii) whether the government would be enriched by the time value of that unlawful tax.

4.5.1  Enrichment by the principal amount of unlawful tax

The natural starting point is the Supreme Court of Canada’s judgment in Garland, which concerned claims by the customers of a utility service for restitution of late payment penalties that had been illegally imposed. In that case Iacobucci J held that the question of whether a defendant has been enriched (and whether a plaintiff has been correspondingly deprived) lends itself to a “straightforward economic analysis”: where “money is transferred from plaintiff to defendant,
there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit.”\textsuperscript{117}

In other words, because money is inherently enriching, Iacobucci J clearly suggests that the enrichment limb of the \textit{Garland} test should ordinarily yield a straightforward answer when the subject matter of the enrichment is money.

\textit{Garland} itself stands for a further important proposition: what the defendant does with money it receives is irrelevant to determining whether or not it has been prima facie enriched. In that case, the utility service sought to argue it was not enriched by the late payment penalties because, as a matter of fact, the increase in penalties for some customers was offset by a corresponding decrease in general rates (such that the utility service was not the “real beneficiary” of the late payment fees on a “net” basis). Although a majority of the Ontario Court of Appeal accepted this argument, it was rejected by the Supreme Court. Iacobucci J held that a straightforward economic analysis inevitably led to the conclusion that the utility company was enriched; what the utility company did with the money thereafter was of no relevance to the first stage of the \textit{Garland} test.\textsuperscript{118} He said: “There is simply no doubt that [the utility company] received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit…”\textsuperscript{119} Moreover, Iacobucci J observed that there is no “requirement that the benefit be retained permanently.”\textsuperscript{120}

\textsuperscript{117} \textit{Garland}, supra note 15 at para 36.
\textsuperscript{118} \textit{Ibid} at paras 32, 36 and 37.
\textsuperscript{119} \textit{Ibid} at para 36.
\textsuperscript{120} \textit{Ibid} at para 37. However, the question of whether the defendant retained the benefit at the time of the plaintiff’s claim might be relevant to the question of whether a change of position defence would be available to the defendant.
By way of analogy, Garland supports the proposition that the government should be seen as enriched by the principal amount of unlawful tax it receives as at the date of receipt. A payment of tax is, at its core, a transfer of money from a taxpayer to the government. It should therefore follow as a matter of “straightforward economic analysis” that the government is enriched by the face value of the unlawful tax it receives. Moreover, as a matter of principle, what the government thereafter does with that money (i.e., whether it spends the money on public services, uses it to repay borrowings, or puts it on deposit) should not affect the fact that the government was enriched when it initially received that money.

A more recent decision from the Supreme Court lends further support to the proposition that what the government does with amounts of unlawful tax it receives should be irrelevant to the question of whether it has been enriched by the face value of that tax. In Professional Institute of the Public Service of Canada v Canada (Attorney General), various unions representing Crown servants brought actions against the government to challenge the way in which actuarial surpluses in federal employee pension plans had been dealt with. In particular, pursuant to legislation that came into force in April 2000, the government debited approximately $28 billion from some of the plans in order to reduce the actuarial surpluses in the plans’ accounts. On the alleged basis that the members had an equitable interest in the plans, they sought: (i) a declaration that the legislation did not permit any deductions; and (ii) an order requiring the government to re-credit the debited sums.

One of the issues in dispute was whether the government had been unjustly enriched by virtue of debiting the surpluses from the pension plan accounts. On this question, the Supreme Court held that because the pension plans had no assets and were mere accounting records, there was simply no enrichment on the part of the government and no corresponding deprivation on the part of the plan members. Because the first two limbs of the *Garland* test were not satisfied, the Supreme Court held that the plain members had not made out a prima facie case of unjust enrichment.

However, this decision is significant for present purposes because the Supreme Court expressly disagreed with the Court of Appeal’s approach to the question of the whether the government could be enriched as a matter of principle. On this point, the Court of Appeal held that the government could not be enriched because “whatever benefit there was to such actions enured to all Canadian taxpayers.”122 In other words, the Court of Appeal suggested that because the debited sums would become available for the government to use on other public expenditures, the government could not be “enriched” because it was the public as a whole that stood to benefit.

Rothstein J, delivering the judgment of the Supreme Court, rejected this proposition out of hand. At paragraph 155, he said:

“[I] do not understand the nature of the inquiry in the same way. The enrichment and corresponding deprivation elements ask whether there was a transfer of wealth from the plaintiff to the defendant. The fact that the defendant is a public body is irrelevant to whether such a transfer of wealth took place. Indeed, this reasoning would have the effect of insulating the government from any claim for unjust enrichment” (emphasis added).123

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122 *Ibid* at para 155.
This is significant because it affirms that there is no reason to treat the government differently with respect to the question of whether it is enriched just because of it legally unique position. Under the law of unjust enrichment in Canada – just as in England – the government will ordinarily be treated as being enriched by the face value of the principal amount of tax it receives as at the date of receipt. Not only is this conclusion sound as a matter of intuition, but it follows inexorably in light of Canadian authority on the highest level. Bastarache J’s suggestion that the enrichment limb of the *Garland* test might be too difficult to apply in the context of unlawful tax cannot stand.

4.5.2 Enrichment by the time value of money: the position in Canada

I now turn to consider the issue of the time value of money. Under the English law of unjust enrichment, a taxpayer seeking restitution of unlawful tax can claim an amount of restitution to reflect the time value of that money (computed by applying a rate of interest to the principal sum on a compounded basis). Would the law of unjust enrichment in Canada recognize the time value of money as an “enrichment” in the same way?

Although there is not as yet a Canadian equivalent to the House of Lords’ decision in *Sempra*¹²⁴, McInnes suggests that the direction of travel makes a similar breakthrough only a matter of time. In due course, “Canadian judges similarly must accept that, regardless of deliberate wrongdoing, a transfer of money provides the recipient with two restorable benefits: the principal sum and its time value.”¹²⁵

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¹²⁴ *Sempra*, supra note 102; McInnes, *Restitution*, supra note 75 at 105.
On this question, the Supreme Court’s decision in *Ermineskin Indian Band and Nation v. Canada*[^126] is of considerable interest and may serve as a launchpad for future developments. In that case, the Crown held money in trust for a number of First Nations bands, comprised largely of royalties from oil and gas reserves in Alberta. The Crown paid interest on these royalties at rates that varied over time. However, the bands alleged that the Crown had a fiduciary obligation to invest the royalties in a diversified portfolio that would have yielded hundreds of millions of dollars in additional investment income, and sought damages for breach of trust.

Although the bands’ claims were rejected both by the Supreme Court and the courts below, one of their arguments was that the Crown was unjustly enriched by having had use of the bands’ royalties. In particular, they argued that if the Crown had not had access to the bands’ royalties, it would have issued long-term bonds to obtain replacement financing at higher fixed rates. The government was therefore enriched to the extent of the difference between the rate at which it would have had to borrow and the rate it paid on the bands’ royalties.

At first instance, the judge heard evidence from a number of actuaries, economists and experts on government debt management to determine whether the government had been enriched for the purposes of the first limb of the *Garland* test. The judge held that the correct approach was to consider what the Crown would have done had it not had access to the bands’ monies. On the evidence, the judge held that the Crown would have used cheaper short-term debt financing (i.e., at rates lower than those which it paid to the bands on the royalties).[^127] He said:


[^127]: *Erminksen v Canada*, [2005] FCJ No 1992 (QL); 269 FTR 188 at para 305.
“At first glance, it may appear that there was a benefit because the plaintiffs' money was collected, held, and borrowed by the Crown. However, when one looks at what the Crown would have done had it not had any recourse to that money, it leads to the conclusion that the Crown would have sought any additional debt financing through use of short-term instruments. This form of debt financing would have allowed the Crown to reduce its costs, whereas with the Indian moneys on deposit in the [consolidated revenue fund], the Crown ended up paying more for access to them.”

Rothstein J, who delivered the Supreme Court’s judgment, agreed with the judge’s findings. He observed:

“The basis for determining whether the Crown was enriched is a comparison with what would have been the case had the Crown not had access to the royalties in the [consolidated revenue fund]. The trial judge found that the Crown could (and would) have obtained replacement funds at a lower cost, i.e. the short-term treasury bill rate, than the interest it actually provided on the royalties. I agree with the trial judge and the Court of Appeal that the Crown was not enriched.”

In other words, because the government would have borrowed at lower rates if it did not have access to the bands’ royalties, the first instance judge and the Supreme Court held that the government was not enriched from having had use of the bands’ money.

Ermineskin is an important decision because it implicitly recognizes that the time value of money can, in principle, constitute an enrichment. Although the facts of that case meant that the government was not enriched because the interest rates it paid on the bands’ royalties exceeded the objective value of the same amount of money in the open market, it is an encouraging development for the law of unjust enrichment – and a potential basis for taxpayers to argue that

128 Ibid at para 308.
129 Ermineskin SCC, supra note 126 at para 184.
the government is enriched by the time value of unlawful tax as well as by the face value of the principal amount of the tax.

By way of comparison, the position under the *Kingstreet* cause of action is far more restrictive. Although the plaintiff in that case did seek an award of compound interest (in addition to repayment of the principal amount of tax), Bastarache J held that this was “not an appropriate case for the awarding of compound interest as the appellants did not allege any wrongful conduct on behalf of the province that might warrant moral sanction.”\(^ {130}\) Indeed, it is interesting to note that Bastarache J took a more restrictive view than the majority of the Court of Appeal, which acknowledged that the plaintiff should be “entitled to interest to compensate [it] for the loss of the use of money that otherwise would have been available but for the unlawful demand and payment.”\(^ {131}\)

From a taxpayer’s perspective, this immediately exposes a deficiency with the *Kingstreet* cause of action. The requirement for the government to have acted with so-called “moral sanction” before a taxpayer can obtain restitution for the time value of money is difficult to comprehend. As Bastarache J observed in paragraph 13 of his judgment: “Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation ....” Why is it not equally important to recognize that a taxpayer will have also lost the opportunity to use its money, irrespective of whether or not the government acted with ‘moral sanction’?

\(^ {130}\) *Kingstreet SCC*, *supra* note 1 at para 62.

\(^ {131}\) *Kingstreet Investments Ltd v New Brunswick*, 2005 NBCA 56, [2005] ANB No 205 at 98 (rev’d *Kingstreet SCC*, *supra* note 1).
In conclusion, Bastarache J’s observation that the enrichment limb of the test is too difficult to apply in the context of a claim to recover unlawful tax is misconceived. Not only would a taxpayer readily be able to show that the government has been enriched by the principal amount of the unlawful tax, but the law of unjust enrichment in Canada is ripe for recognizing that the time value of money also constitutes an enrichment. The *Kingstreet* cause of action, on the other hand, fails to recognize this important principle, denying taxpayers the ability to obtain full restitution. Moreover, it outright denies taxpayers the ability to bring a claim in unjust enrichment for the recovery of unlawful tax, and so does them a further disservice. The time has therefore come to reconsider whether the *Kingstreet* cause of action has any continuing conceptual or practical utility.
Conclusion

In *Kingstreet*, Bastarache J recognized a new restitutionary cause of action on “constitutional grounds” as the only vehicle through which unlawfully levied taxes could be recovered at common law. He rejected unjust enrichment as a viable cause of action in the process, branding it inadequate as a means for protecting the important constitutional principles at stake whenever tax is collected unlawfully, and criticizing it for failing to provide taxpayers with a straightforward route to recovery.

This thesis challenges Bastarache J’s rejection of unjust enrichment in favour of a “constitutional right” to restitution on two fronts. First, this thesis argues that, from a theoretical perspective, the recognition of a standalone cause of action in *Kingstreet* is an unwelcome development for the Canadian law of restitution. This is because the *Kingstreet* cause of action: (i) is taxonomically incoherent; (ii) unjustifiably infringes the principle that the Crown should be subject to the same private law causes of action and remedies as private citizens; and (iii) leads to internal inconsistency within the Canadian law of restitution. Moreover, in the years since *Kingstreet*, it has been confined to a very narrow basis, applying only to claims for the recovery of taxes exacted pursuant to constitutionally *ultra vires* legislation. Seeing as a claim in unjust enrichment is available to recover taxes that are unlawful in the administrative law sense, or to recover other payments that have been exacted in breach of the *Charter*, it is questionable whether the *Kingstreet* cause of action continues to serve any legitimate or purpose as a standalone cause of action.

Secondly, this thesis challenges Bastarache J’s negative treatment of the *Garland* test as a viable means for recovering unlawful tax. Bastarache J rejected unjust enrichment as a cause of
action in part because he considered it would be unduly difficult to show that the government has been enriched by the receipt of unlawful tax or that a taxpayer in Kingstreet’s position has been correspondingly deprived. However, neither conclusion stands up to close scrutiny in light of existing Canadian jurisprudence. Moreover, from a comparative perspective, recent developments in English law show that a cause of action based in unjust enrichment may provide taxpayers with a far more potent remedy. In particular, by recognizing that the government is enriched both by the principal amount of unlawful tax and by the time value of that money, taxpayers in England claiming restitution of unlawful tax stand to receive a remedy which accords far more with commercial reality than does the remedy available under Kingstreet. Although the Canadian law of unjust enrichment is still on its way to unequivocally recognizing that the time value of money is an enrichment in its own right, recent case law suggests that this is the direction of travel. The time is therefore ripe to reconsider whether Kingstreet – and its bar on advancing claims in unjust enrichment – should continue to represent the final word on the matter.
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