

THE IMPROBABLE RISE AND FALL OF AUCKLAND HARBOUR BOARD V THE KING

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*The question of whether courts can order the Crown to spend public monies in the absence of an appropriation has been a source of perennial legal controversy in Canada. Although a number of scholars have argued in favour of public funding orders, relatively limited attention has been paid to the underlying issue of whether courts have the jurisdiction to order the Crown to disburse public funds in the absence of an appropriation. Courts in Canada have generally exhibited caution when asked to make public funding orders. In justifying this deferential stance, Canadian courts have frequently relied upon dicta from the Privy Council's 1924 decision in *Auckland Harbour Board v The King*, where Viscount Haldane held that any "payment out of the consolidated fund made without Parliamentary authority" was "illegal and ultra vires" and therefore properly recoverable "by the Government." The author challenges the received orthodoxy that *Auckland Harbour Board* precludes courts from ordering the Crown to spend public funds. The author maintains that insofar as *Auckland Harbour Board* has been read as creating a blanket prohibition against public funding orders, it has been misunderstood and overextended. While there is no question that the Crown cannot order the dispensation of public funds without authority, this does not completely bar courts from making public funding orders. It is only where a court makes an order that effectively demands Parliament to appropriate funds, or which requires the payment of funds absent or in contravention of an appropriation, that *Auckland Harbour Board* has any real purchase.*

*La question de savoir si les tribunaux peuvent ordonner au ministère public de déboursier des fonds publics en l'absence d'une affectation est source permanente de controverses juridiques au Canada. Alors qu'un bon nombre d'universitaires défendent les ordonnances de dépenses publiques, on prête relativement peu d'attention à la question sous-jacente de savoir si les tribunaux ont compétence pour ordonner au ministère public de dépenser des deniers publics en l'absence d'affectation. Les tribunaux canadiens font généralement preuve de prudence lorsqu'on leur demande de rendre de telles ordonnances. Pour justifier cette retenue judiciaire, une remarque incidente formulée par le vicomte Haldane dans l'arrêt *Auckland Harbour Board c The King*, rendu par le Conseil privé en 1924, est souvent invoquée : il s'avère*

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[TRADUCTION] « *illégal et ultra vires* » de prélever toute « somme sur le Trésor sans autorisation du Parlement » faisant ainsi en sorte qu'elle soit recouvrable à bon droit « par l'État ». L'auteur remet en question l'orthodoxie bien établie voulant que l'arrêt *Auckland Harbour Board* empêche les tribunaux d'ordonner au ministère public de dépenser des fonds publics. Il soutient que dans la mesure où cette décision a été interprétée comme interdisant complètement aux tribunaux de rendre des ordonnances en ce sens, elle a été mal comprise et indûment élargie. Il ne fait aucun doute que le ministère public ne peut ordonner l'utilisation de deniers publics sans autorisation, toutefois, il ne s'ensuit pas une interdiction stricte à l'égard des tribunaux de rendre de telles ordonnances. De fait, à moins qu'un tribunal n'ordonne effectivement au Parlement d'affecter des fonds ou qu'il n'exige le versement de fonds sans affectation ou en contravention de celle-ci, l'arrêt *Auckland Harbour Board* n'est d'aucun secours.

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Introduction

The question of whether courts can order the Crown to spend public monies has been a source of perennial legal controversy. Although many scholars and activist lawyers have argued in favour of the merits of making such funding orders,¹ relatively limited attention has been paid to the

¹ The term “public funding order”, as used here, is intended to be descriptive, and is not a technical term of art. To be sure, orders involving the payment of damages to litigants out of the Consolidated Revenue Fund to settle judgments against the Crown are routine and are typically authorized by the various *Crown Proceeding Acts* or *Financial Administration Acts* in place across Canada. The “public funding orders” discussed in

underlying question of whether courts have the jurisdiction (inherent or otherwise) to order the Crown to disburse public funds.² More often than not, proponents of funding orders assume that courts possess the authority to compel the expenditure of public funds. Government lawyers, by contrast, have steadfastly resisted any attempts to interfere with the Crown's spending powers, arguing that such orders will disrupt the delicate balance between the judicial, executive and legislative branches of government.

Courts in Canada have generally exhibited caution when asked to make public funding orders.³ In justifying this deferential stance, they

this paper generally refer to the ordering of payments that do not involve judgements in traditional civil claims in tort or contract. For example, a number of legal scholars have discussed the possibility of courts making public funding orders that would compel the Crown to use public funds to support indigent litigants: see e.g. Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011) 39:2 Adv Q 197; Jennifer Bond, "The Cost of Canada's Legal Aid Crisis: Breaching the Right to State-Funded Counsel Within a Reasonable Time" (2012) 59:1 Crim LQ 28; Mary Jane Mossman & Cindy L Baldassi, "A Constitutional Right to Civil Legal Aid in Canada?" in Vicki Schmolka, eds, *Making the Case: The Right to Publicly Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002) 187.

² By "jurisdiction", I am referring to the authority that a court or tribunal has at first instance to decide the matter before it, as distinguishable from the secondary question of whether the court should exercise that jurisdiction in a particular case. Jurisdiction, as used here, would embrace the court's "original jurisdiction" and its "inherent jurisdiction". See Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection according to the McLachlin Court" (2015) 73:1 UT Fac L Rev 35 (the term "judicial competence" has been used to describe essentially the same question).

³ *R v Gauvin* (1997), 184 NBR (2d) 229, 1997 CanLII 15726 (QB); *New Brunswick (Health and Community Services) v G(J)* (1997), 187 NBR (2d) 81, 145 DLR (4th) 349 (CA) [G(J)]; *R v RJH*, 2000 ABCA 111, 186 DLR (4th) 468 [RJH]; *R v Fok*, 2000 ABQB 695, 47 WCB (2d) 511; *British Columbia (Minister of Forests) v Jules*, 2001 BCCA 647, 208 DLR (4th) 301 [Jules]; *R v Gray*, 2002 BCSC 1192, 169 CCC (3d) 194 [Gray]; *R v Cai*, 2002 ABCA 299, 317 AR 240 [Cai]; *S v S*, 2004 BCPC 354, 8 RFL (6th) 194; *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244, 43 BCLR (4th) 65 [Lang]; *R v K(T)*, 2006 NUCJ 15, 70 WCB (2d) 555; *R v RJH*, 2006 ABQB 656, 405 AR 231; *R v MacKenzie*, 2007 BCPC 109, [2007] BCJ No 793 [MacKenzie]; *HMTQ v McGrath*, 2009 BCSC 180, 67 RFL (6th) 407; *R v Dallaire*, 2010 ONSC 715, 89 WCB (2d) 234 [Dallaire]; *R v Russel*, 2011 ONCA 303, 104 OR (3d) 721, rev'd 2013 SCC 43, [2013] 3 SCR 3; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2011 BCSC 1219, 27 BCLR (5th) 152 (Conseil-scolaire SC), rev'd 2012 BCCA 422, 355 DLR (4th) 688; *R v Cocks*, 2012 BCSC 1254, [2012] BCJ No 1852; *Leduc v Leduc*, 2013 BCSC 78, 42 BCLR (5th) 400; *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 [Criminal Lawyers' Association]; *Allart v Alec's Automotive Machine Shop (2003) Ltd*, 2014 BCSC 476, [2014] BCJ No 494 [Allart]; *R v Crichton*, 2015 BCCA 138, 120 WCB (2d) 624 [Crichton]; *Director (EAP) v Alberta (Provincial Court)*, 2017 ABQB 3, 53 Alta LR (6th) 382 [Director (EAP)]; *JESD v YEP*, 2017 BCSC 666, [2017] BCJ No 788 [JESD], rev'd

have regularly relied upon *dicta* from the Privy Council's 1924 decision in *Auckland Harbour Board v The King*.⁴ The *Auckland Harbour Board* case arose from a dispute over a mistaken payment made by a Minister of the Crown to a New Zealand harbour authority. Upon learning of the error, the Crown sought to set-off the payment against other debts owed to the Crown by the harbour authority. The harbour authority sued the Crown, lost, and eventually appealed to the Privy Council. Viscount Haldane dismissed the appeal holding that any "payment out of the consolidated fund made without Parliamentary authority" was "illegal and *ultra vires*" and therefore properly recoverable "by the Government."⁵

In the decades following its release, the *Auckland Harbour Board* decision was rarely cited by Commonwealth courts. When it was referenced, it was almost invariably relied upon as support for the narrow proposition that the Crown is entitled to seek restitution of payments made under a mistake of law.⁶ All of this changed in the 1990s. *Auckland Harbour Board* suddenly emerged from dusty obscurity and was touted as a case of seminal importance that stood for the supposedly ancient and hallowed rule that "public monies are not subject to the charge of third parties by judicial process."⁷ So it was that the *Auckland Harbour Board* principle was born or, at least, was rediscovered.

This paper challenges the orthodoxy that the constitutional principles discussed in *Auckland Harbour Board* preclude courts from ordering the Crown to spend public funds. While there is little question that courts cannot order the legislative branch of government to appropriate monies from the Consolidated Revenue Fund,⁸ I argue that it does not follow that

2018 BCCA 286, 294 ACWS (3d) 573; *Alberta v Vader*, 2017 ABCA 158, 55 Alta LR (6th) 252 [Vader]. The focus of this paper is on *Auckland Harbour Board v The King*, [1924] AC 318 (NZPC) (see the text accompanying note 4), which was cited in the above listed cases. However, there are many other examples in the case law where courts have expressed a reluctance to impose positive financial obligations upon government that would require, or result in, the expenditure of public funds: *British Columbia (AG) v Christie*, 2007 SCC 21 at paras 25–27, [2007] 1 SCR 873 [Christie]; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 [Little Sisters]; *Canadian Bar Association v British Columbia (AG)*, 2006 BCSC 1342, [2007] 1 WWR 331, leave to appeal to SCC refused, 32600 (31 July 2008).

⁴ [1923] NZPC 3, [1924] AC 318 [*Auckland Harbour Board* cited to AC].

⁵ *Ibid* at 326.

⁶ See e.g. *Walkerville Brewery Ltd v Canada*, [1939] SCR 52, [1938] 3 DLR 525 (discussed below) [*Walkerville* cited to SCR]. See also *AG v Great Southern & Western Railway Co of Ireland*, [1925] AC 754, 133 LT 568 (HL).

⁷ *Canada (AG) v Savard* (1996), 47 CR (4th) 281 at para 9, 106 CCC (3d) 130 (YCA) [Savard].

⁸ The Consolidated Revenue Fund refers to the pool of income generated by taxes and other revenue received by the Crown, which is used to pay for the costs of public

courts are prohibited (in all circumstances) from ordering the Crown to spend funds that Parliament has already appropriated—particularly where the Crown is given discretion in administering and dispensing the funds. Insofar as *Auckland Harbour Board* has been read as creating a blanket prohibition against public funding orders, it has been misunderstood and overextended.

In Part 1 of this paper I review *Auckland Harbour Board* in detail, arguing that Lord Haldane's oft-cited judgment deals with a set of constitutional rules governing parliamentary appropriations. While these rules continue to apply in Canada (as they do throughout the Commonwealth), they are primarily focussed on the court's jurisdiction to order the Crown to disburse public funds absent a parliamentary appropriation. However, where funds have been appropriated by Parliament to the Crown, it is open to courts (at least in certain circumstances) to compel their expenditure in the interests of justice.

Part 2 endeavours to situate *Auckland Harbour Board* in its proper legal and historical context. This section briefly reviews the emergence of the constitutional rules governing Parliamentary appropriations, which can be traced to the *English Bill of Rights* of 1689.⁹ While the rules governing Parliamentary appropriations form part of the bedrock of Canada's constitutional order, I argue that they are of limited relevance in determining whether courts have the jurisdiction to make public funding orders, since these rules are principally directed at the relationship between Parliament and the executive rather than the executive and the courts.

Part 3 examines in detail the treatment of *Auckland Harbour Board* in the Canadian jurisprudence. For analytical convenience, this discussion divides the case law into four groups: (1) cases involving the recovery of mistaken payments; (2) cases involving the appointment of state-funded counsel; (3) cases where individuals have sought to compel government to pay for a variety of litigation-related expenses; and (4) cases where courts began to question the applicability of the *Auckland Harbour Board* principle to all public funding orders. I ultimately argue that *Auckland Harbour Board* is only directly relevant to the first group: cases involving mistaken payments made by or to the Crown.

services. The Consolidated Revenue Fund of Canada is established by section 102 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*]. The provincial Consolidated Revenue Funds are established under section 126 of the *Constitution Act, 1867*. These funds are administered through various federal and provincial enactments, some of which are cited below at notes 25, 110, 115 and 117.

⁹ (UK), 1689, 1 Will & Mar, c 2, s 2 [*Bill of Rights*].

In Part 4, I return to my claim that *Auckland Harbour Board* has been misinterpreted, overextended and misapplied by the courts. While there is no question that the Crown cannot dispense public funds without an appropriation, I argue that this does not completely bar courts from ordering the Crown to spend public funds. It is only where a court makes an order that demands Parliament to appropriate funds, or which requires the payment of funds by the absence or in contravention of an appropriation, that *Auckland Harbour Board* has any real purchase. On the other hand, when the Crown has already been authorized by Parliament (through an appropriation) to spend public funds, courts arguably have the jurisdiction to make funding orders in support of the interests of justice.¹⁰

1. *Auckland Harbour Board v The King*: Background and Facts

The *Auckland Harbour Board* decision arose from a dispute between the New Zealand Minister of Railways and a local harbour authority. In brief, the Ministry had agreed to pay the harbour authority 7500£ if the harbour authority granted a lease to a third party in relation to certain lands owned by the harbour authority. The Minister's power to enter into the agreement was specifically authorized by the New Zealand Parliament under the terms of the *Auckland Harbour Empowering Act*. The Act authorized the Minister to pay the harbour authority a sum of money out of the Public Works Fund, but only in consideration for the harbour authority granting the lease upon the Minister's request.¹¹ The Act did not, in other words, confer a general power upon the Minister to make a payment out of public funds.

In the end, the Minister declined to ask the harbour authority to enter into a lease with the third parties; nevertheless, and for reasons that are not entirely clear, the sum of 7500£ was mistakenly paid to the harbour authority. Upon learning of this mistaken payment, the Crown decided to set-off the 7500£ payment against other funds the Crown owed the harbour authority. In response, the harbour authority brought an action challenging the set-off. At trial and on appeal, the Crown successfully argued that the initial payment of 7500£ was illegal, owing to the fact it was made in contravention of the terms of *Auckland Harbour Empowering*

¹⁰ The term "may" is used advisedly. The point, at the end of the day, is that it is impossible to make gross generalizations about the court's authority. Depending upon the circumstances, the authority may arise as aspect of the court's inherent jurisdiction, as incident of the court's judicial independence as protected by section 96 of the *Constitution Act, 1867*, *supra* note 8, or through the authority granted to the courts under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 1 [*Charter*].

¹¹ *Auckland Harbour Board*, *supra* note 4 at 325.

Act.¹² The Crown argued that it was, accordingly, entitled to claim the disputed funds as a set-off against other monies it owed the harbour authority.

On further appeal, the Privy Council (*per* Viscount Haldane) dismissed the harbour authority's claim. In Viscount Haldane's view, granting judgment in favour of the harbour authority would have been tantamount to ordering the Crown to make a payment in contravention of the very statute that had authorized the disbursement of funds.¹³ It was in these very specific circumstances—an action to resist the recovery of a payment made in contravention of the relevant authorizing legislation—that Viscount Haldane tendered the following observations:

The payment was ... an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced.¹⁴

Understanding this passage from the judgment requires consideration of the provisions of the *Auckland Harbour Empowering Act* itself. Under the Act, the Minister, without the necessity of further appropriation, was permitted to pay the harbour authority out of a specific fund, but only if the harbour authority entered into a lease with a third party upon the Minister requesting that it do so.¹⁵ To be sure, the Act contained an appropriation, but one that stipulated the conditions under which the associated funds could be disbursed.¹⁶ In those specific circumstances, the Privy Council was arguably bound to reject the harbour authority's claim because, in the

¹² 2 Geo V 1922 No 29 [*Empowering Act*].

¹³ *Auckland Harbour Board*, *supra* note 4 at 326.

¹⁴ *Ibid* at 326–27.

¹⁵ *Empowering Act*, *supra* note 12, ss 15, 17–18.

¹⁶ In this sense, the agreement contemplated under the *Empowering Act* could be regarded as a kind of legislated contract. On this topic, see Enid Campbell, “Legislative Approval of Government Contracts” (1972) 46 *Austl LJ* 217.

absence of compliance with the Act, there was no legislative authority for making the payment.¹⁷

2. The Legal and Historical Context of *Auckland Harbour Board*

To more fully appreciate Viscount Haldane's statement that "no money can be taken out of the consolidated fund,"¹⁸ it is necessary to place his surrounding remarks in their proper historical and legal context. His Lordship's *dicta* appears to allude to the constitutional controversies that prevailed in England before the Glorious Revolution of 1688, and to the eventual compromise reached under the 1689 *English Bill of Rights*.¹⁹ Prior to that time, disputes had frequently arisen between the Crown and Parliament concerning the Crown's authority to use monies raised from taxes for purposes other than those for which Parliament intended the funds to be used.²⁰ Experience under the reign of several monarchs taught that control over powers of taxation was not alone sufficient to limit the Crown's power. True supremacy meant not only that Parliament needed to control taxation, but also that it had to "know what the money raised would be spent on."²¹

One of the important results of the constitutional settlement of 1689 was the recognition of the requirement that monies for the army and navy could only be authorized through Parliamentary appropriations.²² This novel constitutional requirement²³—that expenditures of public

¹⁷ Indeed, had the Privy Council ruled in favour of the harbour board, it would have effectively ratified an illegal payment of funds that contravened the terms of the *Empowering Act*.

¹⁸ *Auckland Harbour Board*, *supra* note 4 at 326.

¹⁹ See Hans W Baade, "Mandatory Appropriations of Public Funds: A Comparative Study, Part I" (1974) 60:3 Va L Rev 393 at 406–09; *Bill of Rights*, *supra* note 9.

²⁰ Especially controversial was the keeping of a standing army without Parliament's consent. As discussed by FW Maitland, the keeping of "a standing army of any considerable size without supplies from parliament was impossible": FW Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1919) at 327–28 [Maitland]. This resulted in a series of disagreements between Parliament and the Crown during the latter part of the 17th Century.

²¹ Lotta Ziegert, "Does the Public Purse Have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*" (2006) 28:2 Sydney L Rev 387 at 393 [Ziegert]; see also John Waugh, "Evading Control of Parliamentary Spending: Some Early Case Studies" (1998) 9 Public L Rev 28.

²² See Article 6 of the *Bill of Rights*, *supra* note 9.

²³ To be sure, there were attempts by Parliament prior to 1689 to wrest control over the finances from the Crown. However, as Maitland writes, "[a]fter the Revolution [the requirement for Parliamentary appropriations] was invariably followed": Maitland, *supra* note 20 at 310.

funds had to be first authorized by an Act of Parliament—has since become a cornerstone in the legal architecture governing expenditures in Westminsterian parliamentary systems. The other key elements of that can be traced to this historic compromise being: that all public revenues must be collected into one fund (i.e., the later-established Consolidated Revenue Fund); that the executive has a monopoly over the initiation of financial legislation; and finally, that the executive is responsible to Parliament for the expenditure of public funds. These four constitutional rules have been described as “a cluster of rules that safeguard parliamentary democracy.”²⁴

The constitutional compromise reflected in the *English Bill of Rights* would later find expression in Canada’s *Constitution Act, 1867*.²⁵ Section 53 of the *Constitution Act* provides that “Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.”²⁶ Section 54 provides that it “shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General.”²⁷ The effect of these two provisions is that “bills relating to the appropriation of taxes (supply bills) are accompanied by a royal recommendation.”²⁸ Sections 102 and 126 of the *Constitution Act, 1867* require the creation of provincial and federal Consolidated Revenue Funds and further stipulate that the funds must be appropriated for the “Public Service” of the Province or Federal government, as the case may be.²⁹

It should also be borne in mind that the term “appropriation” is a legal term of art. An appropriation refers to “an Act by which Parliament authorizes the expenditure of moneys of the Crown.”³⁰ There are two common legislative methods used to appropriate public funds. The first is through the annual appropriation acts passed by Parliament (or the

²⁴ Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Scarborough, Ont: Carswell, 2000) at 316.

²⁵ *Constitution Act, 1867*, *supra* note 8.

²⁶ *Ibid*, s 53.

²⁷ *Ibid*, s 54.

²⁸ *Re Eurig Estate*, [1998] 2 SCR 565 at para 56, 165 DLR (4th) 1.

²⁹ *Constitution Act, 1867*, *supra* note 8, ss 102, 126.

³⁰ Enid Campbell, “Parliamentary Appropriation” (1971) 4:1 Adel L Rev 145 at 153; Leigh Warnick, “State Agreements” (1988) 62 Austl LJ 878 at 882. See generally *R v Lords Commissioners of the Treasury* (1872), LR 7 QB 387, 26 LT 64 (Eng QBd) [*Lords Commissioners of the Treasury*]; *R v Lords Commissioners of His Majesty’s Treasury*, [1909] 2 KB 183, 100 LT 896 (Eng KB); *R v Dunn* (1885), 11 SCR 385, 1885 CanLII 64; *Jacques-Cartier Bank v R* (1895), 25 SCR 84, 1895 CanLII 71; *Hereford Railway Co v R* (1894), 24 SCR 1, 1894 CanLII 68; *Canada Cement Co v R*, [1923] Ex CR 145.

provincial legislatures) each year, which provide the legislative authority for paying the annual expenses of government. The second is through the passage of legislation that authorizes the Crown to use public funds on an ongoing basis through a standing appropriation.³¹ Standing appropriations typically authorize the Crown to spend monies beyond a single year, thereby avoiding the time-consuming process of voting supply for the unpredictable expenditures of government that come up from time to time.

Let me now return to Viscount Haldane's statement in *Auckland Harbour Board* that "[a]ny payment out of the consolidated fund made without Parliamentary authority is simply illegal."³² This statement, when understood in its proper legal and historical context, is not directed at the court's jurisdiction to grant monetary judgments against the Crown.³³ Rather, as used in *Auckland Harbour Board*, it refers to the court's inability to grant an order that contravened the terms of the appropriation set out in the *Auckland Harbour Empowering Act*. From a constitutional standpoint, the reason the Privy Council could not have ordered the Crown to disburse public funds was that such an order would have contravened the terms of the very appropriation that authorized payment.³⁴

This interpretation of *Auckland Harbour Board*—as being focussed on the constitutional rules governing appropriations—is consistent with the treatment the case has received in the unjust enrichment scholarship.³⁵ For unjust enrichment scholars, *Auckland Harbour Board* has long stood for the proposition that monies paid by a private citizen to the Crown

³¹ By way of example, section 53(1) of the *Judges Act*, RSC 1985, c J-1 contains a standing appropriation that provides "salaries, allowances and annuities payable under this Act and the amounts payable under sections 46.1, 51 and 52.15 shall be paid out of the Consolidated Revenue Fund".

³² *Auckland Harbour Board*, supra note 4 at 326.

³³ The issue of whether the court can issue a judgment against the Crown would more properly fall under the rubric of Crown immunity and the historic rule that "no remedy lies against the Sovereign": Sir William Blackstone, *Blackstone's Commentaries*, 14th ed (Oxford: Clarendon Press, 1803) at 245. However, the Crown's immunity from suit has been substantially abridged by statute throughout the Commonwealth; see, originally, *Crown Proceedings Act*, 1947 (UK), 10 & 11 Geo VI, c 44, which was quickly copied by other jurisdictions throughout the Commonwealth. That said, the Crown's immunity from suit has not been entirely abolished.

³⁴ See Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont: LexisNexis, 2014) at 980, n 6 [McInnes].

³⁵ See e.g. *ibid* at 429–30; John D McCamus, "Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada" (1983) 17:2 UBC L Rev 233 at 239 [McCamus]; William E Knutson, "Mistake of Law Payments in Canada: A Mistaken Principle?" (1979) 10:1 Man LJ 23.

pursuant to a mistake of law are unrecoverable in unjust enrichment.³⁶ But the inverse was not true. A public entity that disburses funds without authorization is permitted to recover them. In consequence, governments throughout the Commonwealth have been placed in a relatively advantageous position when it comes to the law of restitution—a situation that has attracted considerable criticism from scholars and law reformers alike.³⁷ The Law Reform Committee of Australia, for instance, has stated that *Auckland Harbour Board*, “far from being a method of avoiding the injustices of the mistake of law rule, appears to create injustices in itself.”³⁸ To similar effect, the Law Reform Commission of British Columbia stated in a 1980 Report that they were “not convinced that the policy with which Viscount Haldane was concerned is best promoted by the absolute rule he formulated.”³⁹ This discontent about the potential unfairness resulting from the *Auckland Harbour Board* principle led the Province of British Columbia to enact section 87 of the *Financial Administration Act*, which codifies the Crown’s right to recover mistaken payments, while attenuating the extent of that right by extending to private parties the ability to rely upon defences like estoppel.⁴⁰

3. *Auckland Harbour Board* in the Canadian Jurisprudence

The treatment of *Auckland Harbour Board* in the Canadian jurisprudence has evolved considerably in the nearly 100 years since the case was first decided. In the early years, the decision was relied upon exclusively in relation to mistaken payments made either by or to the Crown. More recently, courts have relied upon the decision in support of the unadorned and usually unqualified proposition that “there is no jurisdiction in any level of court to order government to expend funds.”⁴¹ For analytical convenience, the review of the case law below is divided into four loose groupings: (a) cases involving the recovery of mistaken payments made to

³⁶ McCamus, *supra* note 35.

³⁷ *Ibid.*

³⁸ Austl, Law Reform Committee of South Australia, *Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (Report No 84) (South Australia: DJ Woolman, Government Printer, 1984) at 17. See also Austl, New South Wales Law Reform Commission, *Community Law Reform Program: Eleventh Report—Restitution Of Benefits Conferred Under Mistake Of Law* (Report No 53) (New South Wales: publisher unknown, 1987) at 3.18–3.19.

³⁹ Law Reform Commission of British Columbia, *Report on the Recovery of Unauthorized Disbursements of Public Funds* (Vancouver: publisher unknown, 1980) at 6–7 [BC Law Reform]. This report was made in response to a discussion paper issued by the Ministry of Finance in August 1980 soliciting comment on a draft *Financial Administration Act*.

⁴⁰ *Financial Administration Act*, RSBC 1996, c 138, s 87(1).

⁴¹ Gray, *supra* note 3 at para 58.

or by the government; (b) cases involving the appointment of state-funded counsel; (c) cases involving applications for various litigation-related expenses brought by private parties; and (d) cases where courts appear to question whether the so-called *Auckland Harbour Board* principle bars them from making funding orders.

A) The Mistaken Payment Cases

The first category of cases relates to situations that substantially mirror the factual circumstances of *Auckland Harbour Board*; that is, disputes between the Crown and private parties over mistaken payments.

Auckland Harbour Board was cited for the first time by the Supreme Court of Canada in its 1938 decision in *Walkerville Brewery Ltd v The King*.⁴² In *Walkerville*, a brewery sought recovery of funds that it had paid to the Crown in settlement of an action brought for recovery of taxes allegedly owed by the brewery. The Minister of National Revenue had earlier represented to the brewery that the Crown would refund any settlement funds if the brewery could show it was not liable for the taxes. Meanwhile, the Crown was involved in a similar dispute with an unrelated company that was resolved against the Crown, putting in doubt the plaintiff brewery's initial liability for the disputed taxes. Relying upon the Minister's earlier representations, the brewery argued that it was entitled to a refund of the settlement funds. The Supreme Court of Canada, citing *Auckland Harbour Board*, dismissed the brewery's claim. It held that the "[settlement] moneys paid became part of the Consolidated Revenue Fund of Canada" and that "it would require a statute, or something of like force, to clothe the Minister of a Department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable."⁴³

Auckland Harbour Board was not cited again in Canada until 1948, in *R v Toronto Terminals Railway Co*.⁴⁴ In *Toronto Terminals Railway Co*, the Crown commenced an action against a railway company for recovery of payments made by the Crown for a lease of lands owned by a railway. The payments had been made in excess of the amounts that had been authorized pursuant to a lease which was itself the subject of a very specific appropriation. The Court of Exchequer allowed the Crown's action,

⁴² *Walkerville*, *supra* note 6.

⁴³ *Ibid* at 61. The Court appears, in other words, to have concluded that it could not compel the Crown to disgorge the settlement funds because there was no appropriation authorizing the Crown to disburse the funds.

⁴⁴ [1948] Ex CR 563, [1948] 4 DLR 468 [*Toronto Terminals Railway Co*].

observing that what “Parliament sees fit to appropriate, is appropriated for that purpose.”⁴⁵ Relying upon *Auckland Harbour Board*, the Exchequer Court added that “Parliament provided funds to make lawful payments, i.e., payments authorized by the Lease” and that “authority cannot be widened” unless there was “evidence as to a specific appropriation to a particular purpose.”⁴⁶

The Crown’s authority to set-off mistaken payments against outstanding debts was confirmed by the Federal Court in *Irving Oil Co v Canada*.⁴⁷ There the Federal Court dealt with the question of whether the government could set-off an administrative tribunal’s monetary judgment against funds the Crown separately owed the company. The Federal Court held that the disputed set-offs were valid and (apparently) accepted the Crown’s contention that *Auckland Harbour Board* stood for the proposition that such “over payments are recoverable by the Crown at common law.”⁴⁸

One of the more recent decisions involving the application of *Auckland Harbour Board* to mistaken payments by the Crown is *Newfoundland (Social Services Appeal Board) v Butler*.⁴⁹ In that case, the Crown sought recovery of a mistaken overpayment of social assistance made to a private citizen. On judicial review, the chambers judge held the government was entitled to recover the overpayment based on “the principle laid down in *Auckland Harbour*.”⁵⁰ Interestingly, in remitting the matter back for rehearing by the Social Services Appeal Board, the Court suggested that it might be possible that any funds that were expended by the citizen in reliance upon the validity of the overpayment would be unrecoverable. Presumably the Court had in mind the possible application of the doctrine of estoppel.⁵¹

⁴⁵ *Ibid* at para 39.

⁴⁶ *Ibid*.

⁴⁷ *Irving Oil Co v Canada* (1983), [1984] 1 FC 281, [1983] FCJ No 504 [*Irving* cited to FC], aff’d [1985] FCJ No 516, [1985] ACF No 516 (CA).

⁴⁸ *Ibid* at 16.

⁴⁹ 139 Nfld & PEIR 282, 1996 CanLII 6607 (SC).

⁵⁰ *Ibid* at para 17.

⁵¹ Although reliance upon estoppel is recognized by statute in British Columbia, there is conflicting jurisprudence in other jurisdictions: see Law Reform Commission of British Columbia, *Report on Benefits Conferred Under a Mistake of Law* (Vancouver: publisher unknown, 1981) at 6. See e.g. *Commonwealth v Burns*, [1971] VR 825, [1972] ALR 154 (Austl VSC) (the Supreme Court of Victoria held that the government cannot be estopped from recovering a mistaken payment: “a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says that he shall not do” at 830). See also *Attorney-General v Gray*, [1977] 1 NSWLR 406 (Austl NSWCA).

A related circumstance where the Crown has relied upon *Auckland Harbour Board* is in defending claims by private parties seeking to recover mistaken payments made to the Crown. In *Saugeen Indian Band v Canada*,⁵² the plaintiff Indian band sought a refund of excise taxes on goods purchased by the band. The band argued that section 87 of the *Indian Act*, which generally exempts Indian bands from taxation, constituted an exemption from the excise tax. The Federal Court, in dismissing the band's claim, held that even if the band's interpretation were correct, it could not recover the tax because such recovery was barred by the *Excise Act* and by "the common law principle that monies cannot be taken out of the Consolidated Revenue Fund except by authorization from Parliament."⁵³

The approach taken by courts in the mistaken payment cases appears to be entirely consistent with a proper reading of *Auckland Harbour Board*. In all of these cases, the Crown was either recovering payments made without legislative authorization, or was resisting claims that, if successful, would have required the payment of funds in the absence of an appropriation.⁵⁴ Although the mistaken payment cases can justifiably be criticized for exacting harsh and unfair consequences upon private parties, they appear to be consistent with the general logic of *Auckland Harbor Board* and with a strict reading of the constitutional principles governing appropriations.⁵⁵

⁵² *Saugeen Indian Band v R*, [1989] 3 FC 186, [1988] FCJ No 1079.

⁵³ *Ibid* at 42.

⁵⁴ McInnes, *supra* note 34 at 981.

⁵⁵ My claim—that the *Auckland Harbour Board* decision is mainly relevant to cases involving mistaken payments by public authorities—finds some confirmation in commonwealth jurisprudence. Courts in New Zealand have held that the *Auckland Harbour Board* decision applies where a corporation without relying upon an *ultra vires* contract seeks to recover money or other property by asserting a legal or equitable interest: *Cabaret Holdings Ltd v Meeanee Sports & Rodeo Club Inc*, [1982] 1 NZLR 673 (CA). Australian courts have discussed *Auckland Harbour Board* in the context of waiver of rights, the liability of a mistaken payee for monies paid from the Consolidated Revenue Fund, and for the proposition that funds mistakenly refunded by a Collector of Customs could be recovered: *Education, Employment, Training & Youth Affairs, Department of v Prince*, (1997) 50 ALD 186, (1997) 152 ALR 127 (FCA); *Sandvik Australia Pty Ltd v Commonwealth of Australia* (9 October 1990), New South Wales BC9003224 (FCA). English courts, while also recognizing the principle that public funds must be appropriated before expenditures can be made by the Crown, have not concluded that the principles discussed in *Auckland Harbour Board* prohibit money judgments against the Crown. In *McFarland, Re*, [2004] UKHL 17 at para 40, [2004] 1 WLR 1289, for example, the Court discussed the Crown's prerogative to make *ex gratia* payments in wrongful conviction cases, stating that the "making of *ex gratia* payments is lawful if, but not unless, there is Parliamentary authority for the disbursements".

B) Prohibiting Orders Involving State-Funded Legal Counsel

For most of the 20th century, *Auckland Harbour Board* was only cited by Canadian courts in cases involving mistaken payment. But this changed in the 1990s, when courts began relying upon the decision to reject applications for state-funded legal counsel.

Canada v Savard is the first reported decision where *Auckland Harbour Board* was discussed in relation to the appointment of state-funded legal counsel.⁵⁶ In *Savard*, the Court of Appeal for Yukon was faced with the question of whether a trial judge had exceeded his jurisdiction by ordering the Attorney General to bear the costs of legal counsel appointed under section 672.24 of the *Criminal Code*.⁵⁷ This provision of the *Criminal Code* (as worded at the time *Savard* was decided)⁵⁸ authorized trial courts to appoint counsel for mental fitness hearings, but was silent on the question of remuneration. In *Savard*, a trial judge had ordered the Crown to pay an appointee's legal fees; the Crown appealed, arguing that the order was prohibited by the principles discussed in *Auckland Harbour Board*. A majority of the Court of Appeal allowed the Crown's appeal holding that "in the absence of express language requiring government to pay counsel ... the fundamental principle the courts have applied in regard to the expenditure of public funds, as set out in *Auckland Harbour Board v The King*, *supra*, must be respected."⁵⁹ Justice Wood, in dissent, rejected the Crown's argument that *Auckland Harbour Board* was engaged on the facts, arguing that it only applied "to monies held in the Consolidated Revenue Fund."⁶⁰ Justice Wood explained that since "Parliament enacts one or more 'Appropriation Acts' ... authorizing amounts of money to fund the Ministry of the Attorney General,"⁶¹ the trial court's order was not a charge on public monies from the Consolidated Revenue Fund, but would be taken from funds appropriated "by one or more of the Appropriation Acts passed by Parliament."⁶²

Although there was considerable force to Justice Wood's dissent in *Savard*, the majority's decision has been treated as an authoritative

⁵⁶ *Savard*, *supra* note 7.

⁵⁷ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

⁵⁸ Since *Savard* was decided, the *Criminal Code* was amended and now states: "Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General to the extent that the accused is unable to pay them." This can be considered a standing appropriation.

⁵⁹ *Savard*, *supra* note 7 at para 113.

⁶⁰ *Ibid* at para 19.

⁶¹ *Ibid* at para 20.

⁶² *Ibid* at para 21.

statement that courts cannot require the Crown to pay for court-appointed legal counsel. In *Gauvin*,⁶³ for instance, the New Brunswick Court of Queen's Bench declined to order funding for legal counsel as a remedy for a breach of section 7 of the *Canadian Charter of Rights and Freedoms*.⁶⁴ The trial judge concluded that he did not have the jurisdiction to order the Attorney General to pay for legal fees, citing the majority's opinion in *Savard*.

A similar conclusion was reached by the Court of Appeal for New Brunswick in *New Brunswick (Minister of Health and Community Services) v G(J)*.⁶⁵ The issue on appeal in *G(J)* was whether the Court had the jurisdiction to appoint state-funded counsel as a *Charter* remedy in the context of child custody proceedings. The majority of the Court of Appeal held that section 7 of the *Charter* was not engaged in child custody applications. In dissent, Justice Bastarache (as he then was) held that the right to life, liberty and security of the person in section 7 of the *Charter* was engaged in child custody proceedings, and he rejected the argument that *Auckland Harbour Board* prevented courts from ordering the Crown to pay for legal counsel. Justice Bastarache explained that "there is no absolute restriction on orders involving the expenditure of public funds" under the *Charter*.⁶⁶ Justice Bastarache's dissenting opinion was ultimately vindicated on further appeal to the Supreme Court of Canada.⁶⁷ However, the Supreme Court did not mention *Auckland Harbour Board* or *Savard* in its reasons, but simply concluded that "a limited right to state-funded counsel arises under s. 7 to ensure a fair hearing."⁶⁸

Despite the Supreme Court's ruling in *G(J)*, lower courts have continued to rely upon *Auckland Harbour Board* in rejecting the appointment of state-funded legal counsel in criminal matters where the *Charter* is clearly engaged. For example, in *R v Cai*,⁶⁹ the Court of Appeal for Alberta held that *Auckland Harbour Board* and *Savard* precluded courts from appointing state-funded legal counsel, since "granting money creates

⁶³ *R v Gauvin* (1997), 184 NBR (2d) 229, [1997] NBJ No 5.

⁶⁴ *Charter*, *supra* note 10.

⁶⁵ *G(J)*, *supra* note 3.

⁶⁶ *Ibid* at 25.

⁶⁷ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 [G(J) SCC].

⁶⁸ *Ibid* at para 107. Given the submissions in the court below, the Supreme Court of Canada presumably considered the *Auckland Harbour Board* decision. This suggests that the Court concluded that remedial powers conferred by section 24(2) of the *Charter* were broad enough to permit the ordering of state-funded legal counsel in the absence of an express appropriation by the Legislature of New Brunswick.

⁶⁹ *Cai*, *supra* note 3.

a grave constitutional problem.”⁷⁰ The reasoning in *Cai* was later adopted by the Court of Appeal for British Columbia in *R v Ho*.⁷¹ Like *Cai*, the *Ho* decision involved a Crown appeal from a judicial stay ordered pursuant to section 7 of the *Charter*. The accused’s counsel had resigned mid-trial after exhausting the funding provided by legal aid. When new counsel was appointed, the Crown and the accused’s new counsel could not reach a mutually agreeable funding arrangement. The trial judge accordingly stayed the proceedings until such funding arrangements could be made. The Court of Appeal held the trial judge had exceeded his authority by ordering a stay of proceedings based upon inadequate funding. Citing *Cai* and *Auckland Harbour Board*, the Court of Appeal in *Ho* concluded that the *Charter* did not give “the courts the power to create or confer, in the absence of an appropriation or a specific statutory authorization, a power in the Crown, whether in right of Canada or of a province or any minister thereof, to expend public funds.”⁷²

The case law on the appointment of state-funded counsel arguably represents a significant expansion of the narrow *ratio* in *Auckland Harbour Board*. It has had the effect of transforming a relatively obscure decision dealing exclusively with mistaken payments into a doctrine of crown immunity that significantly limits the scope of the court’s jurisdiction to grant remedies at common law and under section 24(1) of the *Charter*.

C) Prohibiting Orders Involving the Expenditures of Funds for Litigation Purposes

A closely related line of cases has arisen from situations where litigants seek public funding in support of broader litigation needs. These situations range from applications for access to drug treatment, advanced cost orders and the appointment and remuneration of *amicus curiae*.

One of the earliest examples of this third category of cases is *R v RJH*.⁷³ The Court of Appeal for Alberta considered the question of whether a judge had the jurisdiction to order the Crown to pay for an offender’s attendance at a drug and alcohol treatment program. Citing *Auckland Harbour Board* (as interpreted by *Savard*), the Court held that such an order would represent “a substantial departure from the long-standing presumption that courts are not free to pry open a government’s purse.”⁷⁴

⁷⁰ *Ibid* at para 93.

⁷¹ *R v Ho*, 2003 BCCA 663, 21 BCLR (4th) 83 [*Ho*].

⁷² *Ibid* at para 70. To similar effect, see *RJH*, *supra* note 3; *Dallaire*, *supra* note 3; *Crichton*, *supra* note 3.

⁷³ *RJH*, *supra* note 3.

⁷⁴ *Ibid* at para 24.

The Court of Appeal added that “any authorization for a provincial court to expend public funds must be explicitly conferred.”⁷⁵

A similar conclusion was reached in *R v Gray*,⁷⁶ where a summary appeal court overturned a provincial trial court’s order compelling the Attorney General to pay for a Fetal Alcohol Syndrome Assessment.⁷⁷ The Summary Appeal Court, citing *Auckland Harbour Board*, held that that “there is no jurisdiction in any level of court to order government to expend funds.”⁷⁸ The Summary Appeal Court added that this principle “holds true with respect to the jurisdiction of a Court to order the government to expend funds to pay for a special assessment to determine if an accused person has a developmental disorder.”⁷⁹ *Gray* was later followed by the Nunavut Court of Justice in *R v K(T)*,⁸⁰ where a trial judge declined to order a Fetal Alcohol Spectrum Disorder Assessment based on the “established ... principle that there is no jurisdiction in any level of court to order a government to expend funds.”⁸¹

The court’s jurisdiction to award costs has also been resisted (albeit unsuccessfully) on the basis of *Auckland Harbour Board*. In *British Columbia (Minister of Forests) v Okanagan Indian Band*,⁸² an Indian band sought an order requiring the Crown to pay advance costs to Aboriginal plaintiffs in a land title claim dispute. At first instance, the trial judge declined to make the order.⁸³ The Aboriginal claimant’s appeal was thereafter dismissed by the Court of Appeal for British Columbia on the basis that “courts of law do not have the jurisdiction to order the Crown to defray legal fees or to retain counsel.”⁸⁴ Although the plaintiff went on to successfully appeal this decision,⁸⁵ the Supreme Court of Canada did not

⁷⁵ *Ibid.*

⁷⁶ *Gray*, *supra* note 3.

⁷⁷ Section 672.11 of the *Criminal Code* grants a court authority to order an assessment of the mental condition of an accused in a limited number of situations such as for a trial fitness hearing or a verdict of not criminally responsible because of mental disorder. However, it has not typically been used to set conditions as to who can prepare the assessment or pay for its costs.

⁷⁸ *Gray*, *supra* note 3 at para 58.

⁷⁹ *Ibid* at para 63. The British Columbia provincial court reached the result in *MacKenzie*, *supra* note 3. The accused had pleaded guilty to breaking and entering and applied under section 7 of the *Charter*, *supra* note 10, for a specialized Fetal Alcohol Spectrum Disorder assessment. In *MacKenzie*, the Court discussed *Savard* and *Gray*, but ultimately found no breach of section 7 of the *Charter*.

⁸⁰ 2006 NUCJ 15, [2006] Nu J No 15.

⁸¹ *Ibid* at para 15.

⁸² 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*].

⁸³ *BC (Minister of Forests) v Wilson*, 2000 BCSC 1135, [2000] BCJ No 1536.

⁸⁴ *Jules*, *supra* note 3 at para 34.

⁸⁵ *Okanagan*, *supra* note 82.

refer to the *Auckland Harbour Board*, but concluded that “[t]he power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs.”⁸⁶ Ultimately, however, the Supreme Court declined to order advance costs, despite its finding that it had the jurisdiction to do so.⁸⁷

*Lang v British Columbia (Superintendent of Motor Vehicles)*⁸⁸ provides a final example of a case where the government attempted to rely upon *Auckland Harbour Board* in resisting a cost award granted in the context of a judicial review. The Attorney General argued that no costs could be awarded against it unless the provincial legislature had made an express appropriation to cover the expenditure. The Court of Appeal dismissed the appeal, holding that unlike “compensation for expropriation in *Auckland Harbour Board* or the *ad hoc* expansion of a legal aid program in *Savard*, court awarded costs in litigation are commonplace expenditures and just part of doing the business of the Attorney General’s ministry.”⁸⁹

D) *Auckland Harbour Board*: Down with the King?

The discussion so far has demonstrated that *Auckland Harbour Board* has been invoked and relied upon by courts in circumstances that depart markedly from the early decisions involving mistaken payments. From its modest beginnings in the mistaken payment cases, the decision has been transformed into a constitutional rule of broad application that holds that “public monies are not subject to the charge of third parties by judicial process.”⁹⁰ However, a small number of recent cases suggest that courts have begun to reconsider the extent to which *Auckland Harbour Board* operates to prevent judges from making public funding orders in appropriate circumstances.

One recent example of a case where the applicability of *Auckland Harbour Board* was questioned is *Conseil Scolaire Francophone de la Colombie-Britannique v British Columbia*.⁹¹ The case involved an action by francophone parents against the British Columbia Ministry of Education alleging violations of the minority language rights guarantees in section 23 of the *Charter*. The chambers judge rejected the Crown’s argument that the

⁸⁶ *Ibid* at para 35.

⁸⁷ *Ibid* at para 77. It is worth pointing out that the recognition of a jurisdiction to order advanced costs has not resulted in a deluge of such orders being made. Here, again, courts have shown a reluctance to exercise their jurisdiction to order advance costs: *Little Sisters*, *supra* note 3. On this topic, see Christopher Bredt & Heather Pessione, “Advance Costs Awards: A Critical Analysis” (2015) 34:1 NJCL 31.

⁸⁸ *Lang*, *supra* note 3.

⁸⁹ *Ibid* at para 43.

⁹⁰ *Savard*, *supra* note 7 at para 9.

⁹¹ *Conseil-scolaire SC*, *supra* note 3.

principles in *Auckland Harbour Board* rendered the claims non-justiciable. In doing so, the chambers judge observed that “[t]he constitutional role of Canadian courts is not the same as the narrow role of the New Zealand courts articulated in *Auckland Harbour Board*.”⁹² It is notable that the claimants later went on to succeed in advancing their claim,⁹³ and were ultimately granted several constitutional remedies that will almost certainly require the expenditure of millions of dollars of public funds.

But the Supreme Court of Canada’s recent decision in *Ontario v Ontario Criminal Lawyers’ Association*⁹⁴ unquestionably contains the most significant recent discussion of *Auckland Harbour Board*. The central issue in *Criminal Lawyers’ Association* was whether the court’s inherent jurisdiction included the power to appoint *amicus curiae* and set their rates of remuneration. A narrow 5:4 majority of the Supreme Court held that the court’s inherent jurisdiction did not extend so far as permitting judges to set an *amicus curiae*’s rate of remuneration.⁹⁵ While the Court was divided on the narrow jurisdictional question, it unanimously held that the *Auckland Harbour Board* principle was not determinative of the result. Justice Karakatsanis, writing for the majority, held that “the principle stated by the Privy Council in *Auckland Harbour Board v The King* ... does not resolve the issue before us.”⁹⁶ Nevertheless, in her view, the constitutional separation of powers precluded courts from dictating the financial terms of *amicus*’ appointment, since doing otherwise would risk putting “judges into the fray.”⁹⁷

Justice Fish, writing on behalf of four dissenting members of the court, agreed with the majority that the *Auckland Harbour Board* principle did not apply,⁹⁸ but went on to hold that there was “no constitutional impediment to a trial judge ordering the Ministry of the Attorney General

⁹² *Ibid* at para 27. While this conclusion is difficult to square with many of the cases involving the appointment and remuneration of counsel (e.g. *Cai*, *supra* note 3; *Ho*, *supra* note 71), it is consistent with the Supreme Court of Canada’s decisions in *G(I)* SCC, *supra* note 67. It is also consistent with the various cases where courts have granted claimants injunctive relief under the *Charter*. See e.g. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*].

⁹³ *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764, [2016] BCJ No 2007 [*Conseil-scolaire CA*], *aff’d* in part, 2018 BCCA 305, 2018 CarswellBC 1956. Of course, the significance of this ruling is also a reflection of the fact that it was a claim advanced under section 23 of the *Charter*, *supra* note 10, which creates positive rights.

⁹⁴ *Criminal Lawyers’ Association*, *supra* note 3.

⁹⁵ *Ibid* at para 5.

⁹⁶ *Ibid* at para 57.

⁹⁷ *Ibid* at para 78.

⁹⁸ *Ibid* at para 128.

to pay an *amicus* at a specific rate of remuneration fixed by the court.”⁹⁹ Justice Fish wrote:

The *Auckland Harbour* principle, however, finds no application in the case at bar. The principle acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Since, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* when their rate of remuneration is *not* fixed by the court, then the same authority necessarily exists even if their rate *is* fixed by the court.¹⁰⁰

Criminal Lawyers’ Association marks a significant development in the jurisprudence on *Auckland Harbour Board* and may in time prove to have far-reaching consequences for the existing jurisprudence. The majority’s conclusion that “the Attorney General is obligated to pay *amici curiae* when appointed”¹⁰¹ suggests that, at a minimum, judges are permitted to order the Crown to expend public funds in certain circumstances. Although this holding has arguably dealt a major blow to proponents of the *Auckland Harbour Board* principle, courts (and Crown lawyers) have continued to rely upon the decision in rejecting (or resisting) public funding applications.¹⁰² This alone suggests that there remains a need to clarify when the principles discussed in *Auckland Harbour Board* operate to bar courts from making public funding orders.

4. The King is Dead? Long Live the King!

Let me now return my claim that *Auckland Harbour Board* has been routinely misinterpreted and misapplied by Canadian courts. In arguing against an expansive approach to *Auckland Harbour Board*, I wish to be clear that I am not disputing the idea that the rules governing parliamentary appropriations continue to constrain the court’s ability to order the expenditure of public funds.¹⁰³ Nor is it my contention that courts should routinely order the Crown to spend public monies. Sound reasons of principle and policy, including the separation of powers, should dictate a cautious judicial attitude when it comes to the making of public

⁹⁹ *Ibid* at para 126.

¹⁰⁰ *Ibid* at para 128 [emphasis in original].

¹⁰¹ *Ibid* at para 2.

¹⁰² *JESD v YEP*, 2018 BCCA 286 at para 75, 13 BCLR (6th) 143; *Vader*, *supra* note 3 at para 13; *JESD*, *supra* note 3 at paras 25–28; *Director (EAP)*, *supra* note 3 at paras 60–62; *Crichton*, *supra* note 3 at para 28; *Allart*, *supra* note 3 at para 20.

¹⁰³ In the absence of an appropriation, the provisions of the *Constitution Act, 1867* continue to operate with full force, and clearly prevent courts from ordering the legislature to appropriate monies, or from compelling the Crown to spend monies in a manner that contravenes an appropriation. In this sense, Viscount Haldane’s *dicta* in *Auckland Harbour Board* is every bit as binding upon courts today as it was in 1924.

funding orders.¹⁰⁴ Yet, there are instances when courts can (as a matter of jurisdiction) and should (as a matter of policy) order the Crown to spend public monies in the interests of justice.

As for the state of the law, the discussion in Part 3 reveals that significant conceptual and precedential uncertainties plague the jurisprudence. On their face, the mistaken payment cases appear to be generally consistent with the constitutional rules governing appropriations. But even these cases must be read in light of modern developments in the statutory regimes governing Crown liability in Canada. In jurisdictions such as British Columbia, the legislature has substantially abrogated a strict application of the *Auckland Harbour Board* principle by permitting private parties to rely upon defences like estoppel.¹⁰⁵ The mistaken payment cases must also be qualified by recent developments in the law related to the restitution of unconstitutional taxes. For example, in *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*,¹⁰⁶ the Supreme Court of Canada held (unanimously) that taxpayers could recover taxes collected by public authorities where the taxing legislation is subsequently declared unconstitutional. This holding would appear to place a limit on *Auckland Harbour Board* in cases involving payments made under an unconstitutional tax. Whether *Kingstreet Investments Ltd* will have broader implications for mistaken payments by private citizens in non-constitutional cases remains unanswered.¹⁰⁷

Outside of the mistaken payment cases, *Criminal Lawyers' Association* should prompt closer scrutiny of cases like *Savard* and its progeny. The case law dealing with the appointment of state funded counsel and payments of litigation costs has utterly failed to grapple with the very specific circumstances that prompted Viscount Haldane to state that “[a]ny payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*.”¹⁰⁸ As I have argued above, properly understood, the constitutional principles in *Auckland Harbour Board* prohibit courts from making orders that would either compel the Crown to expend funds in the absence of an appropriation authorizing the Crown to do so, or to act in contravention of the terms of an appropriation. They do not stand for the bald proposition, promulgated in *Savard*, that

¹⁰⁴ See generally Lawrence, *supra* note 2.

¹⁰⁵ See *BC Law Reform*, *supra* note 39.

¹⁰⁶ 2007 SCC 1, [2007] 1 SCR 3 [*Kingstreet Investments Ltd*].

¹⁰⁷ Rebecca Williams, “Recovery of *Ultra Vires* Taxes: A Wholly Public Approach? *Kingstreet Investments v New Brunswick*” (2007) 15 RLR 130 (Williams discusses the relationship between the *Auckland Harbour Board* decision and *Kingstreet*, and writes that “the *Kingstreet* rule only applies to claims from public bodies” at 134).

¹⁰⁸ *Auckland Harbour Board*, *supra* note 4 at 326.

“public monies are not subject to the charge of third parties by judicial process.”¹⁰⁹

And while it may be true that public funds cannot be paid out of the Consolidated Revenue Fund without legislative authorization,¹¹⁰ it does not necessarily follow that courts have no jurisdiction to order the Crown to disburse funds that have been appropriated for the purpose of satisfying judgments and court orders. It is, in this regard, important to bear in mind that most appropriations involve a considerable element of discretion. As expressed by one scholar:

When Parliament appropriates money for a particular purpose, it does not thereby impose a duty on the Crown to spend the money appropriated. In other words, the effect of the appropriation is enabling. If the Crown has a duty to pay, that duty arises not from the appropriation Act but from some other source. The spending authority which an appropriation confers may leave the Crown with considerable discretion in the choice of objects for which money is spent.¹¹¹

By way of further illustration, the *Federal Crown Liability and Proceedings Act* authorizes the federal Minister of Finance to pay from the Consolidated Revenue Fund “any money awarded by the judgment to any person against the Crown.”¹¹² This provision allows the federal Finance Minister to settle judgments rendered against the Crown without having to seek a further appropriation from Parliament.¹¹³ As Justice Fish explained in *Criminal Lawyers’ Association*, where the “Legislative Assembly has pre-approved the disbursement of funds for the purpose of satisfying court orders, there can be no violation of the *Auckland Harbour* principle.”¹¹⁴ Presumably, the majority opinion in the *Criminal Lawyers’ Association* acknowledged Fish

¹⁰⁹ *Savard*, *supra* note 7 at para 9.

¹¹⁰ This is follows from *Constitution Act, 1867*, and not any unwritten constitutional principles. See also *Steele Ford & Newton v Crown Prosecution Service (No 2)*, [1994] 1 AC 22, [1993] 2 All ER 769 (UK).

¹¹¹ Enid Campbell, “Private Claims on Public Funds” (1969) 3:2 U Tasm L Rev 138 at 139 (writing in the comparable Australian context) [Campbell, “Private Claims”].

¹¹² *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 30 [CLPA]. As Professor Hogg has explained, “In all Canadian Jurisdictions, the United Kingdom and New Zealand, the Crown proceedings statute requires or authorizes the payment of a judgment debt in terms that make it clear that no further appropriation is required.” See e.g. Peter W Hogg, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 9.4(c).

¹¹³ CLPA, *supra* note 112.

¹¹⁴ *Criminal Lawyers’ Association*, *supra* note 3 at para 130. This was also the position of Justice Wood (dissenting) in *Savard*, *supra* note 7.

J's statement as being accurate when it held that "the Attorney General is *obligated* to pay *amici curiae* when appointed."¹¹⁵

The upshot of the above is that where Parliament or the Provincial legislatures have appropriated public funds to be used by the Crown, the court *may* be in a position to order to the Crown to spend those funds. Much will depend upon the terms of the appropriation from which the funds are to be drawn.¹¹⁶ Many statutes contain standing appropriations, such as the one found in the federal *Crown Liability and Proceedings Act*. For example, following *Savard*, the *Criminal Code* was amended to make it clear that the Attorney General would pay for the "fees and disbursements" of counsel assigned to an accused in a fitness hearing.¹¹⁷ Similar standing appropriations are found elsewhere in the *Criminal Code*¹¹⁸ and in the various *Financial Administration* and *Crown Proceeding Acts* in force across the country.¹¹⁹

More difficult questions may arise where no express appropriation is provided for in a statute. However, it may be that an appropriation is implied by the language of the relevant statute, or can be inferred by the practice of the Crown using discretionary funds allocated to the Ministry of Justice or Attorney General in its annual litigation budget. Parliament does not have to use any "particular form of words" for an "Act to take effect as an appropriation."¹²⁰ Like any other statute, appropriations are

¹¹⁵ *Criminal Lawyers' Association*, *supra* note 3 at para 2 [emphasis added].

¹¹⁶ This is would appear to be supported by Lord Blackburn's *dicta* in *Lords Commissioners of the Treasury*, *supra* note 30 at 396 ("When the money has been voted and an appropriation act passed this act must be construed, when it comes before us like any other act The Appropriation Act regulates so far as it goes what is to be done with the money"). See also *Hereford Railway Co v R* (1894), 24 SCR 1 at 14, 1894 CanLII 68.

¹¹⁷ *Criminal Code*, *supra* note 57, s 672.24(2).

¹¹⁸ See e.g. *Criminal Code*, *ibid* at ss 684, 694.1; see generally *R v White*, 2010 SCC 59, [2010] 3 SCR 374.

¹¹⁹ See e.g. *CLPA*, *supra* note 111 at ss 28, 30. The functional equivalent is found in every jurisdiction in Canada: *Proceedings Against the Crown Act*, RSA 2000, c P-25, s 24; *Crown Proceeding Act*, RSBC 1996, c 89, s 13; *Proceedings Against the Crown Act*, CCSM c P-140, ss 14(1), 18; *Proceedings Against the Crown Act*, RSNL 1990, c P-26, ss 23(1), 23(4), 26; *Proceedings Against the Crown Act*, RSNB 1973, c P-18, ss 17(1),(3), 20; *Proceedings against the Crown Act*, RSNS 1989, c 360, ss 20(1),(3), 24; *Crown Proceedings Act*, RSPEI 1988, c C-32, ss 17(1),(3); *Code of Civil Procedure*, RSQ 2014, c C-25, s 94.10; *Proceedings Against the Crown Act*, RSS 1978, c P-27, ss 19(1),(4), 21.

¹²⁰ *Mootoo v AG of Trinidad and Tobago*, [1979] 1 WLR 1334, 30 WIR 411 (PC), where the Privy Council in discussing *Auckland Harbour Board* rejected the view that there has to be a separate act of Parliament authorizing each and every expenditure from public funds. For a discussion on the interpretation of Appropriation Acts, see Ziegert, *supra* note 21; Campbell, "Private Claims", *supra* note 110.

subject to the ordinary principles of statutory interpretation, as guided by Parliament's purpose in enacting them.¹²¹

The relevance and applicability of the constitutional rules governing appropriations becomes altogether less clear when it comes to remedial orders granted under section 24(1) of the *Charter*. Although most of the cases involving the appointment of state-funded counsel were advanced under section 7 of the *Charter*,¹²² the reviewing courts did not consider whether the constitutional rules governing appropriations had to be adapted to reflect the advent of the *Charter*. The prevailing position, as exhibited in leading cases like *Ho* and *Cai*, is that courts cannot directly appoint state-funded counsel or set their rates of remuneration as a *Charter* remedy.¹²³ But this conclusion is difficult to reconcile with the language of section 24(1),¹²⁴ with the orders made in cases like *G(J)*, with cases involving the issuance of structural injunctions,¹²⁵ and with awards of *Charter* damages.¹²⁶ Indeed, the majority judgment in *Criminal Lawyers' Association* wrote of the possibility that courts could fix the rate of remuneration of court-appointed counsel as a remedy under section 24(1) of the *Charter*,¹²⁷ and this notwithstanding previous decisions where courts had declined to do so on the basis of the *Auckland Harbour Board* principle. Although it is outside of the scope of this paper to fully explore the relationship between *Charter* remedies and constitutional rules governing appropriations, there is an apparent conflict between the broad remedial language of section 24(1) of the *Charter*, and the strictures imposed upon

¹²¹ For an informative discussion of the comparable Australian experience, see Ziegert, *supra* note 21 at 393–97.

¹²² *Contra Christie*, *supra* note 3 (here the claimant relied upon the phrase “rule of law”, which is found in the preamble to the *Constitution Act, 1982*.) See also *Criminal Lawyers' Association*, *supra* note 3 (the majority opined that “judicial independence”, as protected by section 96 of the *Constitution Act, 1867*, *supra* note 8, might furnish a basis for judicial intervention where “inadequate funding risks undermining the justice system” at para 42).

¹²³ Ordinarily, courts do not appoint state funded counsel as a remedy for an anticipated breach of section 7 of the *Charter*, *supra* note 10. Instead, they order a “conditional stay of proceedings”, also known as a “Rowbotham order”: *R v Rowbotham*, 1988 CanLII 147, 63 CR (3d) 113 (Ont CA). The order creates an illusion of judicial deference, but the effect of the order is to place the Crown in an untenable position: Crown is forced to pay for an accused's legal representation if they wish to pursue a prosecution.

¹²⁴ Section 24(1) of the *Charter*, *supra* note 10, provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”.

¹²⁵ See e.g. *Doucet-Boudreau*, *supra* note 92; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, [2013] BCJ No 2708; *Conseil-scolaire CA*, *supra* note 93.

¹²⁶ *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28.

¹²⁷ *Criminal Lawyers' Association*, *supra* note 3 at paras 66–67.

the Crown under the provisions of the *Constitution Act, 1867*.¹²⁸ On the one hand, courts have held that “the judiciary cannot be seen to direct the legislative branch to expend scarce public resources in order to satisfy *Charter* claims in a particular manner.”¹²⁹ Yet, on the other, the broad remedial promise of the *Charter* has compelled courts (at least in some instances) to grant orders that clearly involve the expenditure of public funds, and apparently in the absence of a pre-existing appropriation.¹³⁰

Perhaps the most important unanswered question from the jurisprudence is whether the separation of powers thesis adopted by the majority in *Criminal Lawyers' Association* will supplant the *Auckland Harbour Board* principle. The Supreme Court was unanimous in finding that the principle did “not resolve the issue”¹³¹ before it. Yet, the majority’s judgment goes some distance in resuscitating the main normative elements of the principle under the guise of the separation of powers doctrine. This move by the majority was remarkable from a doctrinal standpoint; for unlike jurisdictions such as the United States and Australia, the separation of powers has generally played a subordinate role in Canadian constitutional law.¹³² *Criminal Lawyers' Association* is one of only a handful of Canadian cases where the separation of powers doctrine was described (albeit in a footnote) as having “normative force”.¹³³ The majority’s decision represents a sharp contrast with the cases where the Court has held that “the Canadian Constitution does not insist on a strict separation of powers.”¹³⁴ The *Criminal Lawyers' Association* decision may in time prove to be a point of departure for a more muscular conception of the separation of powers doctrine than has hitherto been recognized in Canadian constitutional law.

¹²⁸ See Lawrence, *supra* note 2 (Lawrence argues that “The potential judicial allocation of public funds in *Charter* litigation must therefore be understood within” the confines of the traditional “constitutional competence” of courts at 41).

¹²⁹ *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 at para 105, [2009] 2 SCR 295.

¹³⁰ And this is to say nothing of the body of cases dealing with judicial compensation, which clearly involve the rough equivalent of a funding order: see *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577.

¹³¹ *Criminal Lawyers' Association*, *supra* note 3 at para 57.

¹³² For instance, in the *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 15, 161 DLR (4th) 385 [*Ref Secession Quebec*], the Supreme Court stated, “the Canadian Constitution does not insist on a strict separation of powers.” Peter Hogg has argued that “[t]he close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions”: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, Ont: Carswell, 2007) at 14–15.

¹³³ See note 3 of the majority’s decision in *Criminal Lawyers' Association*, *supra* note 3.

¹³⁴ *Ref Secession Quebec*, *supra* note 130 at para 15.

5. Conclusion

Few Privy Council decisions have enjoyed as much prominence in contemporary Canadian constitutional law as has *Auckland Harbour Board*. For the better part of 70 years, the decision was mainly of interest to unjust enrichment scholars, who, on the whole, criticized the case for being a harsh exception to ordinary principles governing the law of restitution. But this changed in the 1990s. Since that time, *Auckland Harbour Board* has allowed the Crown to shield itself against real and perceived intrusions by the judiciary into the financial affairs of government. It is perhaps no coincidence that the *Auckland Harbour Board* principle re-emerged from obscurity at a time when Canadian governments had entered into a period of financial austerity that resulted in a de-funding of Canada's legal aid system. In the hands of creative Crown attorneys, *Auckland Harbour Board* has been wielded as a powerful legal tool, used to stave off the advances of activist lawyers and judges.

In this paper, I have argued that *Auckland Harbour Board*—or more precisely, the constitutional principles discussed in the decision—have been misunderstood and overextended by Canadian courts. To demonstrate this mishandling of *Auckland Harbour Board*, I have retraced Viscount Haldane's soaring *dicta* to its historical roots in the Glorious Revolution and the constitutional compromise reach over Parliamentary appropriations in 1689. When placed in this legal and historical context, it becomes clear that *Auckland Harbour Board* turned upon a very specific factual and legal matrix. While the constitutional rules governing appropriations have become part of Canada's constitutional order, they do not control every situation in which a court might theoretically order the Crown to spend public monies.

The Canadian case law reveals continuing tensions concerning the court's authority to make public funding orders. Although the Supreme Court of Canada's decision in *Criminal Lawyers' Association* may be regarded as having rejected the applicability of the *Auckland Harbour Board* principle to many funding orders, the majority's judgment has revitalized the substance of the principle under the separation of powers doctrine. Deciding the proper constitutional role of Canadian courts based upon *dicta* from a 1924 Privy Council decision from New Zealand seems debatable. Going forward, it can only be hoped that the courts will carefully re-examine the jurisdictional foundations of their authority to make funding orders in appropriate circumstances. On closer examination, courts may find their authority in this area extends much farther than they have led themselves to believe.