

Provinces fight to keep illegal tax

By John Carpay

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Today, the Supreme Court of Canada will hear four provincial governments argue that they should be able to keep money taken from taxpayers illegally, in violation of Canada's Constitution.

The case of *Kingstreet Investments v. New Brunswick* arose from an 11% provincial "user charge" paid by the owners of bars, pubs and nightclubs. This 11% charge imposed a considerable burden on people who earn a living in the hospitality and entertainment industry. From 1985 to 1997, businesses were required to pay the 11% on top of the alcohol tax already included in the monopoly retail price set by the New Brunswick Liquor Corporation.

Bar and pub owners challenged the 11% "user charge" as being an indirect tax, in violation of the *Constitution Act, 1867*. Canada's Constitution allows only the federal government to impose an indirect tax, such as an import duty, paid by one person (e.g., a bar owner) in the expectation that it will be repaid by another (e.g., a bar patron). Canada's provinces may only impose direct taxes.

At trial, a New Brunswick court agreed with the hospitality sector, ruling that the "user charge" was an indirect tax and therefore unconstitutional, outside of the province's taxing powers.

Nevertheless, the trial judge believed that people who work in the hospitality industry suffered no financial loss, because the 11% tax was supposedly passed on to consumers in its entirety. While the government could no longer collect this tax, it could keep its ill-gotten gains.

Thankfully, the New Brunswick Court of Appeal overturned the trial decision. Allowing the government to keep illegally obtained taxes would subvert the constitution, effectively rewarding governments for violating it. Further, citizens need an incentive to challenge invalid laws – an incentive that disappears entirely if governments are entitled to keep illegally collected revenues.

The governments of B.C. and Manitoba have intervened in the Supreme Court of Canada, joining New Brunswick to argue that governments should be able to keep illegal tax revenues. B.C. claims that illegally collected taxes are used only for "publicly beneficial purposes" and would never be spent on "discretionary or hedonistic purposes." Manitoba, while acknowledging that governments use "coercive authority" to enforce their tax demands, would deny taxpayers a right of recovery in the interests of "stable government revenues" and "the integrity of the treasury." New Brunswick maintains that repaying illegal taxes would inflict "financial shock" and "significant pain" on governments, which would then have no choice but to reduce services or raise taxes.

Our Alberta government has also entered the fray, arguing that governments should not be held accountable for violating the Constitution. Alberta claims that, as long as a government acts in good faith, it should be spared the "abrupt loss" of being required to return money that was taken from taxpayers illegally. Holding governments accountable would cause "financial chaos and inefficiency."

Alberta and other provincial governments blithely assume that every tax dollar is spent wisely, and only on matters which further the public interest. Apparently there is no waste, mismanagement or inefficiency in the public sector, not to mention misplaced priorities.

In the face of governments' insatiable appetite for more revenues, important constitutional principles are at stake in *Kingstreet*. There should be no taxation without representation. All manner of taxes, rates, fees and charges should be extracted only under legal authority, pursuant to constitutional principles. Governments should be required to honour the Constitution, facing penalties or other consequences when they don't. Taxpayers should have repaid to them that which was taken illegally.

Fears of fiscal chaos are illusory, because illegally collected taxes constitute a tiny fraction of government wealth and income. Further, every government structures its finances so as to deal with unexpected revenue changes.

As for the claim that the owners and employees of New Brunswick's pubs and nightclubs suffered no loss, this ignores economic reality. If some or all of this illegal 11% tax was "passed on" to patrons in the form of higher prices, these higher prices necessarily reduced sales and profit. Taxes also reduce the amount of money that small businesses have available to pay higher salaries to employees.

But even if businesses do succeed in recouping part of their losses, governments should still be held to account when they violate Canada's Constitution. The rule of law, democratic accountability, federalism and other constitutional principles should not be sacrificed to satisfy governments' practically unlimited desire for more tax dollars. Like everyone else, the government must take responsibility when it has done something wrong.

John Carpay is executive director of the Canadian Constitution Foundation, an intervener before the Supreme Court of Canada in the *Kingstreet* case.