PRIVATE DILEMMAS, PUBLIC CONCERNS: CONVERGING VISIONS?

Articles

THE CONFLICT OF LAWS AND JUDICIAL PERSPECTIVES ON FEDERALISM: A PRINCIPLED DEFENCE OF TOLOFSON V. JENSEN

Jason Herbert

THE RESTITUTIONARY CLASS ACTION: CANADIAN CLASS PROCEEDINGS LEGISLATION AS A VEHICLE FOR THE RESTITUTION OF UNLAWFULLY DEMANDED PAYMENTS, ULTRA VIRES TAXES, AND OTHER UNJUST ENRICHMENTS

David Crerar

THE JOHN DOE INJUNCTION IN MASS PROTEST CASES

Julia Lawn

Note

UNEQUAL SHADOWS: NEGOTIATION THEORY AND SPOUSAL SUPPORT UNDER CANADIAN DIVORCE LAW

Craig Martin

Interview / Entretien

THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA: A CONVERSATION WITH JUSTICE ARTHUR CHASKALSON, PRESIDENT OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Kate Kempton and Malcolm MacLaren

Number 1 Winter 1998 Volume 56 Numéro 1 Hiver 1998
Widely regarded as Canada's leading business law firm

With over 110 lawyers conducting a national and international practice from our offices in Toronto, we are consistently at the heart of the largest and most complex commercial and financial transactions in Canada.

Our partners are recognized as among the best in Canada in their fields of expertise. More than three-quarters of our lawyers are partners of the firm, carefully chosen and committed to the highest standards of quality and client service. We are committed to a philosophy of partnership that is unique among major Canadian law firms, and that governs our working relationships with each other and with our clients.

Our clients include industrial, commercial and financial enterprises — domestic and foreign, public and private — ranging in size and complexity of operations from small businesses to diverse multinational corporations.

We focus our practice on inter-related fields of expertise in which we have the depth of experience and expertise to be a market leader.

For more information contact:
Frances Mahil, Director, Student Affairs
Tel: (416) 367-6966 Fax: (416) 863-0871
Email: fmahil@dwb.com
The Restitutionary Class Action:
Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments'

DAVID A. CRERAR**

Abstract ... 49

I Introduction ... 50

II Commonwealth and American Approaches to Restitution ... 51
Canada ... 51
Québec ... 54
Australia ... 55
England ... 56
The United States ... 57

III The Constitutional and Statutory Principles Underlying Recovery ... 59
Constitutional and Statutory Principles ... 59
Conceptual Rationales for Restitution of Ultra Vires Taxes ... 61
Mistaken Payment ... 61
Rights-based Analysis ... 62

IV Five Judicial Bars to Restitution ... 63
Mistake of Law Versus Mistake in Fact ... 63
Requirement of Fault or Bad Faith on the Part of the Government ... 64
Government Immunity from Restitution ... 66
Disruption of Government Finances ... 68

* The author would like to thank Professor Ernest Weinrib of the University of Toronto, Ward Branch of Russell & DuMoulin, Paul Michell of Tory Tory DesLauriers & Binnington, and Julia Lawn for their helpful comments on earlier drafts of this article. The author would also like to thank the editors of the University of Toronto Faculty of Law Review; and in particular, Aaron Palmer, Richard Warren, Noel Peacock, Grace Chow, Kelly Diemer, Avril Allen, and Malcolm MacLaren.

The Defence of 'Passing On' .............................................. 72

Canadian Applications of the Air Canada 'Passing On' Defence ...... 72

Commonwealth Rejection of the 'Passing On' Defence ................ 73

American Courts and the 'Passing On' Defence ....................... 74

Criticism of the 'Passing On' Defence .................................. 75

Restitutionary Attacks on the 'Passing On' Defence ................... 76

V The Class Action as a Vehicle for Restitution ......................... 77

Class Actions Facilitated Through Legislation ......................... 78

Class Actions Facilitated Through Restitutionary Principles ........ 80

The Problem of Minimal or Notional Loss ............................... 80

Minimal Individual Loss and the Defence of 'Passing On' ............ 82

VI Class Actions Against a Taxing Authority: Procedure ............ 83

Authority for a Class Action Against the Government ................. 83

Restitutionary Principles at the Certification Stage .................. 86

The Pleadings Disclose a Cause of Action ............................. 87

Identifiable Class ......................................................... 88

Common Issues ........................................................... 88

Class Proceeding the Preferable Procedure ............................. 89

Representative Plaintiff ................................................. 90

Remedies: the Distribution of Disgorged Moneys ....................... 93

VII Canadian Class Actions Based on Restitutionary Principles .... 95

Class Actions Based on Restitutionary Principles ...................... 95

Restitutionary Class Actions Launched Against Governmental and Quasi-governmental Bodies ..................... 96

VIII Conclusion ............................................................. 98
Recently, an increasing number of plaintiffs has sought the restitution of taxes levied unconstitutionally by various levels of government. The litigants in such suits have tended to be large corporations. However, taxes, by their very nature, fall upon the shoulders of many. Often the size or complexity of these taxes, coupled with the logistics of mass litigation, deters suits for recovery. The author argues that the class action, entrenched and expanded in Québec, Ontario and British Columbia legislation, offers an ideal vehicle for the mass restitution of ultra vires taxes. The article starts by reviewing common law jurisprudence of suits against tax-levying government bodies, including recent holdings by the high courts of Australia and England in favour of a general right to recovery. These cases stand in contrast to Air Canada v. British Columbia, the leading Canadian case on restitution of taxes unlawfully demanded. The second half of the article examines the reasons for the development of class action legislation. It argues that the relative procedural novelty of class actions and the relative substantive novelty of restitution can mutually inform one another. Class actions would allow regular citizens, and not just corporate litigants, to reclaim incorrectly collected taxes. To this end, the article explores Canadian legislation governing class proceedings, identifying legislative features especially germane to the proposed restitutionary class action. The article concludes by examining the relatively young Canadian jurisprudence on class actions, and reviewing the advantages and pitfalls of a class action suit for ultra vires taxes and other unlawfully demanded payments.

Un nombre croissant de demandeurs ont récemment essayé d'obtenir la restitution des taxes et des cotisations prélevées indûment par le gouvernement à divers niveaux et par d'autres instances. Ceux-là sont la plupart du temps des sociétés anonymes. Il n'en reste pas moins vrai que souvent l'importance et la nature complexe de ces taxes, ainsi que les dépenses d'engager ces actions, empêchent l'aboutissement de celles-ci. L'auteur affirme que la loi portant sur le recours collectif offre une manière parfaite d'effectuer une restitution globale des taxes et des cotisations indûment prélevées. L'article commence par rappeler la jurisprudence anglo-américaine au sujet de la restitution, tels les judgments du Haut Tribunal d'Australie et d'Angleterre en faveur d'un droit général à une restitution. La deuxième partie de l'article examine les raisons du développement de la loi du recours collectif. Il y est expliqué que le recours collectif permettrait aux particuliers de réclamer la restitution des taxes et des cotisations indûment retenues. L'article se termine par une analyse approfondie de la jurisprudence canadienne à l'égard du recours collectif et l'application de celle-ci au problème de la restitution.
But as for man, for the attaining of peace and conservation of themselves thereby, have made an artificial man, which we call a commonwealth; so also have they made artificial chains, called civil laws, which they themselves by mutual covenants, have fastened at one end to the lips of that man or assembly to whom they have given the sovereign power, and at the other end to their own ears.

— Hobbes, _Leviathan_, Part Two: _Of Commonwealth_

By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It has its affairs and its interests: It has its rules. It has its rights: And it has its obligations.

— _Chisholm v. Georgia_, 2 U.S. 419 at 455 (2 Dal.), Wilson J.

1 **Introduction**

The return of incorrectly collected taxes, fees and charges presents a burgeoning frontier in restitution. Despite the prominence of recent cases, restitutionary claims for illegal and otherwise improper levies are rare. One reason for this scarcity is found in the protection courts have afforded governments in exempting them from restitutionary principles. There are two additional reasons for this paucity of cases.

1. Given the relative novelty of class actions, restitution of *ultra vires* taxes, and even restitution itself, this article will be exploratory in tone. It is conceded that there is very little case law on the intersection of restitution and class proceedings, but this paucity in itself prompts the writing of this article. For this reason, the article will explore these topics using broad strokes. While the title and the central theme of this article focus on the recovery of taxes levied illegally by governments, it will also necessarily touch upon restitutionary scenarios in general, and their applicability as a cause of action for a class proceeding. Consequently, this article will use the phrase *ultra vires* taxes as a proxy for all moneys illegally or incorrectly collected, and thereby becoming the subject of restitution. Sometimes these moneys will not be taxes, but will represent levies, fees, fines, and other monetary collections by governmental, quasi-governmental, regulatory, and even private bodies. This article will note and distinguish the defendant's position where relevant to the principles discussed. Many of the arguments protecting governments from restitution are not applicable to a regular restitutionary dispute involving private corporations or semi-government agencies such as public utilities.

2. It is established law that a plaintiff cannot sue a government for civil damages in tort when that government has passed an *ultra vires* statute harmful to the plaintiff. See _Wellbridge Holdings Ltd. v. Greater Winnipeg_, [1971] S.C.R. 957, and _Central Canada Potash Co. v. Government of Saskatchewan_, [1979] 1 S.C.R. 42. In _Comeau's Sea Foods v. Canada_, [1995] 2 F.C. 467, the Federal Court of Appeal seemed to liberalize this strict prohibition by applying the two-part *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) test to potential negligence suits against the government. Under the test, the plaintiff could recover first, in a sufficiently close relationship between the plaintiff and the government where it is reasonably foreseeable that the government's negligence would cause damage to the plaintiff; and second if no considerations could negate this liability. The Supreme Court of Canada retreated slightly, deciding that the duty of care was to exercise due care in ascertaining the scope of the minister's discretion: _Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)_, [1997] 1 S.C.R. 12. The Minister need only exercise this discretion with good faith, according to the laws of natural justice.
First, by their very nature taxes and levies usually fall on many individuals. Second, these fiscal discrepancies are often quite small, for example, where a telephone interest charge exceeds the statutory allowance, or a Ministry charges user fees beyond those permitted by the regulations. Seemingly typical *ultra vires* tax cases are therefore never heard. Instead, litigation tends to arise where a small number of parties, usually well-financed corporations, have a strong pecuniary interest in challenging the tax. Examples of this difficulty include the leading Canadian, English, and Australian cases of *Air Canada v. British Columbia*, Woolwich Equitable Building Society v. I.R.C., and Commissioner of State Revenue v. Royal Insurance Australia Ltd., respectively. In these cases, the respective corporate plaintiffs had $4.4 million Canadian, £6.73 million English, and $1.9 million Australian riding on the outcomes. Alternatively, only an idiosyncratic and determined plaintiff such as wrestling promoter-cum-litigant George “Porky” Jacobs raises such a suit. The procedural framework of the jurisprudence has thus served the exceptions, rather than the rule. The class action represents a potent and appropriate means of securing just restitution beyond these exceptional cases.

### II COMMONWEALTH AND AMERICAN APPROACHES TO RESTITUTION

**Canada**

The statutory and jurisprudential development of this area of restitution follows a familiar pattern. Just as Canada led the Commonwealth nations in its recognition of restitutionary principles in *Deglman*, our courts have shown an early receptivity to claims for *ultra vires* taxes. Canadian judges, albeit not always in the majority, discussed seriously restitutionary principles in cases such as *Eadie, George (Porky) Jacobs, Amax Potash v. Government of Saskatchewan*, and *Hydro-Electric*

6. In addition to Air Canada’s $4.3 million, the late Pacific Western Airlines lost $1,934,122, while Canadian Pacific Airlines lost $7,052,785.
Commission of Nepean Township v. Ontario Hydro, earlier than did their fellow Commonwealth judges.

In the recent case of Regional Municipality of Peel v. The Queen, McLachlin J., the current Supreme Court authority on restitution, discusses the two philosophical approaches to unjust enrichment exhibited by Canadian courts. The first is the traditional 'categorical' approach, under which the majorities decided the cases mentioned in the previous paragraph. The traditional approach sees restitution as comprising a list of discrete categories, the application of which will work to allow or deny restitution to the plaintiff. An example of the categorical approach in the context of ultra vires taxes is found in the foggy distinction between mistakes of law and mistakes of fact. Under the former jurisprudence, the plaintiff could recover taxes paid under mistake of fact, and not mistake of law, unless the plaintiff fell into an exceptional sub-category where the government was more blameworthy in collecting the tax.

The second conceptual framework is the 'principled' approach, which looks for an overarching theory of restitution discerned from these categories. Pettkus v. Becker represents the Supreme Court endorsement of an examination of unjust enrichment not based on precedential categories, but on a consistent test based on the relationship between the parties. In Pettkus, Dickson J. (as he then was) stated that three criteria exist in every instance of unjust enrichment:

1. a benefit to the defendant;
2. a corresponding deprivation to the plaintiff; and
3. no juridical reason for the defendant's retention of the benefit.
Although subsequent Supreme Court jurisprudence illustrates that the practical manifestations of this formula are far from clear, it confirms that Canadian courts now seek to determine cases based on principle, rather than category.\(^5\)

McLachlin J. urged a typically Canadian response in advocating a middle path between the categorical and principled approaches. Her Ladyship saw the principle of “restoration of a benefit which justice does not permit one to retain,” as underlying both the traditional and principled approaches.\(^6\) However, this compromise, in itself, forms an overarching principle to guide restitutio nary enquiries. She confirms this by stating that new restitutionary situations will arise which defy traditional categories. In these situations, the general principle will work to allow the judicial remedy of unjust enrichment through restitution.\(^7\)

Although decided prior to Pettkus and Peel, Air Canada still serves as the leading authority for restitutionary suits to recover moneys paid under an *ultra vires* tax. The plaintiffs in Air Canada argued that the British Columbia Gasoline Sales Tax should not be, and should not have been, levied on gasoline ultimately to be consumed outside the province. To do so would exceed the scope of s. 92(2) of the *Constitution Act, 1867*, limiting provincial power to direct taxation within the province for provincial purposes.

Five of the judges decided that two pieces of retroactive legislation allowed the government to retain the *ultra vires* taxes. As this settled the dispute between the parties, the enquiry could have ceased there. Four judges in two separate decisions, however, went on to consider the question of whether a taxpayer could generally recover moneys paid under an *ultra vires* law. La Forest J., with whom Lamer and L'Heureux-Dubé J J. concurred, wrote the majority, with Wilson J. providing a strong dissent. These views, representing the most interesting part of the judgment and the part most germane to this article, could be considered *obiter dicta*. However, given that these judicial considerations establish a general conceptual framework for restitution of *ultra vires* taxes, they could also be considered the most important sections of the decision.

La Forest J. held that an “exceptional” rule should generally block recovery of *ultra vires* taxes, “at least in the case of unconstitutional statutes.”\(^8\) He advanced two grounds for denial of restitution. Where the plaintiff taxpayer would be enriched by ‘passing on’ the tax burden to its customers, or where the restitution of the tax would disrupt government finances, the court should deny recovery.\(^9\) Wilson J. dismissed these defences as policy-driven considerations which should not intrude upon a

---


17. *ibid.*, at 155.

18. *Air Canada*, supra note 3 at 196-97.

19. These defences will be discussed in greater detail in Part IV, below.
**prima facie** right of recovery. For Her Ladyship, the taxpayer should recover the payments simply because they were not due. While it is not entirely fair to label the La Forest J. and Wilson J. judgments according to Peel, decided four years later, it is submitted that the Wilson J. judgment approximates the principled approach suggested by McLachlin J. La Forest J., in crafting rules and exceptions extraneous to the tripartite unjust enrichment analysis, represents a more categorical approach, with his "exceptional" rule against recovery of *ultra vires* taxes. While the rest of this article will offer evidence of judicial and academic unease with *Air Canada*, its precedential authority establishes that the categorical approach will act to deny restitution in most suits for recovery against governments.

**Québec**

The influence of Québec is perhaps not insignificant to Canada’s leadership in restitution. In *Nepean*, Dickson J. cites the Québec Civil Code in his strong dissent advocating restitution. The Québec Civil Code dedicates two sections to restitutionary principles in Chapter 4: Section II, *Reception of a Thing not Due*, and Section III,
Unjust Enrichment. Article 1491 states that a payment made in error, or made under protest to avoid prejudice, obliges the recipient to return the payment. Article 1376 states that this rule binds the state, just as it does all other legal persons in public law, subject to other applicable laws. The former Article 2260(8) expressly anticipated restitutory suits against the government "[f]or recovery of taxes or assessments paid by error of law or of fact." Given this tradition, it is tempting to hypothesize that Canada's one civilian province would have an impressive jurisprudence on recovery of such taxes. Furthermore, as Québec has had class actions since 1979, one would hope for a detailed exploration of the interplay between the two spheres. Unfortunately, the scarcity of cases leaves this theory untested. Ultimately, Quebec seems to have followed the rest of Canada in denying the restitution of illegally-levied taxes. In Télébec Ltée v. Québec (Régie des télécommunications), the Québec Superior Court applied the La Forest J. decision in Air Canada to deny restitution of telephone licensing dues, and confirmed a general presumption against recovery of ultra vires taxes.  

Australia

Like Canada, Australian courts explored restitutory actions at an earlier stage than did English courts. In Mason v. New South Wales, the High Court held that the threat the state may seize the taxpayer's property could constitute duress justifying restitution. The Court thus ordered restitution of a licence fee demanded from road carriers under an ultra vires statute. Mason is also significant to this article in that it specifically rejected an attempt by the defendant New South Wales to advance a 'passing on' defence.
The recent case of *Royal Insurance Australia* serves as the Australian *Woolwich* and *Air Canada*, establishing a conceptual framework for restitution of moneys collected by a government body. The taxpayer insurance corporation, ignorant of 1987 amendments to the *Stamp Act*, had continued to overpay duties on policies it issued. When it discovered the overpayment, it sought a refund, which the Comptroller refused without reasons. The High Court held that recovery could be justified under the 1987 amendments, imposing upon the Commissioner a duty to refund overpayments. Alternatively, disgorgement would be necessary as it would be unjust for the Commissioner to retain the money. The majority decision of Brennan J. would have returned the money on narrow statutory grounds. In a judgment exploring both the statutory and restitutionary bases of recovery, Mason C.J. applies principles of unjust enrichment unadulterated by policy concerns for the government-qua-defendant:

“[P]rima facie, that is all that is required where, as here, the recipient has no legal entitlement to receive or retain the moneys. The recipient has been unjustly enriched. Indeed, it is perhaps possible that the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim without the need to show any causative mistake on the part of Royal.”

Consistent with the application of pure restitutionary principles, the majority of the panel dismissed the defence of ‘passing on,’ while Mason C.J. went on to dismiss, as well, the defence of disruption of government finances.

**England**

English courts have been slow in recognizing principles of unjust enrichment. Even in 1977, Lord Diplock, in *Orakpo v. Manson Investments Ltd.*, stated that England recognized no doctrine of “unjust enrichment.” Recent decisions by the House of Lords, however, have established England’s restitutionary leadership, especially in the realm of suits against government authorities for *ultra vires* taxes.

The recent House of Lords decision in *Woolwich* established a *prima facie* right of recovery of money pursuant to an *ultra vires* demand of a public authority. In *Woolwich*, the plaintiff building society made under protest tax payments approaching £57 million, which were demanded under the *Income Tax (Building Societies) Act*. Woolwich challenged the regulations, which the House of Lords determined to have been *ultra vires*. The government returned the taxes, but

---

31. *Royal Insurance Australia*, supra note 5.
32. Ibid. at 57.
33. Ibid. at 58-63, Mason C.J., and 69-70, Brennan J. See Part IV, below.
34. Ibid. at 57-58. See Part IV, below.
claimed that this refund was discretionary and that no interest would be paid. Woolwich sued to recover the interest, and once again the House of Lords found in its favour. Although various competing rationales for recovery emerge from the judgment, one clear basis for recovery was the requirement of common justice, enshrined in the Bill of Rights, of the restitution of taxes illegally collected. In the words of Lord Goff:

"Stated in this stark form, as a matter of common justice to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J. pointed out, the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to me to require the tax to be repaid, unless special circumstances or some principle of policy require otherwise: prima facie, the taxpayer should be entitled to repayment as of right." 37

Two other Lords gave speeches which, along with that of Lord Goff, established a majority in favour of a right of general recovery for the deprived English taxpayer.

The United States

The vast jurisdictional and statutory complexities of American approaches to restitution of moneys incorrectly or illegally collected are beyond the scope of this article. 38 Nonetheless, three factors make the American laws less useful to the present enquiry than those of the Commonwealth jurisdictions above. First, in contrast to the common law principles governing restitution in Canada, complete or partial legislation will govern the issue in many states. 39 Second, in contrast to recent Commonwealth decisions advocating a principled approach to restitution, American decisions have liberally wielded the shield of public policy to block recovery. Third, most jurisdictions retain categorical bases for granting or denying restitution, some of which have been rejected in Canadian courts. 40 A taxpayer paying an illegal tax may not recover by claiming mistake, as his is a mistake of law, for which there is no recovery. 41 The sole basis of recovery will usually remain with the explanation that a tax was paid under duress. However, many jurisdictions will deem the taxpayer to have paid the

37. Woolwich, supra note 4 at 172.
39. For example, the federal tax system provides mechanisms for recovery of taxes incorrectly collected: 26 U.S.C. 7442. Of the jurisprudential guidance offered by studying these myriad statutes, Palmer states that “the variances [between the statutes] are so great that no useful general statements about them can be made.” Supra note 38 at 14.20.
40. See Part IV. below, for the limitations of applying concepts of duress and mistake of law to Canadian restitutionary cases.
41. See Part IV. below.
tax voluntarily simply by virtue that the taxpayer did in fact pay. This doctrine has been criticized by those such as George Palmer:

[The doctrine] regards the payment as "voluntary" because he is the moving party, not in the making the payment but in seeking to engage in an enterprise that requires the payment if he is to comply with the law as written. It is an untenable position which ignores the coercion through a play on the word "voluntary."

Perhaps recognizing the unfairness of the narrow rule, and its artificial definition of "voluntary," courts have carved out exceptions. One exception arises where the non-payment of fines would incur a severe penalty, such as strong civil or criminal sanctions, or the loss of one's employment. Despite this liberalization, the US categorical approach, coupled with a policy-based protection of the treasury, offers its taxpayers very narrow grounds for restitution of unjust deprivations.

42. See e.g. Continental Trailways, Inc. v. Director, 509 A.2d 769, where the Court held that public policy discouraged suits for the recovery of taxes erroneously paid or illegally collected, and that the plaintiff bus company had voluntarily paid the contested amounts under a mistake of law.

43. Palmer, supra note 38 at 9.16. A similar debate about compulsion is seen in the development of Canadian and Commonwealth rationales for recovery of ultra vires taxes. The majorities in Mason, supra note 29, Eadie, supra note 7, and George (Porky) Jacobs, supra note 7 saw the relationship between taxpayer and the government as one of compulsion. The government, having compelled the taxpayer to pay an ultra vires tax, must disgorge its unjust enrichment. As intuitively satisfying as this analysis may be, it does not address most ultra vires tax cases. Generally, the taxpayer contributes his taxes willingly, as he is ignorant of the ultra vires status of the taxes. As the illegality of most ultra vires taxes is not discovered until after the authority has collected the tax in good faith, the taxpayer could not claim that he was threatened, nor lodge the protest required to invoke the doctrine of duress. (Peter Kiewit Sons' Co. of Canada v. Eakins Construction Ltd., [1960] S.C.R. 361.) In Air Canada, supra note 3, Wilson J. notes that it is artificial and unrealistic to insist upon protest in the case of ultra vires taxes.) Thus, in the case of Eadie, supra note 7 at 581, Spence J. orders restitution of the ultra vires taxes, his compulsion argument seems an artificial evasion of traditional doctrine. In Eadie, the case for compulsion was bolstered by the claim that the payment was made under "urgent and pressing necessity," brought about through the plaintiff's need to sell his land and his confinement to hospital. The case would be better limited to idiosyncratic facts such as these. Further confusion arises, as the language of 'compulsion' exists as a holdover exception to the rule barring recovery for a mistake of law: the absence of compulsion can be used to deny recovery.

Despite these limitations of the phrase "payments made under duress," one can conceive of a broader notion of "duress" than that offered by the jurisprudence. The English Law Commission has endorsed this approach on public law grounds. Restitution: Mistakes of Law and Ultra Vires Public Authorities Receipts and Payments (London: HMSO, 1995) at 54 [hereinafter English Law Commission]. The English Law Commission suggested that duress would spring from the relationship between the taxpayer and the government, and thus the usual requirement of threats and formal demands need not be satisfied. An expanded notion of duress can also be argued under the human rights-based model to follow.

44. Several of these cases arise in the class action context. In Broward County v. Mattel, 397 So.2d 457 (Fla. App. 1981), attorneys filed a class action to recover excess taxes paid for occupational licences. The Court held that the payment of illegal taxes without protest in order to avoid forfeiture of a right to do business is not a voluntary payment. In Re. State Denistry Board Fees, 423 A.2d 640 (N.J. 1980), the Court similarly ordered restitution of dues extracted beyond the statutory authority of the Board. See also United Private Detective & Security Association v. City of Chicago, 571 N.E. 2d 1087.

45. Palmer is generally critical of the unprincipled American approach to restitution of illegally
III THE CONSTITUTIONAL AND STATUTORY PRINCIPLES UNDERLYING RECOVERY

Constitutional and Statutory Principles

Paul Perell has identified five situations where restitutionary principles are levied against a tax-collecting body. The first is where a tax statute is found to offend one of several constitutional documents. A constitutional right to restitution starts with no less venerable a source than the 1688 English Bill of Rights, which vows that the government will not levy taxes without authorization from Parliament. To various degrees, Peter Birks, Lord Goff and Gareth Jones, and Peter Hogg see the Bill of Rights as a steady foundation on which to base claims for recovery of ultra vires taxes. Federalism similarly underlies several Canadian cases for restitution of ultra vires taxes. Under s. 92(2) of the Constitution Act, 1867, provinces may only levy direct taxes. In the events leading up to the case of Amax, Saskatchewan levied an indirect tax later declared ultra vires. In Air Canada, British Columbia demanded taxes. In his introduction to the chapters explaining why most taxpayers have no rights to recovery, he states:

One would think that when the United States, a state, or a municipality collects taxes or other charges to which it is not entitled because the tax law is invalid, a decent respect for the relations between the state and its citizens usually would place the governmental unit under a duty to refund the tax payments.

Supra note 38 at 9.16.

The Court in Craig v. Frankfurt Distilling Co., 189 Ky. 565, 225 S.W. 729 (1920), since overturned, was even more forceful in its criticism of policy-based non-recovery. The Court ordered restitution of illegally gathered taxes as "[a]ny other rule is unconscionable, and is bad in morals, if not actually dishonest." Another illustration of the policy-based double standard employed in American restitutionary cases is seen in the differing law for recovery of charges mistakenly paid to public utilities. While mistake of law and voluntariness will negate a taxpayer's right to restitution, American courts have generally seen duress in the relationship between the utility and the ratepayer. See Heiserman v. Burlington, C.R. & N.R.R., 63 Iowa 732, 18 N.W. 903 (1884) and Palmer, supra note 38 at 9.15.

47. An Act for Declaring the Rights and Liberties of the Subject and Settlement the Succession of the Crown (1688) 1 Wm. and Mary, cap. 36, art. 4. See also P.W. Hogg, Constitutional Law in Canada, 3d ed. (Toronto: Carswell, 1996) at 1.8 [hereinafter Hogg]. The case of Bowles v. Bank of England, [1913] 1 Ch. 57 affirmed this principle when it was held that a committee, although approved by Parliament, could not levy a tax.
51. Perell supra note 11, and Air Canada, supra note 3.
52. Amax, supra note 9.
had attempted to levy an indirect tax on purchasers of gasoline. Infringement of the Charter could also ground a constitutional restitutionary claim.

The second general category of restitution against the government arises where a municipal by-law subdelegates authority beyond the mandate of its enabling statute. The third is where the government, usually municipal, has no authority to impose the charge. The fourth arises where the law imposing the tax is legal, but is incorrectly applied, resulting in an improper or excessive payment. This incorrect application could be either on the part of the tax collector, or the taxpayer itself. The fifth arises where the government demands payment under a contract that is illegal, unauthorized, misinterpreted or misapplied. As each of these situations could link large numbers of individuals in deprivation, they offer fertile promise for class actions.

53. Air Canada, supra note 3.
56. See e.g. Eadie, supra note 7.
57. See e.g. George (Porky) Jacobs, supra note 7.
59. See e.g. Storthooks v. Mobil Oil Canada Ltd. (1975), 55 D.L.R. (3d) 1 (S.C.C.) [hereinafter Storthooks] and the recent English case of Westdeutsche, supra note 21, arising from the House of Lords finding, in Hazel v. Hammersmith and Fulham L.B.C. (1992) 2 A.C. 1, that the swap agreements which were the subject of that case were ultra vires the corporation.
60. Within these examples, some commentators have distinguished between ultra vires rules arising in the administrative and in the constitutional contexts. Administrative illegality arises where the fees imposed by a ministry, agency, or private or quasi-governmental body, exceed those fixed by a government statute or regulatory body. In Nepean, supra note 10, for example, the defendant Crown corporation charged a rate beyond that mandated by its enabling legislation. Some courts and commentators have allowed recovery against administrative excesses where recovery against constitutional excesses would be denied. As this article advocates that a principled, rather than categorical, test of unjust enrichment should guide the restitutionary analysis, it will not distinguish between these two circumstances except where relevant.

A further threshold distinction is sometime drawn between public and private restitution. The English Law Commission, supra note 43 at 195, recommends a statutory public law scheme for such restitution. On the other hand, Birks feels that legislation is not necessary as Woolwich, supra note 4, and other common law developments indicate an entirely legal solution through the developing jurisprudence. P. Birks, Restitution: The Future (Sydney: Federation Press, 1992) at 62 [hereinafter Restitution: The Future]. The Scottish Law Commission agrees, but on the grounds that Scottish law in general lacks the dichotomy between public law and private law and that a legislative solution would blur this condition and create confusion. Scottish Law Commission, Recovery of Ultra Vires Public Authority Receipts and Disbursements, 1996 at 12-13, and 58 [hereinafter Scottish Law Commission]. This article will not debate the merits of this recommendation, but will act under the premises that no such public law remedy exists in Canada at present, and that private law principles should inform any public law restitutionary remedy. Hogg states that this sort of suit "has no private analogue." It will be the position that this statement is only true in so far as the current jurisprudence exists, and that normatively there is no difference
Conceptual Rationales for Restitution of Ultra Vires Taxes

The previous section examined the statutory and constitutional situations in which restitutionary suits arise. Various restitutionary rationales have been offered for the recovery of *ultra vires* taxes. This section will discuss these rationales, and test their ability to explain why restitution should or should not take place. It will be the position of this article that, ultimately, all of these rationales can fit into the current Supreme Court test for unjust enrichment, as stated in *Petkus v. Becker*. 51 Theories of mistake, compulsion, and right all explain why the defendant lacks a juridical reason to retain a benefit gained at the expense of the plaintiff, and thereby establish a right to restitution. 62 Given judicial resistance to governmental restitution, and the class proceeding threshold test of a cause of action, it is crucial to identify the specific rationale underlying each restitutionary claim.

**Mistaken Payment**

The first explanation is that the tax is in fact a mistaken payment. Historically, this rationale has been limited by doctrinal distinction between mistake of fact, which was recoverable, and mistake of law, which was not. 63 Baron Parke establishes an overarching principle of restitution for mistaken payment in *Kelly v. Solari*:

> [W]here money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it. 64

Had the taxpayer known that the tax was illegal, he would not have paid it; indeed, we must assume that the tax collector would not have collected it. The mere revelation of a pre-existing mistake in the seminal American case of *Lowe v. Wells Fargo* brought about restitution of moneys willingly paid. 65 Similarly, the discovery that a tax is illegal should warrant recovery in itself.

51. *Petkus, supra* note 13 at 257.
62. Of course, there are other rationales for such recovery. The Scottish Law Commission points out that one can discern nine rationales for recovery within *Woolwich*, and that commentators have added another eight (Scottish Law Commission, *supra* note 61 at 88-89). A full enquiry of each of these rationales is beyond the scope of this article, and it has focused on the major grounds advanced.
63. This debate is discussed in Part IV, below, which deals with defences to restitution.
64. (1841). 9 M & W 54, 152 E.R. 24 [hereinafter *Kelly*].
65. (1958). 96 P. 74. In *Lowe*, the plaintiff sought to retrieve money paid to the defendants to replace funds with which his son had been entrusted. The money turned out to have been stolen, rather than lost.
Ultimately, mistake serves as a problematic conceptual basis for restitution in the context of illegally levied taxes. Ewan McKendrick criticizes mistake as the weakest basis for restitution, and points to the fact that in Woolwich, as in most tax situations, the taxpayer willingly and knowingly pays the tax; the fact that the plaintiff’s in Woolwich paid the tax under protest does not negate their free will in paying. The mistake, however, does not go to the fact that the payment is made, but to the nascent illegal status of the taxing authority, or to the mistake that such a payment was required. Wilson J. in Air Canada and Birks also dismiss this justification for restitution.

This traditional concept of mistake has focused narrowly on the plaintiff’s begrudging willingness to pay the tax. The taxpayer plaintiff consciously makes the payment, thus obviating the restitutionary explanation of mistake. The Kelly principle can, however, be interpreted more widely. This wider interpretation focuses not on the instant of payment, but instead on the defendant’s illegitimate and continued retention of the benefit. In short, this rehabilitated mistake-based analysis can be seen as a pure and simple application of the three-part test for restitution set forward in Pettkus v. Becker: the taxpayer has been deprived, and the tax collector enriched, without juridical reason for that enrichment.

Rights-based analysis

A rights-based analysis offers a less semantically problematic basis for recovery. The taxpayer has a right to be free of arbitrary taxes. Correlatively, the government has no right to levy them. However, the taxpayer has a duty to pay taxes and the government backs up this duty with coercive civil and criminal penalties; compulsion clearly underlies the relationship. Wilson J. recognizes this imbalance in her Air Canada dissent:

Payments under unconstitutional legislation are not “voluntary” in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding.

Thus the taxpayer-government relationship should lead to restitution, in contrast to the contractor-government relationship in Morton Construction v. Hamilton, where recovery was denied. That case was decided under the rubric of duress, but can equally be explained under a unified rights theory, examining the extent of the individual right to expect certain treatment by the government. In Morton, the City of

---


67. Restitution: The Future, supra note 60 at 76.

68. Air Canada, supra note 3 at 169. For a US argument along similar lines, see Palmer, supra note 38 at 9.16, and supra note 45.

Hamilton exerted economic pressure on the plaintiff, by threatening to blacklist him from future contracts, in order to extract services outside the contract. Because the plaintiff had no right to receive future contracts from the city, the Court held that duress could not be claimed as a basis for restitution. While an individual enjoys the right to be free from taxes levied in excess of government authority, it was within the government prerogative, at least outside the realm of administrative law, to grant contracts to whom it wished. Thus, under either the categorical or rights-based approach to unjust enrichment, the plaintiff will be denied recovery where he has no right to the benefit claimed.

This situation stands in contrast to that of a taxpayer deprived of money under an ultra vires statute. In contrast to the construction repairs in Morton, the taxpayer is bound by his duty and the state's right to pay the tax. Where the charge is revealed to be ultra vires, the right of the government to employ coercion diminishes. As the government has been unjustly enriched, and the taxpayer correspondingly deprived, the taxpayer should consequently recover the taxes unlawfully demanded.

### IV FIVE JUDICIAL BARS TO RESTITUTION

In the cases surveyed, courts have employed various tools to deny recovery of ultra vires taxes. This section will briefly discuss these bars to recovery, which individual or class litigants would face in any restitutonary action.

**Mistake of Law Versus Mistake in Fact**

The first bar to restitution, now generally abandoned in Canada, lies in the distinction between mistake of law and mistake in fact. While restitution is possible in the latter situation, a plaintiff cannot claim restitution under a mistake of law. Thus, where a taxpayer voluntarily pays a tax, without awareness of its illegality, no recovery will be possible. The case of O'Grady illustrates the application of this rule. In that case, the plaintiff had paid to the defendant City of Toronto municipal taxes that were later discovered to be unnecessary. As the plaintiff had paid the taxes voluntarily, the Court denied recovery.

This "shabby rule," as Birks describes it, met its end in Air Canada, rejected by
both majority and dissent. It should be noted that our senior in restitutionary enlightenment, the Quebec Civil Code, expressly states that *ultra vires* taxes may be recovered regardless of whether the mistake was one of fact or law. The Scottish Inner House of the Court of Session recently killed this distinction in *Morgan Guaranty Trust Company of New York v. Lothian Regional Council*. The Australian High Court expressly obviated this distinction in *David Securities v. Commonwealth Bank of Australia*. Likewise, certain American jurisdictions, such as New York, expressly abolish the distinction. Most jurisdictions in the United States, however, retain this dichotomy, over the protestations of those such as Palmer and Pamman. In England the principle survives, albeit precariously.

While this restitution-denying dichotomy seems moribund in Canada, the relative youth and volatility of Canadian restitutionary principles indicate that it would be premature to ignore it entirely, both as a specific doctrine and as evidence of a genre of judicial conservatism working to block restitution. Opinions in relatively recent cases such as *Nepean* and *Pettkus* have sought to employ the distinction as a legalistic antidote to perceived floodgates of litigation. Restitutionary litigants could face categorical distinctions between mistake of law and mistake of fact which would act to deny recovery.

**Requirement of Fault or Bad Faith on the Part of the Government**

Although generally discredited now, in the past courts have evaded the rule against recovery of money conferred under mistake of law by noting that between the taxpayer and the collecting authority, the authority was more blameworthy for the mis-

---

73. *Air Canada*, supra note 3.
74. As quoted by Dickson J. in his *Nepean* dissent, supra note 10 at 210. In 1991 the section number and wording were changed: art. 1491: *De la réception de l’indu*: “A person who receives a payment made in error, or merely to avoid injury to the person making it while protesting that he owes nothing, is obliged to restore it”; C.C.Q. 1980, supra note 26.
77. Section 3005 of the New York *Civil Practice Law and Rules* states that “[w]hen relief against a mistake is sought in an action or by way of counterclaim, relief shall not be denied because the mistake was one of law rather than one of fact.”
79. While the House of Lords in *Woolwich* questioned the continuing utility and logic of the distinction in English law, because the plaintiff in that case had not claimed to have paid the tax under a mistake of law, the rule was out of the reach of that decision. Lord Slynn of Hadley explicitly stated at 199 that the Court could strike down the distinction. On the other hand, Lord Keith of Kinkel followed the recommendation of the English Law Commission Report *Restitution of Payments made Under a Mistake of Law*, C.P. No. 120, 1991 at 361, and advocated a legislative rather than judicial abolition of the distinction. Lord Goff, who participated in the *Woolwich* decision, had advocated the abolition of this distinction in his restitution textbook: Goff and Jones, *supra* note 49 at 118. See also *Woolwich*, *supra* note 4 at 192.
Eadie shows how courts have allowed recovery where the government and taxpayer were not in pari delicto, equally at fault. In George (Porky) Jacobs, the Court held that the in pari delicto exception could have served as an alternative ground for recovery. In her Air Canada dissent, Wilson J. contrasts the “totally innocent taxpayer” with the improperly-acting legislature; while she does not evoke the doctrine of in pari delicto, it survives in her rhetoric.

While these cases use the doctrine of in pari delicto to allow, rather than deny restitution, the addition of fault considerations problematizes the unjust enrichment. The presence of fault or negligence on the part of the taxpayer, or the absence of fault or negligence on the part of the government could work to deny restitution. While the Supreme Court appears to have laid this consideration to rest in Air Canada v. Ontario (Liquor Control Board), discussed below, fault could still continue to play a role in denning recovery. This is especially true given the roots of restitution in equity, which casts special scrutiny over the behaviour of the parties.

The lower court decisions in Air Canada v. Ontario (Liquor Control Board) illustrate how a requirement of fault can deny restitution. The recent Supreme Court decision clarifies that fault, at least on the part of the taxpayer, should play no role in the unjust enrichment calculus. The L.C.B. litigation arose from a misunderstanding over the applicability of Ontario liquor legislation to the plaintiff airlines. Up to 1984, Air Canada, Canadian Pacific Airlines, and Wardair all held Ontario liquor licences under the mistaken belief of their necessity. Under these licences they paid gallonage fees to Ontario. In 1983, Wardair challenged the gallonage and other fees, claiming that the Ontario legislation should not apply to liquor purchased for in-flight consumption. Wardair made a private arrangement with Ontario exempting it from payment. Canadian learned that it, too, had been paying fees unnecessarily, when it merged with Wardair in 1989. Air Canada and Canadian thus challenged the applicability of the legislation, and demanded restitution of moneys paid. Ontario conceded that it should return the gallonage fees paid by the airlines after 1984. The trial and appeal courts held that, as Ontario did not realize that it could not levy the fees, it should not have to return the money collected. As both parties were equally ignorant of the inapplicability of the fees, and as ultimate responsibility lay with the airlines to determine whether such fees needed to be paid, Ontario could retain the fees collected prior to 1984.

In an unanimous judgment of the Supreme Court, Iacobucci J. held that restitution does not require bad faith on the part of the taxing authority as a precondition to resti-
He cited Eadie to illustrate how restitution may be ordered even where both the taxpayer and the taxing authority were ignorant of the illegality of the tax. The Court thus ordered Ontario to disgorge all moneys wrongfully collected from the airline, both before and after the discovery of the inapplicability of the law.

Although L.C.B. thus removes fault as a bar to restitution, it does not expunge the language of fault from unjust enrichment inquiries. Without referring to the judgment of Wilson J. in Air Canada, Iacobucci J. states that between the taxpayer and the tax collector, the latter bears responsibility for ensuring the propriety of a taxing statute:

> I cannot see that it matters how sophisticated an actor the citizen is. Governments make laws and governments administer them. Citizens do not.

For the purposes of this article, the debate about the role of fault need not be resolved. It is submitted, however, that the Iacobucci J. and Wilson J. obiter indicate that fault represents not a legal consideration in the unjust enrichment calculus, but rather an illustration of the unfairness of denying recovery. In a class action seeking the restitution of illegally collected taxes, the Iacobucci and Wilson J. language of the citizen and the state would serve as a particularly potent shield against denials of recovery.

**Government Immunity from Restitution**

The third strategy courts have used to deny recovery is to hold restitutioinary principles inapplicable to government bodies. In Nepean, for example, Estey J. states that "[t]he concept of unjust enrichment is not easily associated with these relationships." His Lordship concludes that because governmental and quasi-governmental bodies have no authority to make a profit, in the manner of private legal entities, the court cannot order restitution. This dismissal, however, reveals an imbalanced view of the enrichment calculus. It focuses on the enrichment of the tax levying body, and ignores the individual taxpayer's deprivation. Further, it is neither financially nor legally sound. While Estey J. is correct in asserting that governments cannot make a profit *per se*, they may certainly accrue a surplus at the expense of the taxpayer. To this, judicial naysayers of restitution may respond that suing the government is a form of self-torture; the government will simply raise taxes to compensate taxpayers, who are in essence suing the corporate body which they themselves constitute. This Hobbesian misconstrue falters on the fact that not all citizens or ratepayers are affected, or affected to the same extent, by *ultra vires* taxes. Further, no one argues that it is illogical for taxpayers to sue the government in tort and constitutional law, as

---

often occurs. For these reasons, it is foolish to deny that governments have legal personality in the restitutionary arena. Indeed, the restitution jurisprudence itself rebuts this assertion with a plethora of successful restitutionary claims where governmental bodies acted as litigants. This is clear from the styles-of-cause in the seminal cases of Storthoaks, 92 Peel v. Canada, Hastings v. Semans Village, 93 and County of Carleton v. City of Ottawa. 94

A stronger reformulation of the governmental immunity argument finds echoes in the La Forest J. majority in Air Canada. It can be argued that the government is not unjustly enriched when it returns any moneys received, legally or illegally, to the public benefit. The reply to this construct can be extracted from the judgment of Wilson J. The individual taxpayers who have unnecessarily paid moneys to the government are members of the public. In allowing the government to take and then distribute their money unlawfully, their individual rights have been sacrificed for the good of the many. It is crucial to remember at this juncture that the taxes were extracted illegally. Individual resistance should not be seen as repudiating the distributive justice goals of taxes legally levied and carefully calculated to collect each society member’s fair share. The law would not countenance the random governmental seizure of private property simply because it will be turned into a park for general public enjoyment. Nor should the law permit the exaggerated utilitarianism of singling out individuals through illegal or erroneous legislation, and then denying restitution on the rationale that others benefit.

Although in accord with this reply, the American restitutionary authority Palmer concludes that

This objection tends to disappear when the illegal exaction is from many taxpayers, especially when the invalidity relates to a tax which is the principal source of municipal revenues, such as a property tax. 95

It is submitted that here Palmer blurs two concepts, one legitimate and the other not. The sentence ends by focusing on the practical requirements of the state as a justification for retaining unjust tax revenues. The next section will rebut this position, under the heading of “Disruption of government finances.” 96 The first half of the sentence is more plausible. Where the government levies the illegal tax evenly throughout society, and then channels it back, there is less violation of the equality with which governments must treat its citizens. All suffer equally, and then receive the benefit back. In itself, this does not deny restitution, but shows how restitution takes place through the natural workings of government. 97 Few taxes, however, are spread so evenly

92. Storthoaks, supra note 59.
94. (1965), S.C.R. 663.
95. Palmer, supra note 38 at 9.16.
96. See Part IV, below.
97. The process mirrors the imprecise but at times necessary device of cy-près distribution entrenched in class proceedings legislation and discussed at length below. See Part VI, below.
throughout society. A poll tax, levied equally on all members who would later benefit, offers a pure, but rare example of a tax affecting all individuals. Even where an illegal tax is levied proportionally, based on property values or income, certain individuals are forced to bear a greater burden of the illegal government action. When coupled with the imprecision of property rates, the tax Palmer offers as an example, even a broad-based tax violates equality of treatment. Further, the entire argument is premised on two fictions, which illustrate the unfairness to the individual taxpayer. The first is the equation of individual interest with public interest. This equation might be plausible in the context of legitimate taxes; however, the imposition of the public interest onto the individual through illegal taxes makes this alignment seem forced. The second fiction is that the individual will take relief from the illegal tax levy in enjoyment of the public benefit financed unnecessarily. This unlikely link between individual suffering and individual enjoyment thus fails to rationalize the retention of the illicit tax. Therefore, the legitimacy of governmental retention is doubtful where illegal tax is cast broadly.

Disruption of Government Finances

The fourth ground for the denial of restitution is that such claims will render government finances chaotic. Although this impediment is the least attractive in terms of fairness, it has been the most successful shield of restitution naysayers. These values of pragmatic functionalism underlie the words of Estey J. in Nepean:

"Certainty in commerce and public transactions such as we have here is an essential element of the well-being of the community. The narrower rule applicable to mistake of law as compared to mistake of fact springs from the need for this security and the consequential freedom from disruptive undoing of past concluded transactions."

In the United States, courts frequently cite this rationale in order to deny recovery.

98. For judicial recognition of this imprecision, see e.g. Noel Developments Ltd. v. Vancouver (City) (1994), 1 B.C.L.R. (3d) 102 at 106-107 (C.A.) [hereinafter Noel].
99. Nepean, supra note 10 at 243. Scottish courts have also shown trepidation about the effects of recognizing a restitutionary right to reclaim ultra vires taxes. In Glasgow Corporation v. Lord Advocate (1959), S.C. 203 at 230, the Lord Advocate showed extra-bipolar concerns similar to those of La Forest 3.:

It does not therefore follow that, when the error is established, the money must automatically be paid back by the taxing authority. For a repayment in such circumstances has wider repercussions, and affects far more interests than those of the taxpayer... [This would] introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be wholesale opening up of transactions between them whenever any Court put a new interpretation upon an existing provision imposing a tax.

[Emphasis added.]

The Irish Supreme Court voiced similar concerns in Murphy v. Attorney-General, [1982] I.R. 241.

100. Mercury Machine Importing Corp. v. City of New York, 3 N.Y.2d 418 at 426-427, 144 N.E.2d 400 (1957). See also Palmer, supra note 38 at 14.20(a). Palmer, at 14.20, is highly critical of this defence, which is "a poor excuse indeed for permitting the governmental unit to retain money
The values of permanence and stability therefore work to defeat a restitutionary claim.\textsuperscript{101}

Ultimately, we must question whether justice or administrative convenience should prevail in a legal enquiry.\textsuperscript{102} In \textit{Air Canada}, one senses the exasperation of Wilson J. that not only restitutionary principles, but more lofty constitutional principles of the rule of law, should be overturned for policy reasons.\textsuperscript{103} She exposes the ugly utilitarianism underlying the La Forest J. judgment:

\textsuperscript{101} As Goff and Jones observe, the fiscal chaos defence is "a manifestation of the defence of change of position." Goff and Jones, supra note 49 at 552. Lipkin Gorman v. Karpnale, \textit{[1992] 4 All E.R.} 512 (H.L.) states that this would only be applicable if the recipient spent the money in good faith on purchases that he would not have otherwise made. In that case, as in the earlier Canadian case of \textit{Starthoaks}, supra note 59, this was founded on the principle that it would not be equitable to order the defendant to return the money in certain circumstances. The Canadian test is stricter, requiring that specific expenditures be linked with specific receipts. Birks states that, because the government pays for its regular programs from a central revenue pool, this defence "will thus be virtually impossible to establish." "Restitution from the Executive", supra note 48 at 201. Goff and Jones similarly argue that the government should bear the onus of demonstrating how potential chaos would make it inequitable to order restitution. The learned authorities thus hypothesize that it would be unlikely that a government, except a public authority with modest means, could ever satisfy this onus. Goff and Jones, supra note 49 at 552.

\textsuperscript{102} Under the current jurisprudence, however, if the government has specifically linked the tax with certain expenditures, this defence would be more feasible. For example, a special cigarette tax could be earmarked for health care expenditures. Were that statute struck down as unconstitutional, and were that money already spent, the government could perhaps make out this defence. However, here the overarching equity enquiry would intervene, and a government or corporation would likely be considered less compromised, and therefore less able to claim a change in position.

\textsuperscript{103} Air Canada, supra note 3 at 169. Such responses may be dismissed as rhetorical, but here the rhetoric is justified: juries should find it appalling that administrative convenience justifies the denial of correction of a blatant injustice arising from government error, of all parties. Birks likewise expresses indignation: "[A] society which respects the rule of law because it knows that legality is the cement of democracy must prefer the inconvenience and expense of lawful means." \textit{Restitution: The Future}, supra note 60 at 84.
Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government’s mistake? I submit that it is grossly unfair that X, who may not be (as is the case) a large corporate enterprise, should absorb the cost of government’s unconstitutional act.\(^\text{104}\)

Order and certainty, in government finances and legal doctrines, should not defeat fairness.\(^\text{105}\) This article agrees with Andrew Burrows in stating that “there is no convincing counter-argument to the powerful logic and fairness of Wilson J.’s words.”\(^\text{106}\)

In addition to the fairness argument, the functionalism of the government disruption defence violates a corrective justice view of restitution. As the ‘passing on’ defence blurs the clear bipolar inequality between plaintiff and defendant, by considering consumer third parties, the government finances defence imposes governmental convenience, and indeed all of society, into the equation.\(^\text{107}\) It is submitted therefore that the “juristic reason” denying recovery should arise from the relationship between the parties, and not from an external source. This approach would promote the clarity argued for above, and ensure that the bipolar inequality between the parties be solved on its merits, untouched by distorting third party considerations.

Three factors should soothe fears of government disruption, and remind us that the government has much leverage to deal with the aftermath of unconstitutional legislation. The first is that limitation periods will contain any flood of litigation. Lord Goff mused over this possibility in Woolwich, and pointed to Germany, where a general right to recovery of such taxes is tempered by strict limitation periods.\(^\text{108}\) In Germany, after discovery that the taxing statute is \textit{ultra vires}, the taxpayer has only a month in which to launch a suit. Lord Goff concludes that “such draconian time limits may be too strong medicine for our taste.” To this end, Graham Virgo suggests two years as an arbitrary but reasonable limit.\(^\text{109}\) In the context of class actions to recover \textit{ultra vires} taxes, this type of rule may be necessary to counteract provisions in class proceedings legislation, for example, s. 28 of the Ontario \textit{Class Proceedings Act}, which suspends the limitation clock for class actions.\(^\text{110}\) Such abridgement would be unnecessary for the British Columbia legislation which,

\begin{itemize}
  \item \textit{Air Canada}, supra note 3 at 169-70.
  \item Here, one is reminded by the words of La Forest J. in \textit{Tolofson v. Jensen; Lucas v. Gagnon}, [1994] 3 S.C.R. 1022 at 1058: “While, no doubt, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition of justice.”
  \item Incidentally, this deference to the government can be seen as a private law analogue to the notoriously deferential stance of La Forest J. on public law \textit{Charter} matters, as seen in cases such as \textit{McKinney v. University of Guelph}, [1990] 3 S.C.R. 229. This is arguably no coincidence, as both involve the blurring of individual rights when they threaten governmental order.
  \item \textit{Woolwich}, supra note 4 at 174.
  \item Virgo, supra note 70 at 461.
  \item \textit{Class Proceedings Act, 1992}, S.O. 1992, c. 6 [hereinafter Ontario \textit{Act}].
\end{itemize}
through peculiar wording, limits time suspension only to certified actions.11

The second factor is that nothing precludes a government from intervening legislatively to deal with the consequences of its legislative mistakes.12 Elsewhere in Air Canada, the majority approved the government tactic of passing a new *infra vires* tax that applied retroactively. Similarly, in *Royal Insurance Australia*, Mason C.J. stated that

> The remedy for any disruption of public finances occasioned by the recovery of money in conformity with the law of restitution lies in the hands of the legislature. It can determine who is to bear the burden of making up any shortfall in public funds.13

Whether or not a government abrogation of restitutionary principles is fair is a separate issue. Ultimately, it is clear that the government has the means to rearrange its finances. Given the relative slowness of a class action, or any litigation, there is no possibility that a legitimate recovery suit would suddenly cripple the government. In the restitution context, as in the constitutional context, a defence of governmental inconvenience should not deny recognized rights.

The third possibility is the introduction, legislatively or judicially, of a defence of extreme disruption of finances. In severe situations, where a declaration that a tax is *ultra vires* could seriously cripple the government, the court could follow the lead of the European Court. Where that Court foresees its exceptional and novel ruling would unleash a flood of litigation, it occasionally limits the temporal effect of its ruling, allowing only claims already commenced to proceed.14 While Birks calls this a “boldly pragmatic” measure, he prefers it to a blanket prohibition on recovery.15 This extraordinary defence, however, would suffer from the same basic conceptual difficulties as outlined above. Perhaps reflecting this difficulty, the English Law Commission raised the possibility of a statutory defence of “severe disruption to public finance,” but rejected this as unfair and impossible to draft in a precise manner.16
The Defence of ‘Passing on’

The fifth, and still potent, defence against restitution is that the plaintiff taxpayers are not unjustly deprived if they recouped their losses by ‘passing on’ the tax cost to their customers. This phenomenon is seen most clearly where the taxpayer is a business, such as a retailer or airline. The taxpayer, facing a tax, raises prices and thereby places the tax incidence onto the customer. The taxpayer business suffers no financial loss, as it covers the tax through increased revenues. If a successful restitutional claim forced the government to repay the taxpayer business, the business would enjoy a windfall. Therefore, restitution would result in the unjust enrichment of the taxpayer business, as La Forest J. argues in *Air Canada.* Just as the law must prevent unjust enrichment of the government at the taxpayer’s expense, the law must prevent unjust enrichment of the taxpayer at the expense of its customers. It will be the position of this section that while this concern over unjust enrichment of the taxpayer is laudable, the ‘passing-on’ defence fails practically and legally as an antidote to taxpayer windfall.

*Canadian Applications of the Air Canada ‘Passing On’ Defence*

In *Allied Air Conditioning,* a group of air conditioning contractors sought restitution of taxes it claimed had been wrongfully collected. The defendant province British Columbia argued that *Air Canada* placed an onus on the plaintiff taxpayer to prove that the taxes had not been passed on to customers. The plaintiffs argued that *Canadian Pacific Airlines,* decided together with *Air Canada,* suggested that taxes directly and demonstrably passed on to customers would not be recoverable. However, when no direct clear link existed between the taxes and the cost to the customer, taxes should be recoverable. Although the trial judge accepted this argument, the British Columbia Court of Appeal reversed the decision and denied restitution. Legg J.A. accepted the province’s argument that the plaintiff taxpayer bore the onus to establish that the tax was not passed on to customers. Even indirect passing on would also work to deny recovery. In a brief judgment concurring with Legg J.A., Taylor J.A. applied the defence in a more cautious manner. He noted that no one taxpayer could claim prejudice to business competitiveness when the tax affected all members of the industry equally:

> Unless prices were established by competition with suppliers who did not have to pay the tax, it is difficult to see how it could be said in such a trade as this that the burden fell on the contractor, rather than the customer.

It was not clear from the facts, however, that the tax did indeed affect all members of the industry equally. It is submitted that *Allied* further acts to frustrate restitution of

---

117. *Air Canada,* supra note 3 at 193.
118. *Allied Air Conditioning,* supra note 58 at 223.
119. Such a conclusion would require a more exhaustive analysis of the air conditioning industry. It
unjust enrichment by continuing the *Air Canada* focus on the enrichment of the plaintiff taxpayer instead of the government.

In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney-General)*, the plaintiff mistakenly overpaid tax under the *Nova Scotia Health Services Tax Act*, and claimed unjust enrichment when the province refused to return these overpayments.\(^\text{120}\) The Nova Scotia Court of Appeal distinguished *Air Canada* and *Allied*, noting that the plaintiff was alone in its industry in overpaying the tax. By contrast, in *Allied* at least 13 other contractors also claimed restitution of the mistaken payment. The Court of Appeal, therefore, ordered the defendant Nova Scotia government to reimburse the plaintiff the tax overpayment. While *Cherubini* was decided on principled grounds, it also indicates how lower courts do avoid unfair results by distinguishing a precedent imposing a blanket prohibition against recovery.

### Commonwealth Rejection of the ‘Passing On’ Defence

In the tailwind of *Air Canada*, English and Australian courts have considered the La Forest and Wilson J.J. judgments, and sided with the latter reasoning. In *Woolwich*, Lord Goff found Wilson J.'s reasoning to be “most attractive.”\(^\text{121}\) Similarly, the Australian High Court in *Royal Insurance Australia* endorsed the Wilson J. dissent.\(^\text{122}\) Here, the Court correctly identified the passing on consideration as extraneous to the bipolar dispute between the litigants. As Brennan J. stated:

> The fact that Royal had passed on to its policyholders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the

---


\(^\text{121}\) *Woolwich*, supra note 4 at 176. Despite his commendation of Wilson J.'s judgment, he left open the possibility of a defence of ‘passing on’, which could perhaps be evoked, depending “on the nature of the tax” (at 178). He states that *Air Canada* reveals that “the defence is not without its difficulties.” On the other hand, the Law Commission appears to be Advocating a statutory defence similar to, but not called, “passing on.” Their proposal is a broader defence against a restitution claim where the restitution of the *ultra vires* taxes would unjustly enrich the claimant: *English Law Commission*, supra note 43 at 122.

In the recent important case of *Kleinwort Benson*, supra note 21, the English Court of Appeal heard the defence of ‘passing on’ raised by the defendant city council in a non-tax dispute. The plaintiff bank had entered into an interest rate swap agreement, a transaction later deemed to be *ultra vires* the council. All three judges held that the defendant could not rely on a ‘passing on’ defence. At 401, Lord Morritt made the most extensive comments on the authority of *Air Canada*, supra note 3. His Lordship observed that the concept of relative title indicates that the fear of windfall should not block recovery. In other words, between the payer and the payee, the former would be more entitled to a windfall than the latter, whose illegal collection caused the entire confusion in the first place. Lord Morritt also observed that the passing on defence would unfairly grant the unjustly enriched defendant a tool by which to delay judgment against it.

\(^\text{122}\) *Royal Insurance Australia*, supra note 5 at 57.
Commissioner. The passing on of the burden of the payments does not affect the situa-
tion that, as between the Commissioner and Royal, the former were enriched at the
expense of the latter.123 [Emphasis added.]

England and Australia have firmly stated that public policy concerns should not
diminish the overarching public policy concern about taxation without authority.124

American Courts and the 'Passing On' Defence

Although American courts typically permit the defence of 'passing on' to block resti-
tution, few cases have discussed the rationales behind the principle. In the cases of
Shannon v. Hughes125 and Decorative Carpets v. State Board of Equalization,126 the
Courts recognized that the taxes in question were unconstitutional and that the payer
should recover. Because the plaintiff taxpayers had passed on the charge to their cus-
tomers, they were denied recovery to prevent an economic windfall. However, the
court hearing 123 East Fifty-Fourth Street v. United States rejected the defence and
ordered the government to disgorge an illegal cabaret tax to the plaintiffs.127 The
strong dissent of Learned Hand J. weakened the authority of 123 East Fifty-Fourth
Street. Hand J. applied a nuanced analysis which allowed the passing on defence only
where the plaintiff, in charging its customers, had "added the amount [of the tax] as a
separate item and described it as a tax which it must pay, and which it was apparently
collecting... in order to pay it to the Treasury."128 Under these conditions, the tax-

123. Ibid. For a case comment see J. Beaton, “Restitution of Overpaid Tax, Discretion and Passing-
124. European courts have endorsed the 'passing on' defence in two recent cases. Although in
Europe only Denmark recognizes 'passing on' as a defence, the Court of Justice of the
E.C.R. 3595, [1985] 2 C.M.L.R 658 (E.C.J.), held, in the context of dock dues, that member
states could adopt this defence in their jurisdictions. That Court, however, also confirmed the
presumption of a right of recovery in such situations. In the recent case of Société Conathec v.
the same Court held that European Community states were not required to repay taxes contrary
to European Community law if the plaintiff has passed on the taxes to its customers. The
Court emphasized that passing on would not constitute grounds for denial of restitution in
itself, but that it would have to be further proven that the plaintiff was unjustly enriched by the
passing on.
125. 270 Ky. 530, 109 S.W.2d 1174 (1937) [hereinafter Shannon v. Hughes].
126. 58 Cal.2d 252, 373 P.2d 637 (1962) [hereinafter Decorative Carpets]. For other applications of
the passing on defence, see Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049 (1984), where the
plaintiff liquor wholesalers were denied their restitutionary claim for $45 million in a tax found to
be unconstitutional, as they had passed on the tax to their customers. See also Standard Oil Co. v.
Bollinger, 337 Ill. 353, 169 N.E. 236 (1929), where recovery of an unconstitutional gasoline tax
was denied because it had been passed on to customers, and Division of Alcoholic Beverages v.
McKesson Corp., 524 So.2d 1000 (Fla. 1988), where the distributor of alcoholic beverages was
denied recovery because it had "likely" passed on the tax to its customers.
127. 157 F.2d 68 (2d Cir. 1946) [hereinafter 123 East Fifty-Fourth Street].
128. Ibid. at 71. The Court in Saltzman v. New York State Commission, 475 N.Y.S. 2d 610 (A.D. 3
payer plaintiff becomes a trustee for the customers, to whom it must distribute the 
money. Recently, the application of the doctrine has come under academic scrutiny 
by William J. Woodward, who argues that under the status quo, 

[The results are random, bearing no consistent relationship with a policy of depriving 
the government of illegal taxes or with a policy of compensating plaintiffs for loss 
resulting from illegal taxes. Other than administrative convenience, little supports this 
majority approach.]

Criticism of the ‘Passing On’ Defence

Criticism of the passing on defence has been wide and multifarious. The first attack 
concerns procedural fairness. Wilson J., arguing for the prima facie right of a tax-
payer to be free of illegal taxes, stated that the plaintiff taxpayer should not have to 
prove the absence of a windfall. Allied Air Conditioning, however, places such an 
onus on the plaintiff. If one accepts the legitimacy of a passing on defence, the doc-
trine should act procedurally as a defence, to be raised by the defendant government. 
Placing initial onus on the plaintiff taxpayer adds procedural unfairness to the initial 
depredation.

The second practical attack is the conceptual difficulty in linking the tax with the 
putative passing on of the tax. While some taxes will be directly and discretely added 
to the customer, many will be generally absorbed by the plaintiff taxpayer. The com-
mercial complexities and myriad decisions underlying a corporate financial budget 
establish that in practice it will be difficult to link the illegal tax with the amount 
passed on to the customer. Birks therefore argues that this approach leads the court to 
“an impossible enquiry.”

The third practical attack on the defence is that it makes little sense economically. 
Although raising prices will meet the immediate need of the tax, it will ultimately 
drive off customers. In Royal Insurance Australia, Mason C.J. refers to the American 
case of Shannon v. Hughes to illustrate this fallacy. In Shannon v. Hughes, the

Dept. 1984) endorsed this principle in denying recovery to a plaintiff who could not establish that 
it had repaid any overcollection of taxes to its customers.
129. See Part IV, below.
131. For a thorough and spirited attack on ‘passing on’, see P. Michell, “Passing On,” and the 
L. Rev. 130 [hereinafter Michell]. This article will not seek to duplicate the depth of this article, 
which focuses narrowly on the doctrine, but will briefly summarize some criticisms of the ‘pass-
ing on’ defence.

132. Air Canada, supra note 3 at 170.
133. Allied Air Conditioning, supra note 58.
134. “Restitution from the Executive”, supra note 48 at 172.
136. Royal Insurance Australia, supra note 5 at 59.
plaintiff taxpayer, an ice cream salesman, had passed on the tax to his customers by raising prices. Mason C.J. observed that it was unfair to apply a passing on defence where it was demonstrated that the passing on had caused the plaintiff's profits to drop sharply. When the plaintiff loses money through passing on of the tax it is difficult to argue that the plaintiff has been enriched by a windfall resulting from the overall transaction.

With regard to the final economic argument, La Forest J. perhaps rationalized this objective by noting that airline competitors were co-plaintiffs in that case. Air routes and schedules play a greater role in consumer preference than the ticket price. Because all airlines are subject to the same ultra vires tax, none would be disadvantaged vis-à-vis the others, along the lines of the Taylor J.A. reasoning in Allied. Because of increasing international competition, however, it is difficult to claim that the imposition of an unnecessary tax would not affect an airline. It would be dangerous to use these rationalizations to establish a general presumption against restitution from government.

**Restitutionary Attacks on the 'Passing On' Defence and Solutions**

The doctrine is also problematic on unjust enrichment grounds. 'Passing on' intrudes the customer third party into the bipolar consideration of plaintiff and defendant. Where the plaintiffs clearly serve as tax collectors for the government, the plaintiffs might be unjustly enriched at their customers' expense. The court, however, should examine this possibility separately to ensure a pure and coherent analysis.

One solution to guard against the plaintiffs' unjust enrichment would be to deem the plaintiffs constructive trustees of moneys passed on to the consumers who had overpaid. For example, in Decorative Carpets, Traynor J. sought to address the passing on windfall problem by ordering plaintiffs who had successfully sued the government to keep the proceeds in a constructive trust for their customers. In Royal Insurance Australia, Mason C.J. distinguishes between a tax which the plaintiff has directly passed on to its customers, and one which the plaintiff has recouped indirectly from others. In the latter situation, where the plaintiff has passed on the burden of the taxes indirectly to its customers, a constructive trust does not arise. In the former situation, the taxpayer plaintiff becomes a constructive trustee of the moneys paid as tax. The plaintiff becomes a tax collector for the government. If the taxpayer plaintiff does not forward the money to the government, through error, intention, or the revelation that the tax was ultra vires or unnecessary, the customer may assert its right to demand money back from the plaintiff. If the plaintiff renders to the government taxes that are later revealed to be invalid or unnecessary, the customer may recover directly from the government.

137. Decorative Carpets, supra note 126. See also 123 East Fifty-Fourth, supra note 127, Learned Hand J., and Michell, supra note 131 at 172-178.

138. Royal Insurance Australia, supra note 5 at 62-63.
Ultimately, neither situation should work to deny restitution between the government and the taxpayer plaintiff. Where the plaintiff passed on the burden indirectly, “[a]s between the plaintiff and the defendant [government], the plaintiff having paid away its money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim.”139 [Emphasis in original.] Even when the taxpayer plaintiff has become a constructive trustee by directly passing on the taxes to customers, the government remains an irrelevant third party. The conflict arises between the legal owner of the money, the taxpayer plaintiff, and the equitable owner, the customer. Here, the taxpayer plaintiff should not answer to the government, but should answer to the court, possibly through undertakings, that it will return the moneys to the customers.140

It is submitted that the Mason C.J. approach is the most correct conceptually. This approach also clarifies the separate relationships of unjust enrichment between the parties. By separating the enrichment analysis into two suits, and focusing first on the tax collector-taxpayer bipolar relationship, and then on the taxpayer-customer bipolar relationship, the court can examine more clearly the unjust enrichment alleged between each set of parties. Otherwise, the two relationships would blur into one, and the restitutionary analysis would be confused. The government advances the passing on defence in the name of the customers deprived unjustly of taxes paid incorrectly. Instead of helping these customers through restitution of their money, the defence allows the government to retain its unjust enrichment twofold: at the hands of the legal owner, the taxpayer plaintiff, and the equitable owners the customers themselves.141

V THE CLASS ACTION AS A VEHICLE FOR RESTITUTION

The first half of this article focused on the substantive restitutionary principles that would support or hinder the proposed class action. This second half will focus on the procedural aspects of the proposed action. First, it will discuss the legislative rationales behind class actions, and argue that these rationales, recognized by courts, make the class action a particularly appropriate vehicle for restitutionary claims. The most germane rationale is the facilitation of access to justice for the individual who may be unable or unmotivated to seek legal recourse. The legal fees faced by a taxpayer or consumer would deter recovery. The collective action and resources of a class proceeding would overcome this individual action dilemma, and thereby realize both individual and social justice. It will be shown that in addressing consumer and taxpayer apathy, the class action offers a unique solution to the problem of the ‘passing on’ defence discussed above. The final two sections of the article will shift

139. Ibid. at 63.
140. Ibid.
141. For the special utility of the class action procedure to reclaim taxes against a constructive trustee, whether government or the taxpayer, see Part V, below.
the focus from theory to practice, and discuss first how a restitutionary class action would unfold. It will then offer examples of the intersections of class proceedings and restitution in Canadian jurisprudence. However, the relative paucity of these cases strengthens the central thesis of this article, that the fusion of class action procedure with restitutionary substance offers a compelling empowerment of the individual, a possibility which should be explored in academic writing and in the courts.

Surveying the styles-of-cause for restitutionary litigation over *ultra vires* taxes and other unjust enrichments, one is struck by an obvious anomaly. By their definition, statutory levies are not aimed at individuals but at classes of individuals. These classes usually take the form of groups of businesses, or geographically determined groups of people, such as citizens or ratepayers.42 However, as previously mentioned, classes rarely litigate such actions. There are two main reasons for this, which are covered in the next two sections.43

**Class Actions Facilitated Through Legislation**

The first reason lies in the procedural difficulty of organizing an action; the new class action legislation seeks to remedy this problem. Even before the enactment of class proceedings legislation, Québec,44 Ontario,45 and British Columbia46 litigants could attempt mass litigation through representative actions.47 Courts interpreted these representative action rules narrowly, therefore limiting their flexibility and usefulness.

142. Taxes can also be imposed on items and transactions. Although the payers of these levies could constitute a class and potentially satisfy the class certification test, they may face procedural or strategic difficulties given their lessened homogeneity or identifiability. The author is indebted to Paul Michell for this suggestion.


146. British Columbia Rules of Court, r. 5(1).

147. The legislation was largely based on the English Rules of 1833. The new legislation expressly removes three barriers by which r. 12 of the Rules of Civil Procedure blocked class actions. Certification is not to be denied merely because there are separate contracts, different remedies for different class members, individual damage assessments, subclasses, or an initially unknown number of plaintiffs. In British Columbia, similar limitations in r. 5 prompted the new legislation.

The remaining Canadian provinces still use these less elaborate avenues for class proceedings: Alberta Rules of Court, r. 42; Saskatchewan Rules of Court, r. 70; Manitoba Court of Queen's Bench Rules, r. 12; New Brunswick Rules of Court, r. 14.01; Nova Scotia Civil Procedure Rules, r. 5.09; Prince Edward Island, Civil Procedure Rules, r. 12; Newfoundland, r. 7.11, Federal Court Rules, r. 711. For a review of jurisprudence under these pieces of legislation, see Branch, *supra* note 143 at 21.10-21.840.
Hayes v. British Columbia Television Broadcasting serves as an example of the limited efficacy of the old rules.\(^{143}\) A contestant sued the Lingo television game show on behalf of a group of persons who had not received the prizes promised them. The British Columbia Court of Appeal reiterated the three-part test for class actions: a class capable of clear and finite definition; essentially the identical issues of fact and law for each member; and assuming liability, a single measure of damages applicable to all members. The Court held that as the contracts and representations given to the individual contestants differed, no class action was possible.\(^{148}\)

Similarly, in Naken, the Supreme Court of Canada dismissed an attempted class action brought on behalf of some 5,000 owners of allegedly defective Firenza motor vehicles.\(^{150}\) The Court ruled that Ontario Rule 75 (now Rule 12.01) was inadequate to support the complexity of the potential class action, and indicated that legislative reform would be needed.

Reports leading up to class action legislation in Ontario\(^{151}\) and British Columbia\(^{152}\) focused on the practical benefits, both legal and social, brought by class actions. These reports focused on three values promoted by class actions. First, the class action would facilitate and enable mass litigation, thereby promoting access to justice.\(^{153}\) Second, the resulting proceedings would be clarified through more detailed rules, and would allow for judicial economy.\(^{154}\) Third, the new rules would promote behaviour modification on the part of both plaintiffs and defendants.\(^{155}\) Would-be plaintiffs otherwise deterred from seeking justice over a minor wrong would be encouraged to launch a suit, through cost-sharing and procedurally expedient rules. The overall behaviour of defendants, who hitherto could take advantage of loopholes in the rules of legal procedure to evade civil liability \(\text{vide Naken}\) would improve in the face of potential litigation.

The new legislation sought to combat this conservative granting of class actions by previous courts, and to increase litigation access through clarifying the goals and procedures of class litigation. The legislation has been successful to a limited degree. When reviewing the certification applications before them, several courts
have cited the legislative goal of facilitating litigation over matters that would otherwise go unlitigated. It is granted that some cases have applied the legislation more restrictively than class action advocates would have perhaps envisioned. However, the steady proliferation in the number of class actions after the legislative reforms prompts further exploration of creative legal avenues through the class action vehicle. As this next section will discuss, the sphere of unjust enrichment, rarely the subject of class actions, represents a new realm for discovery.

**Class Actions Facilitated Through Restitutionary Principles**

*The Problem of Minimal or Notional Loss*

The difficulty of mustering litigation costs is correlative with the problem of minimal amount litigated over and the value of the effort of recovery. While some taxes, such as those in the *Air Canada*, *Woolwich*, and *Royal Insurance Australia* cases, involve large sums of money, many taxes will be insignificant. Here restitutionary principles complement class action goals in promoting litigation for the recovery of moneys having minimal significance to the individual but great significance to the class.

In many restitutionary cases, the plaintiff suffers only a *de minimus* or symbolic loss, and faces an uphill battle first in financing the litigation expense, and then in persuading the court to listen to the claim. Despite this adversity, some of the rare cases that have survived to litigation have been successful. For example, in *Daniel v. O’Leary*, recalcitrant ratepayers litigated over a monthly two dollar charge for sewage service. The Court ordered the ratepayers to pay the two dollars a month fee on the basis of unjust enrichment. In the class action context, the Quebec case of *Delaunais* concerned a two dollar overcharge on a fishing licence.

Some of the most famous restitution cases arise where the plaintiff has suffered no pecuniary loss. In the famous *Great Onyx Cave* case, the defendant profited from

---


[Permission class action promotes access to justice for the taxpayers who have with the City of Charlesbourg a common problem, in which the monetary value is of relative modesty and where the plaintiffs would not or could not negotiate the judicial process. [Author’s translation.]


158. (1976), 14 N.B.R. (2d) 564 at 565 (Q.B.). Although not a class action, the judge observed that a denial of restitution, and a finding for the defendant residents, would prompt the 70 other residents of the subdivision, all of whom used the sewer, to forfeit payment.

Although there was no entrance to the cave on the plaintiff's property, he was able to claim a share of the profits in restitution. Ernest Weinrib grounds this restitution in the violation of the plaintiff's rights in a normative, if not financial, manner. Similarly, in the English case of Reading, where a soldier profited from bribes willingly paid, the enrichment half of the equation is more apparent than the corresponding deprivation. Although the government suffered little or nothing financially from the bribe, the Court ordered the defendant to disgorge his bribe to the government.

As stated above, one prime impetus for the new class proceedings legislation is the remedy of exactly this kind of wrong, where many individuals suffer from damage which is sometimes minimal or notional. Alternatively, where the money in question would be substantial to the individual, the cost and pain of litigation would deter attempts at recovery. The class proceedings jurisprudence in Canada and the United States teems with examples of individuals banding together to remedy minimal or notional deprivations. In a famous American example, class proceedings alleging conspiracy and fraud were brought when it was revealed that the band Milli Vanilli had lip-synced its album. In the past thirteen years, Québec courts have certified at least six separate class actions brought by disgruntled travelers on charter tour packages. In each suit, most individual claims were for less than one thousand dollars. The Supreme Court of Canada recently ruled on a class action for non-pecuniary loss in the case of Syndicat national des employés de l'hôpital St-Ferdinand. The defendant union held a series of illegal strikes which deprived mentally disabled patients of certain care and services for 33 days. The Public Curator brought a class action on behalf of the deprived patients. These cases, decided outside of the realm of restitution, illustrate how intangible or non-pecuniary wrongs can be well addressed through the vehicle of the class action.

In addition to facilitating individual access to justice, the use of the class action for restitution would realize the social effects cited by the reports leading up to class

---

163. Freedman v. Arista Records, 137 F.R.D. 225 (E.D. Pa. 1991). The Court, in its supervisory capacity, rejected a settlement offering each purchaser of a Milli Vanilli record, tape or compact disc a $3.00 rebate on other records produced by Arista.
proceedings legislation. Few individuals would launch a lawsuit over a symbolic loss, or a two dollar monthly overcharge. However, a corporation, governmental or otherwise, could profit enormously from this small overcharge to thousands of taxpayers. The result would clearly be unjust. A class action could be an appropriate means, and sometimes the only viable means, to rectify this imbalance and restore the parties to parity. Where members of the plaintiff class suffered no actual pecuniary loss in relation to the defendant's gain, a restitutionary class action could condemn the unjust enrichment of the defendant, who would be forced to disgorge its profits.

**Minimal Individual Loss and the Defence of 'Passing on'**

The apathy and impotence of taxpayers and consumers relates closely to the above debate over the legitimacy of the 'passing on' defence. The fact that few individuals will be able or willing to litigate for relatively minimal losses can be used either to criticize or to justify a passing on defence. We will start with the critical camp. In *Royal Insurance Australia*, Mason C.J. shows how individual apathy reveals the unfairness and functional irresponsibility of the defence of 'passing on.' His Lordship points to *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, where the United States Supreme Court rejected the defence of passing on in an anti-trust context. In *Hanover Shoe*, the Supreme Court noted that it would be impossible to determine the economic effects on a company who had passed on its overpayments to its customers. This confusion is exacerbated by the fact that the defence would be applicable at all levels of tax distribution, with the wholesaler passing on the overpayment to the retailer, and so on. Ultimately, this chain of passing on would lead to the consumer who would have little interest in suing for recovery. Mason C.J. in *Royal Insurance* and the United States Supreme Court in *Hanover Shoe*, therefore, focused on the unjust enrichment of the government and ordered disgorgement. The immediate plaintiff, who may or may not pass on the overpayments, suffers the most individually from the overpayments, and is the only party motivated enough to seek government restitution. Practice fuses with fairness to indicate that the plaintiff taxpayer should have its moneys restored.

This lack of motivation on the part of taxpayers or customers could also be used to legitimize the passing on defence. In contrast to the *Royal Insurance* and *Hanover Shoe* positions, La Forest J. in *Air Canada* focuses on the unjust enrichment of the taxpayer who is able to pass the overpayments onto consumers. La Forest J. would respond that because customers will not sue for restitution, the government’s disgorgement of money to the plaintiff taxpayer would unjustly enrich the latter party. Therefore, consumer apathy permits the court to focus only on the potential enrichment of the taxpayer, and not on the actual enrichment of the government. The
danger of an unchallenged windfall allows the court to promulgate a 'passing on' defence.

The class action vehicle counteracts this problem of customers unmotivated or unable to individually reclaim the taxes. Restitutionary class actions would allow the immediate payer of *ultra vires* taxes to the government to regain their overpayments. It would also allow customers indirectly bearing the brunt of these taxes to recover from the immediate taxpayer. The restitutionary class action, therefore, cuts through the notional passing on debate, reviewed above, between Mason C.J. and La Forest J. Recall the two categories of taxpayer plaintiff discussed by Mason C.J. in *Royal Insurance Australia.* Where the taxpayer has passed on the tax directly to its customers, thereby becoming a constructive trustee, and where it is revealed that the taxes need not be paid to the government, the customers may sue the taxpayer plaintiff *en masse* for recovery. In many situations, such as the ice cream case of *Shannon v. Hughes,* or the restaurant case of *123 East Fifty-Fourth Street,* the money would be negligible for each individual plaintiff in the class action. Collectively, however, the illegal or unnecessary tax could constitute a significant sum. In larger commercial enterprises, the customer tax could prove significant both individually and collectively, and the class action would enable litigation where an incentive already exists. In both cases, the danger that the plaintiff taxpayer would be enriched vanishes because the class action would facilitate the customers to reassert their beneficial interest in the taxes. The need for the judicial contortions of the 'passing on' defence similarly vanish, ensuring a pure restitutionary analysis and allowing clear examination of the distinct relationship of unjust enrichment untainted by extraneous concerns of government stability.

VI CLASS ACTIONS AGAINST A TAXING AUTHORITY: PROCEDURE

Authorities and Limitations for Class Actions Against the Government

The restitutionary class action claim could be made against governments, quasi-governmental bodies, corporations regulated by these agencies, or private corporations and individuals. Section 36 of the *Ontario Class Proceedings Act* expressly states that a class action suit may be brought against the government: "This Act binds the Crown." Subsection 2(c) of the British Columbia *Crown Proceedings Act* speaks

---

169. *Royal Insurance Australia,* supra note 5 at 62-63. See the discussion of constructive trusts, in Part IV, above.


171. *123 East Fifty-Fourth Street,* supra note 127.

172. In *Wayne County Produce Co. v. Duffy-Mott Co.,* 155 N.E. 669 (N.Y.C.A. 1927) a customer succeeded in this very sort of action, seeking recovery of a tax allegedly passed on to it by the defendant, a sweet cider wholesaler. The wholesaler, successful in its restitutionary suit against the government, was in turn ordered to disgorge a portion of its windfall to the plaintiff. See generally, *Michell,* supra note 131 at 171-172.
wider than the class action context and confirms that "the Crown is subject to all those liabilities to which it would be liable if it were a person."

Most jurisdictions protect governments from litigation through special limitation periods, usually shorter than for identical actions brought against non-governmental parties. As further protection, some jurisdictions impose strict notice periods for suits against the government. Such legislation may be directed towards the Crown generally, toward public authorities, and toward municipalities. As a given public authority may have specific duties and limitation periods, it is necessary to check the jurisdiction's general Limitation Act, Crown Proceedings Act, Public Authorities Act, and any other legislation specific to the public authority to ensure compliance with these limitation periods.

In Ontario, suits against public authorities must be launched within six months. At least 60 days' notice must be given before the commencement of any action against the Crown. In British Columbia, s. 3(2)(a) of the Limitation Act imposes a two-year limitation on actions for damages based on statutory duty. Suits against British Columbia municipalities for acts purporting to have been done under the authority conferred on the municipality must be launched within six months. Under the Federal Act, suits arising from action within a specific province follow the limitation period for that province; alternatively, suits must be brought within six years. The notice period for federal suits is seven days.

In their restitution textbook, G.H.L. Fridman and J.G. McLeod have stated that "the present restitutionary causes of action fit uncomfortably within the traditional confines of the limitation statute." Three considerations suggest that these limitation periods may not apply to restitutionary suits against governments and public authorities. The first arises from the wording of limitation period legislation. While most limitation periods specifically list categories of actions and their limitation periods, limitation periods for suits for unjust enrichment, let alone such suits against the government, are usually not specifically prescribed. In the absence of specific limitation periods, most legislation contains a more liberal catch-all provision. Courts in

174. Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7(1).
175. Proceedings Against the Crown Act, R.S.O. 1990, c. P27, s. 7(1).
176. Limitation Act, R.S.B.C. 1996, c. 266.
179. Ibid., s. 12(1).
181. E.g. the trial judge in Allied Air Conditioning v. British Columbia (1992), 76 B.C.L.R. (2d) 218 (S.C.) held, that given the silence of the Limitation Act on restitutionary actions, a general six-year limitation mandated by s. 5(4) should be applied. Similarly, in the trial judgment of Peel v. Canada (1986), 7 F.T.R. 213 (T.D.), Strayer J. held, that in the absence of specific limitations regarding enrichment claims, the limitation period would be determined by the six-year period for 'actions under the cause', under s. 45(1)(g) of the Limitation Act [hereinafter Peel, (T.D.)].
other jurisdictions have held that, as the limitation legislation does not discuss restitutionary suits, such suits are unbound by limitations. This legislative silence is unsurprising, given the relatively recent development of restitutionary principles. Further, as Graham Mew observes in his text on Canadian limitation periods, most legislation protects authorities from suits arising from acts or omissions. Reticent to deny justice through the procedural device of limitation periods, courts have placed a heavy onus upon public authorities seeking their protection. However, in contrast to suits arising in tort or contract, restitutionary actions may not arise from an act or omission on the part of a public authority. This would be especially germane where the plaintiff voluntarily paid a tax. Where the suit does not focus on the defendant Crown’s neglect or default in the execution of a public duty, but instead seeks to rectify unjust enrichment untouched by considerations of fault, it may be suggested that the prescribed limitation categories do not apply. At the trial level in *Peel*, (T.D.), for example, Strayer J. held that Canada could not rely on s. 111(1) of the *Public Authorities Protection Act* to defeat the claim for restitution of money paid to the Crown under the *Juvenile Delinquents Act*. As the Crown was being sued on an obligation arising as a result of the actions of parties other than the Crown itself, a limitation defence did not apply.

The second reason to question the applicability of limitation periods concerns discoverability issues that arise in many instances of *ultra vires* taxes. In *City of Kamloops v. Nielson*, the Supreme Court of Canada held that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff. Where a party pays a tax under protest, a cause of action will not arise until a court confirms that the tax is, indeed, *ultra vires*. The limitation period should not commence at the time of the payment, or at the time of the protest, but at the later time when the plaintiff or plaintiffs discover a right to restitution of money collected incorrectly or illegally. It is submitted that Strayer J. was correct when he held that the limitation period in *Peel*, (T.D.) did not commence until after a court struck down the impugned law. While no Canadian class action has argued discoverability principles to allow

---

185. *Supra* note 181.
187. These discoverability principles, of course, are not unique to restitutionary class actions. In contrast to discoverability in torts, where the plaintiff can discover underlying and continuing damage, and an associated cause of action, restitutionary class actions often rely on the intervening discovery of a third party: the courts, that the impugned tax is *ultra vires*, thus providing a cause of action.
a claim after the expiration of the ostensible limitation period, the likelihood that the illegality of a tax will be 'discovered' through litigation years after the tax collection makes this principle especially germane to the immediate enquiry. 90

The third anomaly regarding limitation periods arises from the class proceedings legislation itself. Section 28 of the Ontario Act suspends the passage of applicable limitations periods once a class proceeding has been commenced. 91 The limitation clock will recommence, however, upon various contingencies, such as a failure to receive certification from the court, or a subsequent decertification. Thus even if the action fails as a class proceeding, individual members of the class may still have time to launch individual suits. The British Columbia Act differs radically from the Ontario and Quebec legislation on the point of limitations. Due to the wording of s. 39, the limitation period will not toll unless the proceeding is actually certified as a class action. For individual members in British Columbia, the certification will often become an all-or-nothing proposition as, failing certification, individual time limitations may have already elapsed. 92

Restitutionary Principles at the Certification Stage

Throughout this analysis we must keep in mind the bifurcated nature of class actions: the representative plaintiff must first obtain certification to launch the action. If the class action survives this first hurdle, and proceeds successfully to trial, then the court will give the second decision, that of final judgment on the merits. Following certification of the action, the interlocutory advancement of the suit and the trial itself will not differ radically from regular actions. In terms of procedure, s. 35 of the Ontario Act establishes that the Rules of Court apply to class proceedings. 93 In terms of substantive law, the court will decide the case based on restitutionary principles regardless of whether the action is brought by an individual or a class. For the purposes of this analysis, the important aspects of class actions are the certification application, and the intricacies of financial distribution following a final judgment.

A suit would progress as follows. A taxpayer, ratepayer, or consumer learns that a tax or charge has been unlawfully or incorrectly demanded. This charge deprives the plaintiffs, and correspondingly enriches the defendant. Many other payers have been likewise deprived. Under each of the three Canadian pieces of class proceeding

---

90. In *Maxwell v. MLG Ventures Ltd.* (1995), 40 C.P.C. (3d) 304, the Ontario Court (General Division) examined discoverability principles statutorily established in s. 138 of the Ontario Securities Act, R.S.O. 1990, c. 55, which states that the limitation period will commence 180 days after the plaintiff first had actual knowledge of the facts alleged not to have been disclosed in the impugned offering circular.
91. In the Quebec C.C.P., art. 2908.
92. The wide discretion conferred by s. 9 could arguably allow the court to suspend a limitation period in the interest of justice.
93. In the B.C. Act, s. 40.
legislation, the payer can seek certification to launch a class action. In granting certification, the court will examine the criteria set out in s. 5 of the Ontario Act:

- a) the pleadings or the notice of application discloses a cause of action;
- b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- c) the claims or defences of the class members raise common issues;
- d) a class proceeding would be the preferable procedure for the resolution of the common issues, and
- e) there is a [responsible and organized] representative plaintiff or defendant.

Substantive concerns of restitution arise in s. (a), while procedural utility unique to mass suits against government or other unjustly enriched parties touch upon the final four considerations.

**The Pleadings Disclose a Cause of Action**

The substantive threshold for a cause of action is not daunting. As Winkler J. stated in *Edwards v. Law Society of Upper Canada*:

"There is a very low threshold to prove the existence of a cause of action ... the court should err on the side of people who have a right of access to the courts."

Nonetheless, some class actions are dismissed at the certification stage, or prior to the certification stage through summary dismissal, summary judgment, or applications to determine a point of law. Cases such as *Tiemstra v. I.C.B.C.* have expressed reticence at employing the class action vehicle beyond its traditional areas of mass torts, products liability, and simple contracts. Further, given traditional judicial resistance to novel and expansionistic applications of the law of unjust enrichment, innovative

---

194. In the B.C. Act, s. 4, in the Québec C.C.P., art. 1003. See generally, Branch, *supra* note 143 at 4.10-4.1640.
195. For the purposes of this article, we will focus on the Ontario statute, although those of British Columbia and Quebec are similar.
198. *Tiemstra v. I.C.B.C.*, [1997], 149 D.L.R. (4th) 419 (B.C.C.A.), [1996], 21 B.C.L.R. (3d) 49 (S.C.). Although the Court in *Tiemstra* refused to certify on the grounds that class proceedings were not the preferable procedure, it also contrasted the claims in the immediate case with traditional areas of tort or contract which suit best the class action vehicle. See also *M-Jay Farms Enterprises Ltd. v. Canadian Wheat Board*, [1997] M.J. No.462 (C.A.)(QL), which was summarily dismissed for disclosing no right of action.
restitution claims could be vulnerable despite the low threshold. Judicial sensitivity to
restitutionary principles with regard to subsection (a), the cause of action, will result
in the certification of more actions. Whereas some applications will be dismissed
when there has been minimal or unclear compromise of the plaintiff's rights, a resti-
tutionary framework provides a stronger basis for a suit seeking to force the defen-
dant to disgorge its illegitimate gains.

**Identifiable Class**

The low legislative requirements for numerosity, which allow in theory for two per-
sons to make up a class, are in response to American jurisprudence refusing to certify
relatively small size classes.99 Despite the relative liberality of the Canadian legisla-
tion, the fewer the number in the potential class, the harder it will be for the appli-
cants to satisfy subsection (d); where the class is small, traditional joinder rules
would suffice. In the immediate enquiry, this problem would only arise where a tax
has been levied upon a discrete number of taxpayers. The *Air Canada* litigation, with
its three plaintiffs, would obviously not be a prime candidate for a class action. The
mass taxpayer action envisioned by this article would be precisely the large class that
the legislation has in mind. Therefore, the typical taxpayer action, such as *Caron* with
its 15,000 taxpayers, would have no problem with the requirement of numerosity.200

The petitioner need not give the exact number or identity of the persons in the
class at the time of certification. It is sufficient to establish to the court that there
exists a class of two or more persons who could be identified objectively after the
final trial. Once again, taxpayer suits would have little problem in establishing the
identifiability of the class, given the availability of tax rolls and detailed governmen-
tal accounting records. In the case of a non-governmental restitutionary class action,
such as a store systematically overcharging a sales tax, the identifiability of the indi-
vidual within the class will pose greater evidentiary problems. These problems, how-
ever, could be overcome through the production of affidavits, receipts, or other flexi-
bile means, as encouraged by the legislation.

**Common Issues**

The fact that different members of the class have been deprived of different amounts
of money under different transactions is not fatal to the requirement of common
issues. Section 1 defines "common issues" as

a) common *but not necessarily identical* issues of fact; or

b) common *but not necessarily identical* issues of law that arise from common but
   not necessarily identical facts.201 [Emphasis added.]

99. See generally, Branch, supra note 143 at 4.150 and 4.2 (6).
200. *Caron*, supra note 156.
201. In the B.C. *Act*, s. 1. See generally Branch, supra note 143 at 3.80, 4.600-4.630.
Further, s. 6 of the Ontario Act emphasizes that the court may not refuse to certify solely on the basis that the relief claimed would require individual assessment of damages after determination of the common issues, or that the relief claimed relates to separate contracts involving different class members. In contrast to typical class actions grounded in tort, which often require complicated post-trial assessments of individual damages bolstered by expert evidence, the restitutionary class action would proceed in relative simplicity. Once the central issue of unjust enrichment is determined, the individual members need only receive the deprived amounts. Evidence subsequent to the main trial would be easily provided through tax rolls or receipts.

**Class Proceeding the Preferable Procedure**

Would-be class actions that fail usually falter upon the fourth requirement. Where the aggrieved taxpayers are few, traditional rules of joinder and consolidation would satisfy the goals of access to justice and judicial economy. A class proceeding, with its possibility for complexity, would not be desirable where the class is sufficiently manageable under traditional techniques of joinder or consolidation. Nor would a class proceeding be the preferable method where a statutory or administrative scheme already exists for reclaiming illegally gathered taxes or overpayments. For example, in the US case of *Jones v. Township of North Bergen*, the Third Circuit Appellate Court denied certification to a taxpayer class action where the state already provided "a plain, speedy and efficient remedy for aggrieved taxpayers." Similarly, in *Rogers Broadcasting v. Alexander*, the Ontario Court refused to certify a class action brought under the *Canadian Business Corporations Act* where that statute already provided means of addressing the grievances of the applicants.

In the present context of *ultra vires* taxes, it may be asked why it would be necessary to launch a class action at all. A single applicant could challenge the constitutionality of an impugned tax or tariff, and the government would presumably refund all moneys collected after a judicial declaration of invalidity. There remain several reasons, however, why the class action would remain the preferable procedure in cases of unjust enrichment at the expense of many individuals. The first clearly arises where the defendant is non-governmental or *quasi*-governmental and may not

---

202. In the B.C. Act, s. 5.  
204. See McConnell v. United States, 295 F.Supp. 605 (E.D. Tenn. 1969), where certification was denied to taxpayers grieving federal income tax overpayments, where the relevant federal statute already provided a means of restitution. Similarly, see *Ziegler, supra* note 197, where the Ontario Court (General Division) held that the *Rent Control Act, 1992*, S.O. 1992, c. 11, s. 30 already provided a complete code of procedure, including the power to conduct representative actions, therefore, a proposed class action for recovery of rents illegally collected should not be certified.  
205. (1994), 25 C.P.C. 159 at 163 (Ont. Ct. (Gen. Div.)), See also *Noel, supra* note 98 at 107.
automatically refund the moneys to those who have not filed suit. Where the issue might be *res judicata*, the expiry of limitation periods would allow many defendants to escape repaying those persons to whom they are not bound by a court decision. Nor is it entirely clear that a municipality or other government would be forced to restore an *ultra vires* tax to persons who had not sued for it. While this mass restitution would be politically expedient, the government would perhaps prefer immediate fiscal stability to taxpayer disgruntlement, especially if the impugned tax were so minimal that few others would sue to enforce its collection. Given that an individual suit would not freeze limitation periods for other taxpayers as would a class action, all other claims would likely be statute-barred by the end of the individual trial.

Another possibility is that the government could pass retroactive legislation validating the tax, or changing its effects so as to render it *intra vires*. In the events leading up to *Air Canada*, British Columbia did exactly that, passing grandfathered legislation to rehabilitate its *ultra vires* gasoline tax. Only through a class action will a court order bind the defendants to the individual members of the class, thereby requiring disgorgement to all.

Ultimately, one must look to the goals of judicial economy and access to justice cited in the reports leading up to the class proceeding legislation. Even with a relatively simple overpayment or *ultra vires* tax, the costs of litigation would be daunting for an individual. In many cases, the fiscal reality of litigation will make the class action not only the preferable procedure, but the only viable procedure for demanding restitution.

**Representative Plaintiff**

The final requirement is that there exists an adequate representative plaintiff. Ontario *Act ss. 5(2)(a), (b), and (c)* further clarify that the plaintiff should be organized and motivated, with a plan for the litigation, and with no conflicts of interest.

---


207. See also Part IV, above. In addition to *Air Canada*, *supra* note 3, *Amax*, *supra* note 9, is the leading authority on the issue of retroactive rehabilitation of taxes. The various judicial interpretations given to *Amax* at the three levels of judgment in *Air Canada* show that this issue is still volatile. At the British Columbia Court of Appeal, for example, Hinkson and Lambert J.J.A. saw *Amax* as holding that the state cannot engage in an *ultra vires* exercise of power by way of taxation, and then manipulate statute or the common law to retain the proceeds of the illicit tax (explained in *Air Canada*, *supra* note 3 at 178). Esson J.A., with whom La Forest J. agreed, interpreted *Amax* more narrowly to block only governmental attempts to bar would-be plaintiffs from recourse to the courts in the face of an *ultra vires* levy tax (explained in *Air Canada*, *supra* note 3 at 179).

208. As s. 26(2) of the B.C. Act and art. 1027 of the Québec C.C.P. remind, the results of the litigation will not be binding against persons who have opted out of the class action.


210. In the B.C. Act, s. 4(1)(i)(ii), (iii), and (iii).
In most cases, a court will only be able to determine this factor after examining the plaintiff’s knowledge of the suit, her motivation, her competence, her willingness to seek proficient counsel, and the like.\textsuperscript{211} In the context of a restitutionary class action, this issue could arise in two ways. The first is the threshold question of whether the representative plaintiff has individual standing to launch the suit.\textsuperscript{212} For example, a proposed plaintiff may not have standing to sue the municipality of residency. American case law insists strictly that a representative plaintiff be a member of the class represented.\textsuperscript{213} While the Ontario legislation is silent on the issue, the British Columbia legislation is more liberal with regard to standing, permitting a non-member of the class to sue “only if it necessary to avoid a substantial injustice to the class.”\textsuperscript{214}

The second question arises where there may exist several distinct categories of persons unjustly enriched. For example, in a property tax suit, different neighbour-hoods may have been overcharged in different rates and manners. In such a situation, s. 8(2) of the Ontario Act empowers the court to order the division of the class into subclasses, each headed by its own named representative.\textsuperscript{215}

Restitutionary class actions of the genres envisioned by this article offer a third problem concerning the representative plaintiff. Once again, such a restitutionary action may hold the promise of only minimal recovery for the representative plaintiff. Why would any person go through the difficulty of organizing a class action to recover a small amount of money? Where the emphasis is on the disgorge ment of the defendant, rather than the restitution of moneys to the plaintiff, it may be doubted that a representative plaintiff would step forward. There arise several responses to this fear. The first is the evidence that despite \textit{de minimus} promise of gain to the representative plaintiff, individuals will in fact step forward to prosecute claims. In this, the restitutionary class action is not unique. One could ask if the struggle of Ms. Naken, 211_ Refusal to certify on this ground is rare. In \textit{Nadeau v. Compagnie P\'etrol\'\'ire Impirale L\'\'\'ee Esso}, [1981] R.J.Q. 1171 (Sup. Ct.), the proposed plaintiff in a price-fixing suit against gasoline chains was deamed unfit as he had lied about aspects of his affidavit setting the cause of action.

212. For standing issues generally, especially in declaratory or constitutional suits by taxpayers, see, B.L. Strayer, \textit{The Canadian Constitution and the Courts: the Function and Scope of Judicial Review}, 3d ed. (Toronto: Butterworths, 1988) at 179-183.

213. See the non-restitutionary class actions in \textit{Hobbs v. Police Jury of Morehouse Parish}, 49 F.R.D. 176 (W.D. Louisiana 1970), and \textit{Allee v. Medrano} (1974), 416 U.S. 802 at 828-829, 94 S. Ct. 2191, where the Supreme Court noted that

\begin{quote}
[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person does not predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action
\end{quote}

In \textit{Young v. Pierce}, 544 F.Supp. 1010 (E.D. Texas 1982), a group of three proposed plaintiffs sought certification to bring a civil rights suit against 36 different municipalities. The Court held that, while the three could bring suits individually against their own municipalities, they had no standing to sue on behalf of other individuals in other municipalities.

214. In the B.C. Act, s. 2(4).
215. In the B.C. Act, s. 6.
all the way to the Supreme Court, was worth the price of an automobile. Few class
actions make economic sense to the individual plaintiff; however, class actions are
still launched. Whether motivated by politics, principle, litigiousness, crankiness, or
desire for fame or empowerment, individuals will come forward to rectify unjust
enrichment. The second reason arises as an insurance policy for the first. The most
important modern Canadian jurisprudence has come about as a result of social and
political organizations exercising a watchdog role through litigation. Similarly,
there exist many consumer and taxpayer organizations that would be well-motivated
to launch a suit even where individual recovery would be slight. The third response
is the reality that many class actions are not commenced by the representative plain-
tiff, but by entrepreneurial lawyers who identify a valid cause of action and advertise
for members of the plaintiff class. Here, the individual motivation to organize and
launch the class action comes from the profit motive of the lawyer foreseeing a large
fee. Such a fee could be extracted, like the original impugned tax, at a de minimus
cost to each individual plaintiff.

216. See e.g. Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Ford v. A.G.

217. While such organizations could finance or organize such a class action, they would generally not
see in their own name, but in the name of the representative plaintiff. It may be possible for an
aggrieved corporation or other body to sue on behalf of similarly aggrieved legal entities.
Ontario Act, s. 2(1) and B.C. Act, s. 2(1) refer to a ‘person’ bringing a suit. The Interpretation
Act in each province—R.S.O. 1990, c. 1.11, s. 29 and R.S.B.C. 1996, c. 238, s. 29—states that
‘person’ includes a corporation or partnership. Quebec art. 1068 allows charities, cooperatives,
unions, and certain other corporate bodies to sue on behalf of their members. See Branch, supra
note 143 at 4.260 and Sullivan, supra note 143 at 15-16. Of course, where there are a finite num-
ber of companies or legal personalities affected, the preferability of the class action decreases,
as opposed to traditional roles of joinder.

218. Costs and the limited availability of funding may further deter the would-be representative
plaintiff. The effect of this disincentive will differ according to jurisdiction. Despite the
recommendations of the Ontario Law Reform Commission that the Ontario Class Proceedings
Act modify the usual Anglo-Canadian costs regime wherein the loser pays the bills of the win-
der, s. 31 of the Ontario Act preserves this rule. Section 31, however, confers discretionary pow-
ers on the court to waive this rule where the case is a test case, raises a novel point of law, or
involves a matter of public interest. It is submitted that the cases discussed in this article would
gain an exemption under all three categories. In contrast to the Ontario Act, s. 37 of the B.C. Act
adopts a “no costs rule.” Subsection 37(2), however, allows a court to make an award of costs in
exceptional circumstances. In Québec and Ontario, a representative plaintiff who obtains fund-
ing is immunized from an adverse costs award: see An Act Respecting the Class Action, R.S.Q.,
c. R-21, s. 31, and the Law Society Amendment Act (Class Proceedings Funding), S.O. 1992,
c. 7, s. 39.4. These aforementioned statutes also facilitate class actions, with limited success,
through the establishment of class action funds. Note, however, that the Ontario fund may not be
used to cover lawyer’s fees: s. 39.1. For costs generally, see Branch, supra note 143 at 19.10-
19.270.

Contingency fees represent a means of facilitating a restitutionary class action. In a unique
exception to its general prohibition on champertous contracts, s. 33 of the Ontario Act allows a
modified contingency fee regime. Contingency fees are already permitted in British Columbia
and Quebec. For funding and financing generally, see Branch, supra note 143 at 8.10-8.290.
Remedies: The Distribution of Disgorged Moneys

The class proceedings legislation provides detailed means of distributing the moneys ordered disgorged after a successful trial. Sections 23 to 27 of the Ontario Act outline detailed means of distributing awards to individual members of the class based on the amount of which they were deprived. Courts enjoy broad discretionary powers in authorizing an appropriate and effective means of distribution. These awards may be made in aggregate where proof by individual class members is not required. As mentioned, in most tax cases, detailed government records will facilitate distribution. Likewise, a private defendant may hold sufficient records to allow distribution to individuals. Alternatively or coextensively, individual customers could collect from the aggregate moneys paid into court, after production of a receipt proving unjust deprivation.

More serious problems are posed where the unjustly deprived moneys were negligible or imprecisely recorded, or the deprived individuals are unknown or absent. The legislation, however, anticipates precisely these difficulties. Sections 26(4) and (6) of the Ontario Act allow for the cy-près distribution of an award. Where the return of moneys to specific payers would be evidentially or practically difficult, the court may order the disgorgement of the money in a means calculated to indirectly benefit the deprived payer. In the governmental context, this could be through a tax cut or the channelling of the ill-gained funds into a specific public project. In the case of a utility overcharge, a general discount could be offered. In the case of restitution against a private corporation, the court could order that the defendant make a dona-

219. In the B.C. Act, ss. 26-34. In the Quebec C.C.P., arts. 1028, 1030, and 1032-39 deal with distribution.

220. In this, the corrective justice bipolarity principle may be blurred in practice. In the case of ultra vires taxes, the court may examine the ledgers of the government and calculate the total amount of ultra vires taxes received, even if the total number of taxpayers is unclear. However, in the unjust enrichment context, this is less offensive than in the torts context. Whereas tort liability does not exist in the air, and relies on a calamitous event linking the plaintiff and defendant, unjust enrichment is not so temporally dependent. The court could order the defendant government to disgorge the unjustly collected tax revenues, and wait for the unknown plaintiffs to step forward and claim. It would be crucial for the court to ensure a rigid system of proof and identification to ensure that a non-plaintiff would not be unjustly enriched through fraudulent or accidental claims.

A second potential problem lies with the provision in s. 24(2) (in the B.C. Act s. 31) allowing payment on an average or proportionate basis where it is impractical to ascertain the actual amount due to each member of the class. Again, this could prejudice the interests of individual members of the class. In the tax context where some precision could usually be ascertained, this fear is less acute.

221. In the B.C. Act, ss. 34(1) and 34(4); in the Quebec C.C.P., arts. 1034-1036.

222. In his article on the new Ontario Class Proceedings Act, Watson actually gives an unjust enrichment example, where a regulated television cable company overcharged its subscribers, the court could order that future bills include a rebate. This would presumably leave ex-subscribers who had overpaid out in the cold. This, too, is a principle of both corrective justice and common sense that a court fashioning a remedy would have to consider. G.D. Watson & M. McGowan, Guide to Case Management and Class Proceedings (Toronto: Carswell, 1993) at 5.
tion, or lower prices, or otherwise disgorge the money. The imprecision of this system may benefit plaintiffs or even non-plaintiffs in a manner more or less than their actual deprivation. Delaunais would have been such a case if the Court had accepted its proposed settlement. Following the Delaunais trial, it was impossible to know the names of the thousands of persons who had overpaid the fishing tariff in 1982. The proposed solution was a court order that the Ministry donate $465,000 to a wildlife conservation and recreation group. While the unjustly deprived taxpayer will not necessarily benefit from such a solution, the cy-près distribution at least forces the defendant to disgorge its unjust enrichment.

Such a disgorgement seems intuitively sensible: it satisfies a public goal of deterring overcharging, and directs the money to an appropriate source. However, there is no link between the group receiving the money and the class of mostly unknown plaintiffs, besides their shared penchant for fishing. A more satisfactory solution would be an order that the government hold the impugned funds in trust for the actual visitors to reclaim in the years ahead, upon production of a receipt or some other means of proof. As mentioned above, the constructive trust offers a solution to the quandary posed by the passing on problem. It is conceded that at some point there must be a mechanism for dealing with the unclaimed money. Here, the court could depart from private restitutionary principles, and craft a public-law solution such as that in the Delaunais case. Again, one could argue that this represents not a substantive abandonment of private law principles, but rather a procedural lapse, analogous to the expiry of a limitation period. The court would have to take into consideration factors such as notice to potential claimants, and the possible prejudice to claimants in setting a deadline for collection by members of the class.

223. Although lowering prices would confuse matters further by increasing the demand, promoting business, and hurting competitors, thus possibly benefiting the taxpayer-plaintiff.

224. The Delaunais case, supra note 159, is currently in limbo. The representative plaintiff and the government reached an out-of-court settlement. The Québec C.C.P. art. 1025 and Ontario Act s. 29(3) require court authorization of such settlements, as a means of protecting the interests of the members of the class. B.C. Act, s. 35(1)(a). In April 1992, the Court rejected the settlement, citing fears of self-dealing.

225. See Newberg, supra note 143 at 10.17-10.24, for criticism and discussion of the cy-près doctrine in the class action context.

226. See discussion of constructive trusts in Part IV, above.

227. Where there is unclaimed money after the period for claiming has expired, it is to be returned to the defendant. In Illinois Bell Telephone v. Slattery, 102 F.2d 58 (7th Cir. 1939), it was proposed (but rejected) that such funds should be declared bona vacantia, to be the property of the state. In the case of taxes, this, of course, would be a redundant doctrine.
VII CANADIAN CLASS ACTIONS BASED ON RESTITUTIONARY PRINCIPLES

Class Actions Based on Restitutionary Principles

While this article has focused on the theory and practice behind restitutionary class actions, the relative novelty of the Canadian class proceedings legislation provides few examples to discuss in relation to the preceding exegesis. As the goal of the article is a future-looking exploration of the possibilities of the restitutionary class action, this scarcity does not alarm. There have been very few Canadian class actions based on restitutionary principles. In addition to the Quebec cases below, there have been three class actions suits involving restitutionary principles in Ontario and one in British Columbia. In Smith et al. v. Canadian Tire Acceptance Limited, the Borrowers’ Action Society sued Canadian Tire for alleged credit card overcharges exceeding criminal interest rates. The Court dismissed the action after the defendant applied for summary judgment, agreeing that the late charges did not fall under the definition of interest under s. 347 of the Criminal Code. A subsequent suit concerning over-charges failed on similar grounds in the case of Garland v. Consumers’ Gas Co. In the third case, Windisman, the plaintiff sued on her own behalf and on behalf of some 544 purchasers of units for underpaid and unpaid interest. The defendant condominium developer argued that unjust enrichment principles should allow it to adjust the contractual terms after the closing of the condominium sales. In his judgment, Sharpe J. stated that no unjust enrichment had occurred, as the defendant received no benefit, and the plaintiffs suffered no detriment. However, if enrichment had taken place, the closure of the contracts of sale provided a juridical reason for this enrichment. In Edmonds v. Accton Super-Save Gas Station Ltd., the plaintiff claimed that the defendant gas station chains had incorrectly collected Goods and Services Tax at the rate of 7% on gasoline purchases. The action did not survive to the certification stage, as it was dismissed under a Rule 34 application to determine a point of law.

As none of these cases involved governments or ultra vires statutes, and did not discuss the restitutionary elements in detail, they will not be discussed further here, except to offer a precedent of the use of the class action for private restitutionary

---


231. (1996), 5 C.P.C. 446 (10). Although the plaintiff did not specifically base her claim under restitution, restitutionary arguments would have no doubt emerged had the suit survived.
suits. It is not suggested that any of the above cases were dismissed unmeritoriously, or without full consideration of restitutionary principles where appropriate. At the same time, the development of a jurisprudence of restitutionary class actions will in turn engender further actions, as courts become more familiar with the interrelationship between substance and procedure in such suits.

Restitutionary Class Actions Launched Against Governmental and Quasi-governmental Bodies

In Québec, courts have authorized two of the four restitutionary actions that have arisen. In *Delaunais*, the Québec Ministry of Recreation, Hunting, and Fishing had charged two dollars over the amount set by regulation for a fishing licence. 232 The Québec Court certified the action, which was eventually settled out of court. In *Caron*, the representative plaintiff claimed that the City of Charlesbourg was not authorized by the *Cities and Towns Act* to levy a 6% school tax. 233 On behalf of 15,000 taxpayers, Caron sought a declaration that the tax was *ultra vires*, and that the school board return the tax. The Court certified the class action, noting that the facts alleged appeared to justify the pleadings, that the action raised issues common to each member of the class, and that usual joinder rules would not be feasible:

> We believe that the proposed class action would promote an action in which the individual claims would not justify going to court. The question of the legality of the impugned resolutions [authorizing the tax], to determine the issue of the interest on the back taxes is an important issue for each of the members of the group; they all share the same problem as Mr. Caron. 234 [Author's translation.]

Although the case has not proceeded to trial, *Caron* represents the best and most optimistic illustration of the restitutionary class action in the young Canadian jurisprudence.

Two Québec restitutionary class proceedings failed at the certification stage due to procedural inadequacy. In *Deslauriers v. Ordre des Ingénieurs de Québec*, the would-be representative plaintiff, an engineer, sought to sue the professional society for *ultra vires* professional dues. 236 The Court rejected this request, based on the plaintiff's failure to contact other members of the society to solicit their views on the proposed action. 236 In *Thibodeau v. Commission de la Santé et de la Sécurité du*
Travail du Québec, a non-tax suit launched against the Worker’s Compensation Board for unjust enrichment over delayed compensation, the plaintiff was similarly denied certification because of procedural failings.\textsuperscript{237} The Court, however, also summarily dismissed the claim on restitutionary grounds, as it disclosed no cause of action. The Court concluded that the Workers’ Compensation scheme vested no rights in the individual worker, but merely served to supplement the contributions of the employer. The plaintiff correspondingly suffered no deprivation.\textsuperscript{238} In a variation on the governmental immunity argument above, the Court also held that the Commission could not be unjustly enriched, as after paying its own operating expenses, its coffers were directed towards payment of claims and not profit \textit{per se}.\textsuperscript{239}

While this article does not suggest that this particular case was incorrectly decided, one could imagine that a more flourishing and varied jurisprudence of restitutionary class action would afford applications such as that in \textit{Thibodeau} greater judicial consideration.

We cannot draw conclusions from this brief jurisprudence, which focuses more upon the procedural requirements of the class action than the substantive issues of restitution. These examples, however, provide a range of potential class action suits brought by ratepayers against an unjustly enriched governmental or quasi-governmental body. \textit{Caron} shows how a parallel study of class actions and restitution can benefit both areas of the law, to rectify both public and private wrongs between governments and individuals.

There are four reasons for the paucity of restitutionary class actions against government bodies. The first is, of course, the relative novelty and rarity both of cases involving restitutionary principles and of class actions. Second, the revelation of an illegal tax is not intuitive and immediate in the manner of products liability or personal injury mass tort litigation. Third, the effects of \textit{ultra vires} taxes do not linger in the manner of torts or product liability; many taxpayers would shrug off taxes already paid. The final reason is that such class actions can be settled or abandoned, as seen in \textit{Delaunais}. For these reasons, and for the resulting scarcity of cases illustrating restitutionary class actions against governments and governmental bodies, this article has sought to approach its thesis in a conceptual and conjectural manner. It would be premature to examine the future of such actions based on the few precedents above. Instead this article has sought to point the way for future class actions through an examination of the principles linking the procedural vehicle with the substantive restitutionary law underlying these potential future actions.

\textsuperscript{238} \textit{Ibid.} at 208-209.
\textsuperscript{239} \textit{Ibid.} For the defence of governmental immunity, see Part IV, above.


**VIII CONCLUSION**

The class action offers an especially appropriate means of addressing mass restitutionary claims, which in past have gone unlitigated and uncorrected. Even where the impugned charge or levy has been substantial to the average individual, taxpayer, or business, in the thousands of dollars, many will balk at legal redress in the face of legal costs and complexities. Where the utility overcharge, the illegal tax, the excessive interest rate, or the unauthorized toll affects the individual with less pecuniary bite, most will swallow their principled indignation and let it pass. Further, these amounts, either large or small, will accumulate to bestow upon the collector a dramatic unjust enrichment. Given collective action problems, coupled with the imprecision and inadequacy of traditional joiner rules, such unjust enrichment will usually go unchecked. The class action legislation empowers individuals to recoup their loss. It serves in turn as a regulatory mechanism, deterring the unjustly enriched from illegal collections.

Despite the litigation opportunity the class action legislation presents, the restitutionary class litigation must anticipate difficulties in any action. One challenge is doctrinal. Although the cause of action threshold is relatively low, litigants will face an uphill struggle, especially in an action to recover illegally levied taxes. Although Canadian courts have applied a principled analysis to unjust enrichment in the private sphere, the utilitarian, policy-based *Air Canada exception* will prevent recovery in most circumstances. However, a union of restitutionary principles and class action procedure will challenge the authority of *Air Canada*, and perhaps expand the potential for the restitutionary class action. In light of decisions in England and Australia criticizing *Air Canada*, in light of greater Supreme Court acceptance of a principled approach to restitution, and in light of recent changes to the membership of the Supreme Court, including the retirement of La Forest J., this roadblock to tax restitution may soon be lifted. Increased litigation will provide both the logical tension and the litigation opportunity for overturning *Air Canada*.

Another challenge is strategic and logistical. The representative plaintiff faces an initial financial challenge, in gathering the money to publicize and launch a suit. Canadian class proceedings systems differ most greatly not in their legislation, but in their legislative apparatus designed to promote class actions through funding mechanisms. The potential class litigant must be aware of the potential for funding, and the potential for adverse costs awards. Throughout the restitutionary litigation, the class will likely face a well-financed and represented defendant, along the lines of the government, utility, or bank envisioned by this article. The brief Québec jurisprudence illustrates two hazards litigants face in the potentially long battle for recovery. First, as seen in *Caron*, the strain of finances and organization is often too great, and many class actions will die before trial. Second, as seen in *Delannais*, even if the

---

240. *Air Canada*, supra note 3.
241. *Caron*, supra note 156.
class action is successfully waged so as to force a settlement offer, the representative
plaintiff will have to convince the court that an offer is in the best interests of the
class.\textsuperscript{232} The restitutionary class litigant will face the doctrinal challenges posed by
the categorical approach, whose frozen conception of restitutionary rights and exceptions
does not lend itself well to the innovative suits such as would be a restitutionary
class action.

The above should not suggest a pessimistic future for this infant procedural mech-
nanism. Recent developments in the procedure and substance surveyed in this paper
envision greater clarity, and with it, greater opportunity for both restitution and pro-
cedure. A move away from the categorical approach to restitution, as evidenced by
\textit{Nepean} and \textit{Eadie}, to a principled rule of \textit{Peel} and \textit{L.C.B.}, envisions that restitution-
ary principles can provide a basis for correcting previously unremedied unjust enrich-
ment.\textsuperscript{243} \textit{Peter v. Beblow} is most illustrative of this. Traditionally limited to com-
mercial transactions, its flexible tripartite principles could also ensure restitution and jus-
tice in the realm of family law. Correlative with these recent doctrinal developments
in family law are legislative innovations to ensure efficient dispensation of justice in
family law procedure.\textsuperscript{244} It is suggested that class proceedings could play a similar
procedural role alongside these substantive developments. Stubborn individual liti-
gants, mobilized political or social groups, or entrepreneurial lawyers can seize these
new litigation opportunities to effect individual and social justice.

The realms of class action and restitution can thus inform one another. Class
action litigation is a procedural device especially suitable for realizing restitution of
illegally gathered taxes and other charges. In turn, restitution offers a conceptual
framework highlighting the injustice of unjust enrichment, even where the depriva-
tion of the plaintiffs is only minimal. The class action also provides a practical and
conceptual means to avoid denial of restitution through the defence of passing on; a
customer class action will correct any windfall unjust enrichment of the taxpayer,
thereby removing the need for this problematic defence. If lawyers and judges
approach class action certification applications with an eye to these restitutionary
principles, it follows that more of these actions will be launched and will ultimately
receive certification. This judicial nexus would allow regular citizens, and not just
wealthy corporate litigants such as Air Canada, Woolwich Building Society, and
Royal Insurance Australia to recover what is properly theirs. Class actions will thus
realize distributive goals, while effecting individual justice through the disgorgement
of money unjustly collected.

\textsuperscript{242} \textit{Delaunais}, \textit{supra} note 159.
\textsuperscript{243} \textit{Nepean}, \textit{supra} note 10; \textit{Peel}, \textit{supra} note 11; \textit{L.C.B.}, \textit{supra} note 87; \textit{Eadie}, \textit{supra} note 7.
\textsuperscript{244} \textit{Peter v. Beblow}, \textit{supra} note 15.