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Fredericton's ill-gotten gains

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When governments impose illegal taxes, in violation of Canada's Constitution, should they be required to return the money to the taxpayers they wronged? This is the central issue in *Kingstreet Investments v. New Brunswick*, a case the Supreme Court of Canada will hear this month.

From 1985 to 1997, the New Brunswick government received tens of millions of dollars from an 11% "user charge" on liquor sales, paid by the owners of bars, pubs and nightclubs. This imposed a considerable burden, as businesses were required to pay this 11% in addition to the alcohol tax already included in the monopoly retail price set by the New Brunswick Liquor Corporation.

People who earn a living in the hospitality and entertainment industries challenged the 11% "user charge" as being an indirect tax, in violation of the Constitution Act, 1867. Only the federal government may 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 must impose either direct taxes or user fees which cover the cost of a particular government program.

At trial, a New Brunswick court agreed with pub and bar owners, ruling that the "user charge" was an indirect tax and therefore unconstitutional, outside of the province's taxing powers. But while the government could no longer collect this tax, it could keep its ill-gotten gains. 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. Further, ruled the judge, the government might suffer "fiscal chaos" if required to repay its 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 if governments are automatically entitled to keep illegally collected revenues.

The governments of B.C., Alberta and Manitoba have intervened to join New Brunswick in arguing before the Supreme Court of Canada 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." Returning money to taxpayers would be a "very disruptive attack" on the ability of governments to discharge their "onerous responsibilities" of "advancing the public good." 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." Alberta agrees, asserting that governments should be spared "difficult budget decisions." 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.

These governments blithely assume that every tax dollar is spent wisely, and only on matters which are indispensably important to the public good. Apparently there is no waste, mismanagement or inefficiency in the public sector, not to mention misplaced priorities. The assumption which underlies the governments' arguments is

that governments don't need any real accountability.

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 flies in the face of economic reality. If some or all of the illegal 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.