

Taxpayers' cheer

John Carpay

Canada's provinces will have to take a hard look at their user fees and service charges in light of last week's Supreme Court of Canada's decision in *Kingstreet Investments v. New Brunswick*. Handing a significant victory to taxpayers, the Court ordered the New Brunswick government to repay over one million dollars to the owners of bars and pubs, which they had paid under the guise of an 11% "user charge" on alcoholic beverages.

People earning a living in the hospitality and entertainment industries successfully challenged the 11% "user charge" as illegal because it is an indirect tax, in violation of the Constitution Act, 1867. Under Canada's Constitution, 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). Provinces may not do so. The 11% "user charge" was an indirect tax because New Brunswick derived more revenue from the charge than what it needed to run its liquor licensing system.

Before the Supreme Court of Canada, the governments of B.C., Alberta and Manitoba intervened in support of New Brunswick to argue that governments should not have to repay taxes collected in violation of Canada's constitution. Claiming that every tax dollar is spent on publicly beneficial purposes and advancing the common good, the governments argued that having to repay illegal taxes would inflict financial shock and fiscal chaos, and force them to reduce services or to raise taxes. This assumes, of course, that there is no waste, mismanagement or inefficiency in the public sector, not

to mention misplaced priorities.

Rejecting the governments' arguments, the Court ruled that illegally collected taxes must be returned to taxpayers. Writing for a unanimous Court, Justice Michel Bastarache ruled that governments must be held accountable in order to honour the constitutional principles of federalism, representative democracy, the rule of law, and democratic accountability, otherwise known as "no taxation without representation." As Justice Bastarache put it: "When the government collects and retains taxes pursuant to ultra vires legislation, it undermines the rule of law."

The Court also rejected the "passing on" defence: the governments' argument that illegal taxes need not be repaid because they were merely "passed on" to others. The Court ruled that the "passing on" defence is economically misconceived: its logic is akin to saying that "no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on." Further, this defence is unworkable because it is impossible to prove how much of a loss has – or has not – been "passed on" to third parties.

Practically speaking, the Court's *Kingstreet* ruling means that provincial user fees and service charges must not generate additional revenue for the government. Revenues which provincial governments derive from building permits, fishing licenses, tribunal filing charges, and inspection fees

must approximate the cost of providing the service. If a province collects ten million dollars per year from a service fee, but spends only five million to provide the service, the fee is an illegal tax which can be challenged in court. This decision applies to the federal government as well, if it collects taxes in a manner which does not conform to the constitution.

It will not always be clear whether a particular charge or fee is valid or is an illegal tax. But what the *Kingstreet* ruling makes very clear is that a court will not merely order the government to stop charging the illegal tax; a court will also order the government to repay the money. This result is good for taxpayers because it provides more transparency in user fees and services charges, as provincial governments can no longer use them as a means of hidden taxation.

Knowing that courts will compel governments to repay illegally collected taxes, taxpayers now have a new tool at their disposal to impose accountability on governments. Governments, both federal and provincial, have now lost their incentive to prolong litigation once it becomes clear that a particular fee, charge or tax violates the constitution. The *Kingstreet* decision highlights the importance of litigation to restrain ever-greedy and rapacious governments from doing whatever they please to feed their never-ending appetite for more money.