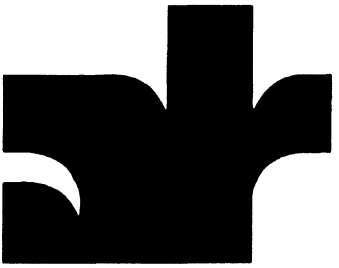

NOTE

*Belinda C Wells**

RESTITUTION FROM THE CROWN: PRIVATE RIGHTS AND PUBLIC INTEREST

> [T]he concept of unjust enrichment ... constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.[1]

LATE last year this proposition was endorsed by the High Court in *David Securities Pty Ltd v Commonwealth Bank*.[2] The Court's recognition of the "unifying legal concept" of unjust enrichment led it to abandon the traditional bar on recovery of moneys paid

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* LL B (Adel); LL M (Lond)

1 *Pavey & Matthews Pty Limited v Paul* (1987) 162 CLR 221 at 256-257 per Deane J.

2 *David Securities Pty Ltd v Commonwealth Bank* (1992) 175 CLR 353 at 378-379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; at 389-390 per Brennan J; at 401 per Dawson J.

under a mistake of law on the basis that, once the unifying concept was recognised, the distinction between mistakes of law and mistakes of fact became "simply meaningless".[3]

In *David Securities* the recipient of the moneys, the Commonwealth Bank, was a private rather than a public entity. Each of the payors asserted that it had made a payment in respect of withholding tax to the Bank pursuant to a term in a foreign currency loan agreement, in the belief that it was legally obliged to make the payment. The High Court held that the relevant term in the agreement was void because of the operation of s61(1) of the *Income Tax Assessment Act* 1936 (Cth). Further, the Court held that each payor would have a prima facie right to recover its moneys from the Bank if the evidence established that, at the time of making the payment, the payor had been mistaken as to whether it was legally obliged to make the payment. There would be a prima facie right to restitution on the basis that the payment had been made under a mistake of law.

However, in *David Securities* there was no need to consider whether, on broad policy grounds, the new mistake of law ground of recovery should operate in the same way (if at all) in a public law setting, where the Crown, rather than a private entity, is the recipient of the moneys paid under the mistake of law. It is this public law setting and the difficult policy issues raised when the recipient of moneys is the Crown, which are the subjects of this article.

The High Court decided in *David Securities* that a payor will have a prima facie right to recover its payment if it was, at the time of payment, either mistaken (in that it held a positive belief which was incorrect) or ignorant as to its legal obligation to make the payment.[4] However, it seems that an 'informed' payor, who was neither ignorant nor mistaken about its legal obligations at the time of payment, will have no such prima facie right to restitution. The new ground of recovery, based as it is upon either ignorance or mistake, is not available to the 'informed' payor who, for example, has decided to make its payment under protest, after receiving legal advice that the payment has been demanded pursuant to an invalid law.

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3 *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193 at 209 per Dickson J (dissenting), cited in the joint judgment in *David Securities* at 375.

4 As to 'ignorance', see *David Securities v Commonwealth Bank* at 365-366. The right to recover is, however, subject to the question of 'voluntariness', which is discussed below.

The impact of the new ground of recovery is potentially very widespread. The traditionally recognised unjust factors which give rise to a right to restitution in the area of payments to the Crown - mistake of fact, compulsion, and *colore officii* - are only maintainable by an individual payor on the basis of the particular circumstances in which it made the payment. The impact of the mistake, the compulsion, or the duress is generally confined to the individual case. By contrast, the same mistake of law may be relied upon by numerous claimants.

A particular mistake of law may have a 'flow on' effect whether the recipient of the moneys is a private person or the Crown. As to the former instance, a number of payors may, for example, seek to recover moneys which they have individually paid to a bank under a mistaken interpretation of the law which is the same in each case, pursuant to a clause of the bank's standard form contract which is in fact invalid. A particular 'misapplication of the law' may have been widely adopted by payors in the community, whether the recipient of the moneys is a private person or the Crown.

However, the impact of allowing recovery for mistake of law is at its most significant where the mistake of law made by the payor is not a mistake as to the effect or application of a valid law, but a mistake as to the *validity* of a law. Here, the recipient of the moneys is almost always the Crown. If recovery of moneys paid under this type of mistake of law is permitted, the ignorant or mistaken payor will again have a prima facie right to recover its moneys; the payor who is not operating under a mistake as to the validity of the law (and who in fact asserts that the exaction is invalid), but who pays the tax or other exaction in apprehension of the penalties that will otherwise be imposed upon it, will have to look to other grounds of recovery (if any). Until such time as payors desist from the practice of asserting that exactions imposed upon them are invalid, the new ground of recovery will be available to certain payors, but not to others. The 'informed' payor's inability to rely on the right will not always be easy to justify.

Nor will the availability of other recognised grounds of recovery have an ameliorating effect. The only recourse for the 'informed' payor who has paid moneys to the Crown pursuant to an invalid statute will be to attempt to establish a right to restitution based upon the ground of compulsion. However, only a few such payors will be successful since the courts have defined "compulsion" narrowly,[5] so that, for example, a threat of legal

5 The current position is probably that summed up by La Forest J in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 at 199: "[T]here must be some

proceedings with the possibility of a prosecution for non-payment of moneys is not regarded as sufficient compulsion[6] (whereas a threat to distrain a business' goods may be). A payor could with some justification complain that the distinctions that the courts have drawn between "sufficient" and "insufficient" compulsion are artificial where the recipient of the moneys is the Crown, since the Crown's demand for moneys is generally backed by an implicit threat that it will rely upon legislative sanctions if the payor fails to pay the exaction.

A further anomaly in the area of recovery of moneys from the Crown is the *colore officii* doctrine. It has long been established that a payor may recover moneys which have been demanded by a public official acting in their official capacity (that is, *colore officii*) if the payor can show that the official had no lawful basis (no authority) for demanding the moneys in the performance of their public duty. Payments demanded *colore officii* are regarded by the law as being made under duress. They are recoverable regardless of whether the recipient exerted any actual compulsion on the payor in order to secure the payment.[7]

In Australia, there has been some blurring of the boundary-line between *colore officii* cases, and non-*colore officii* cases.[8] However the unsatisfactory fact remains that whilst a payment made pursuant to an unauthorised demand made *colore officii* is recoverable, a payment made pursuant to an ultra vires statute will only be recoverable if the payor can establish that the payment was made under a mistake of fact, a mistake of law or under the narrow test of compulsion.

To obviate such anomalous results, it has been suggested by some commentators that the courts should enable payors to recover moneys paid to the Crown whenever the moneys have been exacted pursuant to a statute

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natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment". However, see also *Precision Pools v FCT* (1992) 37 FCR 554 at 565-566 per Spender J.

6 See *Mason v New South Wales* (1959) 102 CLR 108.

7 *Mason v New South Wales* at 134 per Menzies J, citing *Sargood v The Commonwealth* (1910) 11 CLR 258 in which O'Connor J stated that this proposition was clearly established in *Morgan v Palmer* (1824) 2 B&C 729 [107 ER 554], *Steele v Williams* (1853) 8 Ex 625 [155 ER 1502] and *Hooper v Exeter Corporation* (1887) 56 LJQB 457. See also *Mason v New South Wales* per Windeyer J at 140-142, at 118 per McTiernan J.

8 In particular, see *Mason v New South Wales* at 126, 129 per Kitto J; at 134-135 per Menzies J.

which is later held to be invalid.[9] All 'unlawful exactions', it is said, should be recoverable. Recovery should not be contingent upon the payor's good fortune in being able to bring itself within one of the established categories of recovery such as mistake of fact or law, or compulsion.

The suggestion of a broad ground of recovery against the Crown was taken up and approved by a majority of the House of Lords in *Woolwich Building Society v Inland Revenue Commissioners*,[10] which is discussed below. However, as will be argued, there are additional considerations which must be taken into account when the issue is one of recovery of moneys from the Crown, rather than from a private person. These considerations apply equally whether the ground of recovery is mistake of law or the wider ground of "unlawful exaction". It is submitted that the balance that the courts must strike here is no longer merely one between the payor's interest in recovering moneys paid under a vitiating factor, and the recipient's (and society's) interest in the finality of transactions. Where the recipient of the moneys is the Crown, such private considerations must be weighed against the public interest in the security of public finances, and the efficient working of government.

THE WOOLWICH CASE

The three majority judgments in *Woolwich* represent a marked departure from the rigid distinctions referred to above. Lords Goff, Browne-Wilkinson and Slynn held that moneys paid to the Crown pursuant to a demand which was ultra vires are prima facie recoverable because of the unlawful nature of the demand (or because there was no consideration for the payment). The moneys are recoverable regardless of whether one of the established grounds for recovery, such as mistake of fact or law, *colore officii* or compulsion, can be made out. In addition, Lords Goff and Slynn expressed an opinion, obiter, that moneys should also be recoverable where they have been wrongly exacted by a public authority not because the demand was ultra vires, but because "the authority has misconstrued a relevant statute or regulation".[11]

9 See Birks, *Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights* in Finn (ed), *Essays on Restitution* (Law Book Co, Sydney 1990); Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, New York 1989); and Cornish, "Colour of Office: Restitutionary Redress Against Public Authority" (1987) 14 *Jo Malaysian and Comparative Law* 41.

10 *Woolwich Building Society v Inland Revenue Commissioners (No 2)* (1992) 3 All ER 737.

11 As above at 764 per Lord Goff.

The majority judgments argue that logic and justice[12] demand that there be a general right to recover unlawfully imposed exactions, regardless of whether the payor can bring itself within one of the established grounds for restitution. They rightly point out that every demand for tax by the State involves "implied compulsion", due to the "inequalities of the parties' respective positions".[13] The demand "is implicitly backed by the coercive powers of the State and may well entail ... unpleasant economic and social consequences if the taxpayer does not pay".[14] Even if the facts do not fit into the existing categories of compulsion and extortion *colore officii*, "[t]here is a common element of pressure" which would justify a claim for repayment.[15] Further, such payments are made for no consideration.[16]

In the view of Lord Browne-Wilkinson, the concept of unjust enrichment "lies at the heart of all the individual instances in which the law does give a right of recovery", and suggests that persons in the position of the plaintiffs (who had little hope of establishing a mistake of law or compulsion) "should have a remedy".[17] In addition, Lord Goff was impressed by the argument, put in an earlier article by Professor Birks, that the retention by the State of unlawfully exacted taxes is "particularly obnoxious" because "it is one of the most fundamental principles of our law - enshrined in a famous constitutional document, the Bill of Rights (1688) - that taxes should not be levied without the authority of Parliament".[18]

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12 Lord Goff considers that "the principle of justice" is embodied in various earlier judgments and judicial dicta, including the dictum of Dixon CJ in *Mason v New South Wales* (1959) 102 CLR 108 at 117: *Woolwich Building Society v Inland Revenue Commissioners (No 2)* at 756.

13 *Woolwich Building Society v Inland Revenue Commissioners (No 2)* at 782 per Lord Browne-Wilkinson. See also at 781: "[T]he *colore officii* cases are merely examples of a wider principle".

14 At 760 per Lord Goff. Lord Goff finds the reasoning of Wilson J in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 "most attractive": at 762-763.

15 At 787 per Lord Slynn.

16 At 782 per Lord Browne-Wilkinson. It is difficult to tell whether Lord Goff accepted this as a reason for embracing the wider ground of recovery or not: see at 755. See Burrows, *The Law of Restitution* (Butterworths, London 1993) p351 for a pertinent critique of this aspect of the majority's reasoning.

17 At 780.

18 *Woolwich* at 759. See Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in Finn (ed), *Essays on Restitution* p165. With great respect, I am not certain that this "fundamental principle" was ever intended to apply to the type of invalid tax under consideration in this article. In my view, the principle prevents the imposition of taxes by the executive - by "the Crowne by pretence of prerogative": *An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (1689) 1 Wm

PUBLIC INTEREST CONSIDERATIONS

Of the three majority judges in *Woolwich*, only Lord Goff referred specifically to the significant consequences for the Crown of allowing a broad right of recovery of all unlawfully exacted moneys.[19] Lord Goff acknowledged that the available common law defences may prove "inapposite or inadequate" for the purpose of limiting recovery, and that it may be necessary to have recourse to special statutory defences including shorter time limits in which to bring a claim.[20] However, his Lordship appeared to reject the view expressed by La Forest J in the Canadian case of *Air Canada v British Columbia*[21] that there should, as a matter of policy, be no recovery of taxes paid pursuant to legislation which is unconstitutional or ultra vires.[22] In addition, Lord Goff declined to consider whether the Crown should have a defence to a claim where the payor has "passed on" the tax or levy so that the burden of the exaction has fallen on a third party (and, if so, the scope of such a defence).

Passing On

It is not yet clear whether Australian courts will recognise some form of 'passing on' as a defence to a restitutionary claim. At the heart of the defence is the assertion by the defendant that the plaintiff has passed on its loss (eg its payment of an invalid tax) to third parties: for example, by increasing the prices which its customers will pay for its products. As I have mentioned above, in *Woolwich* Lord Goff left open the questions of whether such a defence should be available, and the form that it should take.

& Mary c 36, Art 4. An invalid tax of the type under consideration here has been imposed with the sanction of parliament; its invalidity stems from a limitation on the powers of parliament. If this is accepted, then the Crown's retention of the invalid tax will not offend the principle set out in the Bill of Rights. (I acknowledge the assistance of Mr J Doyle QC on this point). See also Birks, "When Money is paid in Pursuance of a Void Authority - A Duty of Repay?" [1993] *Public Law* 580; Cornish, "'Colour of Office': Restitutionary Redress Against Public Authority" (1987) 14 *Jo Malaysian and Comparative Law* 41.

19 However, Lord Browne-Wilkinson LJ said (at 782) that he agreed with Lord Goff that the practical objections to adopting such a right of recovery were "not sufficient" to prevent him from taking this course of action.

20 *Woolwich Building Society v Inland Revenue Commissioners (No 2)* at 761.

21 *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

22 *Woolwich Building Society v Inland Revenue Commissioners (No 2)* at 763.

His Lordship noted that his consideration of *Air Canada* had indicated that "the point is not without its difficulties."[23]

In *Air Canada*, La Forest J decided that the plaintiffs had the burden of proof of establishing that they had not passed on the burden of the tax to their passengers. La Forest J held that although the province had been enriched through its imposition of an unconstitutional tax, the enrichment of the province had not been "at the expense of" the plaintiffs. This was because the plaintiff airlines had passed on "the burden of the tax to their passengers" by increasing their prices[24]. The plaintiffs, his Honour said, had not made out their claim, since they had "not shown that they bore the burden of the tax".[25]

La Forest J concluded that "[t]he law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss".[26] This proposition may be appealing to some, so long as it is understood that a plaintiff who "passes on" the burden of a payment does not necessarily reduce or remove its loss. By increasing its prices, a plaintiff may lose customers - and may therefore fail to reduce its overall loss. This possibility does not appear to have been considered in *Air Canada.*

At this stage, in its undeveloped state, the "passing on" principle seems problematical, whether it operates as a defence, or as a bar to a claim. Professor Birks has referred to the defence as "suspect", because it "raises almost insuperable factual difficulties" as to whether the plaintiff has ultimately reduced its loss, involving consideration of factors such as "elasticity of demand".[27] Professor Burrows would, it seems, accept the existence of a narrow "mitigation of loss" defence, in which the defendant would carry the burden of proving that the plaintiff had reduced or eliminated its loss in some way.[28] It is not yet possible to predict whether the Australian High Court will embrace the notion of 'passing on' in any of its forms. In order to do so, it would have to move beyond the balance struck by several members of the Court in *Mason v NSW.*[29] In that case the defendant had argued that the plaintiffs could not recover because they

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23 At 764.
24 *Air Canada v British Columbia* at 193.
25 At 194.
26 At 193. See also *Kleinwort Benson Ltd v South Tyneside MBC* (unreported, High Court (UK), 1993) where the Court considered this issue.
27 Birks, *Restitution - The Future* p126 fn10.
28 Burrows, *The Law of Restitution* pp476-477.
29 *Mason v New South Wales* (1959) 102 CLR 108.

had "passed on" to their customers the amounts that they had paid for the permits, and therefore had not sustained any loss. This argument was vociferously rejected by Windeyer J, who said:

> If the defendant be improperly enriched on what legal principle can it claim to retain its ill-gotten gains merely because the plaintiffs have not, it is said, been correspondingly impoverished? The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law.[30]

Change of Position

Certainly it appears that the defence of 'change of position' will rarely, if ever, be available to the Crown. This is the defence, recognised by the High Court in *David Securities,*[31] in which the defendant asserts that it is not liable to repay the moneys because it has significantly 'changed its position' in consequence of its receipt of the moneys. For example, the defendant might, as a result of having received the moneys, have taken an expensive holiday, gambled the money away, or undertaken a new project.[32]

It is likely that a recipient will only be able to establish the defence of change of position if it can show that it has made an 'extra' expenditure (over and above the expenditure that it would otherwise have made) as a result of its receipt of the moneys.[33] No doubt the Crown could always establish that it had expended a particular sum during a financial year on the basis of its expectation that it would receive a certain amount by way of exactions raised by it. It will have budgeted accordingly. It could be argued that on this basis the Crown should have a complete defence to all claims against it. However, the more likely position is that the Crown will never be able to establish the defence because it will never be possible for it to show a

30 At 146. Nor did Menzies J regard the 'passing on' as giving rise to a potential defence: at 136.

31 *David Securities v Commonwealth Bank* at 384-385 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; at 405-406 per Dawson J.

32 As to resolving the question of whether the defendant has nonetheless received some enrichment, see Birks, *Restitution - The Future* pp137-138.

33 *David Securities v Commonwealth Bank* at 385-386; *Rural Municipality of Stortoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1; *Hydro Electric v Ontario Hydro* (1982) 132 DLR (3d) 195 at 212-214.

specific instance of extra expenditure in relation to a particular payment. Neither result would be a satisfactory means of determining such cases.

In the end result, it seems reasonable to assume that the Crown will generally be unable to establish the defences of 'change of position' and 'passing on'. Against this background, there follows a consideration of the consequences which would ensue if the Australian courts decided to recognise a broad right of recovery of all moneys unlawfully exacted by the Crown.

Impact on Government Finances

In *Woolwich*, the Court was concerned with the repayment of moneys paid under a regulation which was subsequently held to be ultra vires. In England, the only possible grounds on which a *statute* may be held invalid by domestic courts are that the statute has not received the assent of the three estates (the House of Commons, the House of Lords and the monarch), or that it has not complied with any relevant 'manner and form' requirements. The former defect occurs only very rarely, and may be rectified by the passage of a subsequent validating statute.[34] However, the impact of European community law is increasing, since it is now recognised that the European Court of Justice may be able to strike down national legislation which contravenes European law.

In Australia and Canada, on the other hand, there is a long tradition of challenging the validity of legislation. In each country there is a written Constitution which sets up a federal system of government, distributes legislative powers between the two tiers of government, and enables legislation to be declared invalid if it infringes these and other restrictions on legislative power. Statutes imposing taxes and other exactions are declared invalid on a relatively frequent basis. As a result, a broad right of recovery such as that enunciated in *Woolwich* would undoubtedly cause a significant degree of disruption to federal and State government finances even if statutes were passed imposing a relatively short time limitation on such claims.

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34 Bennion, *Statutory Interpretation* (Butterworths, London 2nd ed 1992) pp100, 111, 123 and 141-145. See also *WorkCover Corporation v Hojski* (unreported, 29 April 1993, Full Court of South Australia, 2841/92) at 4-6 of the judgment per King CJ (with whom Duggan and Perry JJ concurred).

It was considerations such as these which led to La Forest J's decision in *Air Canada* to adopt a rule *against* the recovery of unconstitutional and ultra vires levies. In La Forest J's view, there are "solid grounds of public policy for not according a general right of recovery" of all payments made under statutes which are subsequently held to be unconstitutional or otherwise ultra vires.[35] His Honour cited with approval the policy grounds stated by Logan J in *Coleman v Inland Gas Corp*:

> [A]ll State governments have been slow indeed to open the doors of their treasuries and allow money to pass therefrom after it has once found lodgment within the governmental vaults. This is as it should be. The State is the sovereign and its affairs must be conducted for the best interest and welfare of the people. That calls for the expenditure of large sums of money for governmental affairs, and such sums of money can be obtained only through taxation. The State should determine the amount which it will spend by the probable income it will receive. When the income is collected it is allocated to different funds. The State uses the funds nearly always during the current year. It has been universally held, unless a contrary conclusion was forced by an ironclad statute, that no taxpayer should have the right to disrupt the government by demanding a refund of his money, whether paid legally or otherwise.[36]

La Forest J regarded it as significant that in the United States, Australia, and New Zealand, taxes paid pursuant to invalid statutes are generally not recoverable. His Honour said that his research had revealed that in the United States many jurisdictions denied recovery on the basis of the rule against recovery for mistakes of law; however, even in those jurisdictions which did not apply the mistake of law rule, recovery of taxes paid voluntarily under unconstitutional statutes was denied.[37] La Forest J made no reference to the United Kingdom, presumably because, as mentioned above, the problem of invalid statutes virtually never arose there (at least until recently).

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35 *Air Canada v British Columbia* at 194.

36 *Coleman v Inland Gas Corp* 21 SW 2d 1030 at 1031, 231 Ky 637 (1929) (Kentucky Court of Appeal).

37 *Air Canada v British Columbia* at 194.

La Forest J was concerned that a general right of recovery would be inefficient, and would result in fiscal chaos. It would be inefficient because governments would be obliged to "impose a new tax to pay for the old", with the result that a new generation of taxpayers would pay for the expenditures of the old.[38] Fiscal chaos would be particularly severe if a long-standing taxation measure was involved, such as the chaos which might have occurred after the US Supreme Court declared a statute to be unconstitutional in *United States v Butler*.[39]

As a result of such policy considerations, La Forest J (with whom Lamer and L'Heureux-Dubé JJ concurred) ruled that unconstitutional and ultra vires levies were not recoverable, although exceptions might be made where "the relationship between the State and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances".[40] His Honour held that, in general, the invalidity of a statute would not give rise to any ground of restitution, including that of mistake of law. La Forest J rejected the idea that "disruption of public finances" should operate only as a defence, available only if the State could establish the potential for fiscal chaos to the satisfaction of the Court.[41]

In La Forest's view, a payor should only be able to recover its moneys upon establishing a ground of restitution based upon a circumstance other than the invalidity of the law. Thus, a taxpayer could still recover moneys paid under a mistake of law where the mistake made was as to the true construction of a valid statute.[42] Or the taxpayer could recover on the ground of mistake of fact, or upon the basis of the narrow test of compulsion referred to earlier. As to the latter ground for restitution, it appears that La Forest J would allow recovery on the basis of compulsion regardless of whether the statute under which payment was made was valid or invalid. Such a view is consistent with his premise that the rule against recovery of ultra vires levies is "an exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it"[43] (that is, the values of protecting the treasury, and avoiding the inefficient course of re-imposing the tax). However, compulsion would

38 At 195.
39 297 US 1; 80 LEd 477 (1936).
40 *Air Canada v British Columbia* at 196-197.
41 See Burrows, *The Law of Restitution* pp359-360 for a rejection of McCamus' suggestion that there should be a defence of "extreme disruption of public finances".
42 *Air Canada v British Columbia* at 197.
43 As above.

remain difficult to establish as a ground for restitution. La Forest J adhered to the traditional view that mere payment in response to a statutory demand cannot constitute compulsion, and described the scope of this ground of recovery as follows:

> What the rule of compulsion seems to require is that there is no practical choice but to pay in the circumstances ... [B]efore a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment.[44]

In the wake of the *Air Canada* decision, it remains unclear whether a majority of the Supreme Court of Canada will adopt La Forest J's general rule (subject to exceptions) against a right of recovery founded on the ultra vires nature of the statute under which moneys have been exacted. Whilst Lamer and L'Heureux-Dubé JJ concurred with La Forest J in *Air Canada*, Beetz and McIntyre JJ declined to decide the question, and Wilson J took the opposite view. In any event, the constitution of the Supreme Court of Canada has since changed.

Wilson J took the contrary view that payments made pursuant to unconstitutional statutes must be recoverable, on the basis that there is "no legitimate basis on which they can be retained" by the Crown.[45] Her Honour dismissed as a fiction the notion that payments exacted pursuant to a statutory demand are made 'voluntarily', and considered it unrealistic to expect a taxpayer, who has no reason to suspect that a statute is invalid, to make its payment 'under protest'. Wilson J agreed with Dickson J's statement, made in *Amax Potash v Government of Saskatchewan*, that to allow the Crown to retain moneys collected pursuant to an ultra vires statute would be tantamount to allowing it to "do indirectly what it can not do directly, and by covert means to impose illegal burdens".[46]

Wilson J did not appear to regard her decision to adopt a rule in favour of recovery as involving a consideration of competing policy issues. In her Honour's view it was quite clear that payments made under ultra vires

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44 At 199.

45 At 170.

46 *Amax Potash Ltd v Government of Saskatchewan* (1976) 71 DLR (3d) 1 at 10, cited in *Air Canada v British Columbia* at 170.

statutes must be recoverable, since there was "no legitimate basis" on which the Crown could retain them. It was inappropriate for the Court to look at other questions of policy which would support the government's view that it required protection against its mistakes. Having developed a rule to protect the "old" generation of taxpayers, Wilson J refused to countenance La Forest J's "policy" which would allow the government to escape its "sins".[47]

MISTAKE OF LAW AS A GROUND FOR RECOVERY

The judgments in the *Air Canada* case are of considerable interest in their analyses of the issue of whether there should be a prima facie right to recover "unlawful exactions". The judgments are also significant in a second respect. As in the *David Securities* case in Australia, the Supreme Court of Canada rejected the long-standing rule preventing recovery of moneys paid under a mistake of law.[48] La Forest J (with whom Lamer J concurred) and Wilson J supported the reasons for rejecting the rule which had been expressed by Dickson J (in dissent) in *Hydro Electric Commission of Nepean v Ontario Hydro*.[49] Dickson J's analysis had revealed that the rule was built on inadequate foundations, was hard to apply (given the difficulty involved in distinguishing between mistakes of fact and mistakes of law), and had therefore produced "a luxuriant growth of exceptions".[50] As the High Court was later to conclude in *David Securities*, Dickson J found that "the judicial development of the law of restitution or unjust ... enrichment renders otiose the distinction between mistakes of fact and mistakes of law".[51] In essence, concluded La Forest J, there should be a prima facie right to recover moneys paid under either type of mistake, provided that the payment was not made in settlement of an honest claim.

As we have seen, in a later part of his judgment in *Air Canada*, La Forest J was concerned to explore, and to limit, the potentially wide ramifications that would flow from acknowledging a right to recover moneys paid under an invalid statute. However, his Honour gave little consideration to the consequences that might flow from allowing recovery for other types of

47 *Air Canada v British Columbia* at 169.

48 *Air Canada v British Columbia*; La Forest J (with whom Lamer J concurred) at 191-192; Wilson J at 168 (obiter); Beetz and McIntyre JJ not deciding.

49 *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193.

50 *Air Canada v British Columbia* at 191, citing Dickson J in *Hydro Electric Commission of Nepean v Ontario Hydro*.

51 As above.

mistake of law. La Forest J referred to Dickson J's conclusion that "[t]he modern justification for the existence of the rule against recovery of moneys paid under a mistake of law has been the stability of contractual relations".[52] His Honour stated that restitution would be denied "if the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment".[53] However La Forest J did not discuss the scope of either of these defences.

Likewise, the joint judgment of the majority in *David Securities*[54] does not overtly acknowledge the significant difference between the consequences that may flow from allowing recovery on the ground of mistake of fact, or on other traditional bases such as compulsion - all of which are specific to, and limited to, the particular transaction before the Court - and the consequences which may flow from allowing recovery for mistake of law, which need not be so confined in its impact. The difference in potential effect is, however, recognised by Brennan J, who says:

> To admit mistake of law as a ground for restitution in any case in which a mistake of fact would ground such a remedy would render many payments insecure even in cases where both parties expected the payment to be final: the uncertainty of the law and the overruling of decisions by later cases or on appeal would infect many payments with a provisional quality incompatible with orderly commerce. Moreover, while mistakes of fact are specific to particular relationships, the revealing of a mistake of law in one case could throw into uncertainty the finality of payments made in a great variety of cases.[55]

Brennan J rejects the well-established view that payments made under a mistake of law are 'voluntary', since this has, in his Honour's view, been nothing more than "a convenient legal mechanism for holding such payments to be irrecoverable".[56] Brennan J also, quite justifiably in my view, rejects the decision of the other members of the court that payments made in satisfaction of an honest claim are "voluntary" and, on that basis,

52 *Hydro Electric Commission of Nepean v Ontario Hydro*, cited in *Air Canada v British Columbia* at 191.

53 *Air Canada v British Columbia* at 192.

54 *David Securities v Commonwealth Bank* per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

55 At 394.

56 As above.

irrecoverable.[57] Nonetheless, his Honour recognises the need to treat payments made under a mistake of law differently, and the need therefore to introduce a limitation on the restitution of such payments in order to "achieve a degree of certainty in past transactions".[58] As a result, Brennan J advocates the adoption of an 'honest claim' defence, which focuses on the recipient's state of mind at the time of payment:

> It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property.[59]

The joint judgment of the majority and the judgment of Dawson J do not expressly refer to the need to confine the scope of the mistake of law ground of recovery. However the judgements restrict the availability of the ground significantly, since they uphold the reasoning in earlier cases such as *Werrin v Commonwealth*[60] and *South Australian Cold Stores*.[61] In each of these cases it had been held that the payor was unable to recover its payment.

In *Werrin* Latham CJ and McTiernan J had held that the plaintiff was unable to recover payments of sales tax that he had made in respect of the sale of secondhand goods, although it had subsequently been held that sales tax was not payable in respect of such goods. The plaintiff, it was held, had no right to recover the payments since he had made the payments rather than contest them, and there had been no mistake of fact, compulsion, duress, or extortion *colore officii*.[62]

Similarly, in *South Australian Cold Stores* the High Court held that the payor had no right to recover overpayments of electricity rates, although the payor had made the payments whilst ignorant that the Prices Order fixing the maximum rates chargeable was legally ineffective. The Court had assumed that because the payor had not made inquiries as to whether the

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57 At 396.
58 At 398.
59 At 399.
60 *Werrin v Commonwealth* (1938) 59 CLR 150.
61 *South Australian Cold Stores v Electricity Trust of South Australia* (1957) 98 CLR 65. See also *J & S Holdings v NRMA Insurance Ltd* (1982) 41 ALR 539 at 550-551 per Blackburn, Deane and Ellicott JJ.
62 *Werrin v Commonwealth* at 157-159 per Latham CJ and at 168-169 per McTiernan J.

formal requirements of the law had been observed, and had "simply taken for granted that somehow or other the charges might lawfully be made", it had exhibited "a readiness" to comply with the payee's demand without more.[63] The payor's claim for repayment failed, because the evidence revealed that the payments were made in satisfaction of an honest claim by the Electricity Trust (which was similarly unaware of the defect in the Order), rather than under a mistake of fact. The case is interesting because it reveals that the Court was particularly influenced by the fact that it would be inconvenient to allow payors to recover payments which had been made under an Order which technically did not comply with a certain legal requirement, but whose defects could easily be remedied.[64]

With the exception of Brennan J, all members of the current High Court have stated in *David Securities* that they would characterise the payments made in these earlier cases as "voluntary payments made in satisfaction of an honest claim".[65] The majority and Dawson J would hold the payments to be irrecoverable on this basis.

In the end result, it appears that the majority and Dawson J would preclude recovery by a payor in most, if not all, cases in which the recipient has acted honestly in requiring the payment of moneys. The majority seems to regard a payment as "voluntary", and therefore irrecoverable, whenever the payor believes that a law is or may be invalid, or is ignorant about the true effect of the law under which it is making the payment, because it has failed to obtain legal advice or to query whether the payment was legally required. The majority concludes that in each such case the payor "is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment".[66] It becomes difficult to envisage circumstances in which a payor would in fact be successful in recovering moneys paid under a mistake of law: an ignorant payor will, it seems, only be successful if it can show that the recipient did not act honestly in requiring payment, and an informed payor cannot recover because it has not been mistaken as to the law at the time of payment. Certainly, Dawson J appears to recognise that the right to recovery will only rarely be available: he speculates that there

63 *South Australian Cold Stores v Electricity Trust of South Australia* at 75 per Dixon CJ and McTiernan, Williams, Webb and Taylor JJ.
64 At 74.
65 *David Securities v Commonwealth Bank* at 374.
66 At 373-374.

"may be relatively few" cases in which a payor will have a right to recover moneys paid by it under a mistake of law.[67]

The judgments in *David Securities*, and in particular that of Brennan J, are of considerable interest in their attempts to limit the scope of the mistake of law ground of recovery. It is difficult to predict whether the members of the High Court would take similar stances if faced with a claim based on the wider 'unlawful exaction' ground of recovery explored in *Woolwich* and *Air Canada*. It could not be said that the various 'honest claim' defences would work satisfactorily in this context: where moneys had been exacted under a statute which was later held to be ultra vires, it would presumably be only in very rare cases that the government could not make out an 'honest claim' defence. Most payors would be ignorant of the invalidity of the law under which they had made their payments. The invalidity of the law would rarely be drawn to the attention of the Crown. Even in the face of letters of protest from 'informed' payors, the Crown would in general consider a statute to be valid until such time as a Court had clearly declared otherwise.

What then are the prospects in Australia? The decision of the majority in *David Securities* has apparently imposed a prima facie obligation on the Crown to repay moneys to payors who were mistaken as to the validity of a law at the time of payment. However, it is difficult to envisage the circumstances in which payors will be successful in relying upon this right. It is an open question whether the Court is likely to go further than this and accord a general right of recovery to *all* payors who have made payments under an invalid law, including those 'informed' payors who have made no mistake of law at all and who in fact believed the law to be invalid at the time of payment. In view of the High Court's recognition of the mistake of law ground of recovery in *David Securities*, one might feel bound to predict that it is only a matter of time before the broad right of recovery enunciated in *Woolwich* is part of Australian law.[68] However, *David Securities* was, as stated above, a case involving two private litigants, in which the issue of 'fiscal chaos' affecting governments was never canvassed. It is perhaps premature for Australian governments to expect the worst, given both the cautious attitude of the court in *David Securities* and the very different

67 At 404 per Dawson J.

68 The point was narrowly avoided in the recent case of *Mutual Pools and Staff Pty Ltd v Commonwealth* (High Court, decision reserved), and did not need to be decided in *Esso Australia Resources Ltd v Gas and Fuel Corporation of Victoria* [1993] 2 VR 99.

constitutional and policy arguments that arise in the sphere of unlawful exactions by the Crown.

CONSTITUTIONAL ISSUES

It is submitted that the consequences which flow from the existence of written Constitutions in Australia and Canada point towards the adoption of a policy *against* the recovery of invalid taxes. As mentioned earlier, legislation imposing taxes or other forms of exaction is not infrequently held invalid by Australian and Canadian courts. In Australia, such laws have, on many occasions, been found to offend either s55 or s92 of the Constitution. Further, constitutional principles in these countries often prevent the government from passing legislation to eliminate or lessen the effects of the invalidity. Legislation which precludes claims to recover the unlawful exactions, retrospectively validates the ultra vires enactment, or imposes a new exaction to replace the old, has been precluded by such principles in the past.

In Australia, the legislative power of the federal and State governments is constrained by the principle laid down in the case of *Antill Ranger*.[69] In that case, the High Court held to be invalid the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (NSW) which purported to extinguish all claims which could otherwise have been made against the State of New South Wales or its officials for repayment of moneys exacted under a particular statute. The statute had earlier been held to infringe s92 of the Constitution and was therefore invalid. In relation to the *Barring of Claims and Remedies Act*, the Court said:

> One of the effects of s92 is that legislation cannot impose a burden on inter-State trade. If the executive authority takes [the individual's] money and the legislature says it may keep it, that surely amounts to a burden. It would defeat s92 to allow validity to such a statute.[70]

In a case decided not long after *Antill Ranger*, the Court held that a statute cannot retrospectively impose a one year limitation period for bringing

69 *Antill Ranger and Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83.

70 At 101.

actions to recover unlawfully imposed exactions, since this would effectively bar the claims retrospectively.[71]

Section 92 of the Commonwealth Constitution is probably still regarded by the High Court as a special type of provision: a "constitutional guarantee". It is arguable whether the High Court would also, in reliance upon the *Antill Ranger* principle, condemn a statute which purported to extinguish claims to recover moneys exacted under invalid legislation where the legislation was invalid for infringing a "non-guarantee" type of constitutional provision. This doubt is raised by the Court's statement in *Antill Ranger* that:

> The taking of the money from the plaintiff was not merely against his will and wrongful. It was done in opposition to the constitutional guarantee of freedom...It is not a question of exceeding the limits of some affirmative power defined according to subject matter. It is a question of infringing upon a constitutional immunity.[72]

Section 55 of the Constitution is unlikely to be regarded as a constitutional guarantee or immunity in this sense.

In Canada, constitutional principle similarly prevents a government from passing legislation which confers on it an immunity from liability to repay the unlawful tax. Such a device is regarded as being "an indirect way of giving effect to an invalid statute".[73] However, in both Canada and Australia the government may enact legislation which retrospectively imposes a tax or other exaction to replace an exaction which was held invalid.[74]

In any event, the legislatures in Australia and Canada may not have the freedom to correct their mistakes available to the legislature of the United Kingdom. As mentioned above, subject to the limitations imposed by European community law, the parliament of the United Kingdom has plenary legislative power constrained only by the requirements that its

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71 *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633.

72 At 99-100. See also *Mason v New South Wales* at 116-117 per Dixon CJ. Again, I acknowledge the assistance of Mr J Doyle QC on this point.

73 *Air Canada v British Columbia* at 187 per La Forest J.

74 Canada: *Air Canada v British Columbia* at 186-187; Australia: see Pearce, *Statutory Interpretation in Australia* (Butterworths, Sydney 3rd ed 1988) at para 10.8, and *R v Kidman* (1915) 20 CLR 425 and *Millner v Raith* (1942) 66 CLR 1 cited therein.

legislation be passed by the three estates, and conform with any relevant manner and form requirements. The State parliaments in Australia also have plenary legislative power, subject to the Commonwealth Constitution.[75] If a State parliament avoids infringing the Commonwealth Constitution, it has a number of options open to it to overcome the effect of an invalid exaction imposed by it: a State parliament may pass a statute making an exaction retrospectively lawful, and may "abolish the common law remedy in respect of the exaction".[76] Nonetheless, the Commonwealth Constitution does impose some constraints, most notably those imposed by s92.

CONCLUSION

At least until recently, the courts in Australia, Canada and the United Kingdom have taken a rather artificial approach to this area in order to impose some limit on the recovery of moneys exacted by the Crown pursuant to invalid statutes. The courts have limited such recovery by reliance upon the rule that moneys paid under a mistake of law are 'voluntary', and therefore irrecoverable.[77] However, in each country the distinction formerly drawn between mistakes of fact and mistakes of law has now been condemned as artificial and illogical, and has been abolished. Nonetheless, the Australian courts have not yet considered the full ramifications of allowing recovery on the grounds of mistake of law and unlawful exaction (if, indeed, the latter ground is recognised).

As mentioned, in Australia all members of the High Court have, to some extent, attempted to grapple with the consequences of recognising mistake of law as a ground of recovery. Brennan J, in particular, has enunciated the policy issues involved, and has devised a coherent means of limiting recovery. In Canada, La Forest J has considered the effects of allowing recovery of all payments made pursuant to ultra vires statutes. Both Brennan J and La Forest J have, albeit in different contexts, undertaken the

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75 And subject also to the requirement that the power be exercised "for the peace, order [or welfare] and good government of the State". This requirement has been interpreted as meaning that there must be a connection (even if remote and general) between the subject matter of the legislation and the State: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

76 As Fullagar J noted in *Antill Ranger and Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 102.

77 This has also been the common law rule generally adopted in the United States: see Palmer, *Law of Restitution*, volume III (Little, Brown & Co, Boston 1978) pp 248-250.

difficult task of balancing the rights of individuals against the public interest.

It is submitted that serious consideration should be given to the argument that there are "solid grounds of public policy"[78] against enabling a payor to recover solely on the basis that it made its payment to the Crown pursuant to an ultra vires statute. It may be philosophically neat to argue that the Crown should not be allowed to retain moneys to which it is not entitled. However, such an argument ignores the practical consequences of adopting such an approach. Where a large number of payors have paid "unlawful exactions" pursuant to an invalid statute, the Crown will be obliged to repay the moneys to each payor and then reimpose taxes to recover the moneys paid out. The burden of repayment will ultimately fall upon the community. The expenditure of the invalid exactions will have benefited or will benefit the community, including the persons who have paid the exactions. A payor may ultimately pay the same amount in tax, through re-imposed taxes, as it would have paid if it had not obtained a refund. As La Forest J pointed out in *Air Canada*, the reimposition of invalid taxes is inefficient, and, until the tax is reimposed, the government's ability to manage its revenues is likely to be severely disrupted as it repays large amounts to claimants.[79]

If these arguments are accepted, then it is necessary in my view to proceed from a starting-point of a general rule against recovery. It would be impractical to require a government to rely upon 'fiscal chaos' as a defence, and so to have to prove to a Court in each case that fiscal chaos would result if recovery was allowed. However, as La Forest J has observed, although there are constitutional impediments which would prevent a legislature from enacting statutes which *prevent* recovery, there is no reason why statutes should not be passed which would *enable* recovery by taxpayers who are able to satisfy certain criteria. Such statutes could take into account a number of variables, such as "the amounts involved, the times within which a claim may be made, the situation of those who are in a position to recoup themselves from others, and so on".[80]

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78 *Air Canada v British Columbia* at 194.

79 This practical justification for denying recovery, at least where no protest has been lodged, has also been recognised by some courts in the United States: see, for example, *Mercury Machine Importing Corp v City of New York* 3 NY 2d 418 (1957) at 426-427.

80 *Air Canada v British Columbia* at 198.

In addition, if a general rule against recovery was adopted, there would be no reason to rule out one or more exceptions to the general rule to enable recovery by taxpayers who had made their payments in particular circumstances. La Forest J suggested that exceptions might be made "where the relationship between the State and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances".[81] This would seem to bring us around full circle to a consideration of the rather unsatisfactory criteria which the courts have laid down for establishing the 'compulsion' ground of recovery. Or perhaps La Forest J is invoking a dramatically different concept of oppression, in which it is the turn of the 'informed' payors (who have paid under protest, after bringing the unlawfulness of the exaction to the attention of the recipient) to have fortune smile upon them!

Of one thing we can be certain. The law relating to the right to restitution from the Crown is still at a formative stage. As yet, in Australia, there has been no attempt by the courts to draw together the various grounds of recovery against the Crown into a coherent whole. The potential of large tracts of the territory is still to be explored.

81 At 196-197.