LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

THE RECOVERY OF UNAUTHORIZED DISBURSEMENTS OF PUBLIC FUNDS

LRC 48

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TO THE HONOURABLE L. ALLAN WILLIAMS, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE RECOVERY OF UNAUTHORIZED DISBURSEMENTS OF PUBLIC FUNDS

In this Report, the Commission examines the common law rule that the Crown has an unqualified right to recover money disbursed from public funds without the requisite statutory authority. We had originally planned to review this rule in a larger Report concerning Benefits Conferred Under a Mistake of Law. However, on August 21st, 1980, the Minister of Finance released a discussion paper entitled *A New Financial Administration Act*. It contains draft legislation whose effect would probably be to extend the application of the rule to situations not now within its ambit. Accordingly, at a meeting of the Commission held on September 12th, 1980, it was decided that our examination of the rule should be submitted as a separate report so that it might be available before September 30th, 1980, which is the deadline set by the Minister of Finance for the submission of comments upon the draft legislation. We have not, however, had sufficient time to examine the whole of the draft legislation in detail and are not in a position to comment generally upon or endorse its provisions.

We have concluded that the strict application of the common law could lead to unjust results, and that it should be partially abrogated. The Crown's right is functionally analogous to a claim in respect of money paid under a mistake of fact, and hence it is appropriate that restitutionary defences (such as estoppel or change of position) which are available in such an action should also be available to the recipient of public funds. Our recommendation is aimed at making such defences available to such a recipient of public funds.

CHAPTER I INTRODUCTION

In August 1980, the Ministry of Finance released a discussion paper soliciting comment on a draft *Financial Administration Act*. At that time the Law Reform Commission was engaged in an examination of the law respecting benefits conferred under a mistake of law. In the course of that examination, we considered the rule that the Crown has an unqualified right to recover disbursements from revenue without statutory authority. Unis common law rule is not codified in the draft *Financial Administration Act*. However, certain provisions of that draft Act are aimed at strengthening the statutory basis of the rule. One discussion paper states:

> The principle that all expenditures must have legislative authority is strengthened and increased responsibility is placed on ministries for ensuring that payments have proper authorization.

In addressing ourselves to the very narrow issue of the Crown's right to recover unauthorized disbursements, it has not been necessary to review the whole of the draft *Financial Administration Act* in detail, and we are not, therefore, in a position to endorse or comment upon all of its provisions. However, in view of the Ministry of Finance's request for submissions concerning the draft legislation, and since a convenient means of reforming the common law rule is to include an amendment to that end in the proposed *Financial Administration Act*, we felt that this Report should be submitted independently of the balance of our Report on Benefits Conferred Under a Mistake of Law.

The rule which we examine in this Report is said to be a "high constitutional principle." It constitutes a gloss on financial (control statutes expressly prohibiting the unauthorized disbursement of public funds, and reflects the concern of the courts to preserve and enhance the constitutional power of the Legislature.

CHAPTER II THE CURRENT LAW

A. The Common Law Rule

The leading case concerning the unqualified right of the Crown to recover money paid out of public funds without statutory authority is *Auckland Harbour Board* v. *The Queen*. In this case the New Zealand Minister of Railways had agreed with the Harbour Board that the Board should be paid 7500 in consideration for granting a lease over certain of its property to a third party. The agreement was authorized by an Act which was held to authorize the payment only on condition that the Board enter into the lease. The agreement was duly entered into, and the Board stood ready to grant the lease at the request of the Minister. That request was never made and the lease was not granted. Nevertheless the money was paid to the Board. The government eventually "resumed" the land in issue, thereby vesting title in the Crown and rendering it impossible for the Board to grant the lease as requested. On the advice of the Minister responsible that the payment was illegal, 7500 was set off against other money owing to the Board. The Board brought an action to recover the sum set off.

The Board's action failed before the Privy Council. Viscount Haldane held, *per curia*

> The payment was ... an illegal one, which no merely executive ratification, even with the concurrence of the Controller and AuditorGeneral, 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.

Hereafter we shall refer to this right of recovery as the "common law rule." It is apparent that Viscount Haldane considered the common law rule to be necessary to preserve the control of Parliament over the executive. The issue is framed not as a question of restitution, but rather simply as a question of the vires of the action taken by the public servant. The implication is that the position of the recipient of the funds is irrelevant.

In a recent Australian case, it was held that the defendant could not raise restitutionary defences to such an action. In *Commonwealth of Australia* v. *Burns,* the defendant continued to receive payments in respect of a pension formerly payable to her deceased father. She contacted the appropriate government department which advised her that the matter had been "looked into" and that she was entitled to the payments. She continued to receive the payments for five years until the error was discovered. In an action by the Commonwealth to recover the money so paid, Newton J. of the Supreme Court of Victoria held:

> In my opinion, the authorities establish that money paid out of Consolidated Revenue without statutory or other lawful authority is recoverable by the Crown from the recipient, at all events if paid without any consideration, and, in my opinion, the position is a *fortiori* where, as here, the payments are the result of a mistake. I consider that the principle, which I have just stated, is a special overriding principle applicable to public moneys in the sense of moneys of the Crown forming part of Consolidated Revenue; the principle is of wider scope than the principles relating to the recovery as between subject and subject of moneys paid under a mistake of fact or for a consideration which has failed. The principle is, in my view, based on public policy. In my statement of the principle I have used the words "at all events if paid without consideration", because special problems might arise with respect to unauthorized payments of public money in return for valuable consideration.

Newton J. also expressed the view that the reference to tracing in Viscount Haldane's speech referred merely to the ascertainment of the recipient, and not to "tracing" in the equitable or proprietary sense."

The defendant pleaded that the government was estopped from advancing any claim, nor in the alternative that she had so materially changed her position that to order repayment of the money would be unjust. Both defences were rejected;

> ... a sufficient answer to this submission is, in my view, to be found in the well-established rule that a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says that he shall not do: as earlier stated, nobody had, or could have had, any lawful authority to make the payments in question to Mrs. Burns.

The result of this decision appears to be that Viscount Haldane's words must be construed literally. Indeed, there is support for that view in Canadian authority. In *The King* v. *Toronto Terminals Railway Co.,* O'Connor J. of the Exchequer Court of Canada held:

> The claim of the Crown is put forward on a second basis that whether there was a mistake or not, the payment of any taxes in excess of the liability under the Lease was not authorized by Parliament within the meaning of Section 22 of the Consolidated Revenue and *Audit Act, 1931,* and was, therefore, illegal and that; the Crown is entitled to recover the same ...
>
> Parliament provided funds to make lawful payments, i.e., payments authorized by the Lease. That authority cannot be widened by the Department. It would require an orderincouncil, or what was referred to in the evidence as a specific appropriation to a particular purpose. Mr. Pickup's (contention in this respect is, in my opinion, sound and the principle laid down in *Auckland Harbour Board* v. *The King*, which he cites in support of his contention is applicable.

In their book The *Law of Restitution*, Goff and Jones express the view that the right of the Crown to recover has "never been questioned in any common law jurisdiction." Indeed, there is American authority supporting a similar proposition. In two decisions of the United States Supreme Court, it was affirmed not only that statutory authority is not required for the action to be initiated, but also that the Government had a "... long established right to sue for money wrongfully or erroneously paid from the public treasury."

The application of this common law rule in British Columbia is at present problematical. There are a number of funds controlled by the government which do not form part of the Consolidated Revenue Fund, and which appear to be administered differently from that fund. Whether for that reason disbursements made from those funds in error would be recoverable under the common law rule is a moot point. Later in this Report we shall discuss the relevant legislation and government practice. The common law rule undoubtedly applies with full vigour to the extent that the consent of the Legislative Assembly is required to authorize the expenditure of money from any fund, or where legislation specifically forbids the expenditure of money except upon condition.

B. The Statutory Control of Public Expenditures

The effect of the rule that the Crown has an unqualified right to recover unauthorized disbursements depends partly upon the practice of the government in managing public revenue and partly on the express terms of legislation dealing with unauthorized expenditures. To the extent that the absolute nature of the rule depends upon the express prohibition of an expenditure from a specific fund, the form of British Columbia legislation is important.

British Columbia statutes contain a number of provisions expressly prohibiting the expenditure of public money without the requisite legal authority. The *Constitution Act* provides:

> 5. No part of the revenue of the Province shall be issued from the treasury, except by warrant of the Lieutenant Governor.

It is not clear exactly what constitutes the "treasury." That word is defined in section 29 of the *Interpretation Act* as follows:

> "Provincial Treasury" (or "Treasury" means the Ministry of Finance constituted under the *Revenue Act*.

It is likely that the combined effect of these two provisions is to extend the prohibition contained in section 5 of the *Constitution Act* to any account kept by the Ministry of Finance.

It would appear, however, that section 5 is far from comprehensive. The discussion paper respecting a new *Financial Administration Act* issued by the Ministry of Finance contains the following comments:

> Over the years the Legislature has established, or permitted the establishment of, a large number of separate funds or accounts under the administration of various ministers or other public officers or committees. Some of these funds are defined in their enabling legislation as being in the Consolidated Revenue Fund, others are defined as being in the Treasury or the Ministry of Finance, while still others are not specified as to their location. In addition to these there are many provisions in the statutes which explicitly or implicitly make the Minister of Finance or another minister or public officer the trustee for certain moneys. The status of many of these funds and trusteed moneys with respect to the Consolidated Revenue Fund is uncertain.
>
> Appendix II to the Ministry of Finance's discussion paper lists a number of funds within the control of the Crown. It contains only 12 funds or accounts which are specifically stated by statute to be in the "treasury" or "Ministry of Finance." A further 5 funds are said to be in the "Consolidated Revenue Fund," while 16 funds or accounts have an "unspecified location." The Minister of Finance and other public officials are responsible for a further 34 funds or accounts ELS trustees. Since the express prohibition contained in section 5 to the *Constitution Act* applies only in respect to funds "in treasury," the management of these funds, and specifically, whether payment out of the fund requires authorization, is a matter either for the common law or the specific statute creating the fund. To the extent that the management of these funds is beyond legislative control, it is a moot point whether the Crown would be able to claim an unqualified right to repayment in the event that funds are disbursed in error.

Supply Acts usually contain restrictions on the *Supply Act* use of money whose expenditure they warrant. *Supply Act No. 2* of 1980 provides:

> *Application and accounting*
>
> 2. (1) No sum out of the supply shall be issued or applied to any purpose or activity other than those described in the votes in the main estimates, or in excess of the estimate of expenditures in them, and the due application of all money expended under the authority of this Act shall be accounted for to Her Majesty.
>
> (2) Money allocated in a vote to a particular activity or standard object of expenditure may, with the approval of Treasury Board, be paid and applied for any other activity or standard object of expenditure that is within the general purposes of the vote.

The general rule is that money received by the government is paid into the Consolidated Revenue Fund, and expenditure out of that fund is authorized by *Supply Acts*. To the extent that that fund is not "in treasury" the express provisions of the appropriate *Supply Act* will usually forbid the unauthorized expenditure of funds.

Sections 23 and 38 of the *Financial Control Act* buttress section 5 of the *Constitution Act*. Section 38(1) provides:

> 38. (1) All disbursements of public money out of the consolidated revenue fund shall be made by official cheque in the form determined by the Comptroller General.

Section 23 imposes a duty on the Comptroller General to ensure that no cheque is issued without proper authority:

> 23. The Comptroller General shall see that no cheque is issued for the payment of any public money for which there is no direct legislative authority, or which is in excess of any portion of the appropriation authorized by the Lieutenant Governor.

The *Financial Control Act* does not stipulate the consequences should the Comptroller General permit an unauthorized cheque to be issued.

The stated object of the draft *Financial Administration Act* and the proposals for reform contained in the discussion paper is to consolidate and rationalize the administration of public funds. The effect of the reforms proposed in the discussion paper is to bring within the ambit of the Consolidated Revenue Fund a large number of funds hitherto administered independently. The definition of "public money" and "Consolidated Revenue Fund" are broad enough to include virtually every fund administered by the government. "Public money" is defined in the draft legislation as follows:

> all money belonging to the government received or collected by the minister or by an officer or by a person authorized to receive or collect the money, and includes
>
> (a) revenues of the government,
> (b) special funds of the government,
> (c) trust funds held by the government,
> (d) the Public Service Superannuation Fund and the Members of the Legislative Assembly Superannuation Accounts,
> (e) money borrowed by the government or received through the issue and sale of securities,
> (f) money received or collected for or on behalf of the government, and
> (g) money paid to the government for a special purpose;

Section 3 of the draft legislation provides:

> 3. (1) All public money shall form one consolidated revenue fund.
>
> (2) The consolidated revenue fund shall comprise
>
> (a) a general fund, consisting of all public money, excepting money authorized by the Legislature to be credited to a fund or account referred to in paragraph (b), and
>
> (b) other funds and accounts established by authority of the Legislature.

Section 11 of the draft legislation provides:

> 11. No payment shall be made from the consolidated revenue fund without the authority of the Legislature.

The broadened definition of "consolidated revenue fund" contained in the draft *Financial Administration Act* would probably have the effect of making the common law rule more significant. The express prohibition contained in section 11 of the draft would attract the operation of the common law rule to unauthorized disbursements out of all funds constituting part of the "Consolidated Revenue Fund." The Crown's absolute right to recover money paid in error is arguably extended to payments from funds in respect of which the Crown at present may have to rely on a restitutionary claim for money paid under a mistake of fact or law. In such an action the defendant is not under a strict liability to repay money received in error but may raise any defence available to him on the relevant facts. Moreover, under section 61(2) of the draft legislation, the Minister of Finance is given the power to require a "public body" to pay its revenue into the Consolidated Revenue Fund. "Public body" is defined broadly in the draft legislation. It includes bodies as diverse as municipalities, commissions, professional societies, hospitals and school trus-

tees. If their revenues are paid into and out of the Consolidated Revenue Fund to which the express prohibition against unauthorized payments set out in section 11 of the draft Act applies, the government may exercise its right to recover unauthorized payments on behalf of a public body which otherwise would have had to rely solely on a restitutionary claim, subject to restitutionary defences.

The draft legislation imposes liability on a person who requisitions unauthorized expenditures. Section 26 provides:

_____*Liability for wrongful expenditure*

> 26. The Comptroller General shall see that no payment is made in respect of requisitions received from ministries for expenditures that contravene this or any other Act, but should a payment be made in respect of a requisition that is subsequently discovered to contravene this or any other Act, the fact that the requisition was not rejected by the Comptroller General shall not affect the responsibility of the person making the requisition referred to in section 23 (1) or his deputy minister to provide evidence satisfactory to the Treasury Board that the expenditure concerned was necessary in the public interest, and if the Treasury Board disagrees it may require him to make good the amount irregularly expended.

The draft legislation is however silent on the liability of the actual recipient of the funds paid in error. That issue is left both by the draft legislation and the current legislation to the common law.

CHAPTER III REFORM

Viscount Haldane forcefully asserted in the *Auckland Harbour Board* case that "the days are long gone by in which the Crown, or its servants could ... ratify an improper payment." The principle that Parliament should control the expenditure of public money is a basic tenet of our democratic form of government. We agree with Viscount Haldane that this principle is one deserving of support. Nevertheless, we are not convinced that the policy with which Viscount Haldane was concerned is best promoted by the absolute rule he formulated.

It may even be argued that the question as Viscount Haldane formulated it was wide of the mark. In a case involving the unauthorized expenditure of public funds, the issue is not merely whether public policy requires the expenditure to be treated as invalid, but whether it also requires the recipient of funds paid out illegally to refund them to the Crown whatever the merits of the case. The second policy consideration was masked in the *Auckland Harbour Board* case as the plaintiff had already been compensated for the value of the land when the Crown resumed title. Had the Privy Council given judgment in the plaintiff's favour, it would have been compensated twice. Viscount Haldane's imposition of a strict liability should arguably be read in the context of the Harbour Board's unmeritorious claim.

While no British Columbia or other Canadian authority compels a court to hold that the recipient of public money paid without statutory authority must return it regardless of any defence which might be raised, Newton J.'s decision in *Commonwealth of Australia* v. *Burns* appears to have crystallized the common law position. In light of the strict language of Viscount Haldane's judgment as well as the assertion by O'Connor J. in *The King* " *Toronto Terminals Railway Co*. that an orderincouncil or an appropriation to a particular purpose is necessary to confer authority or to make a payment legal, it is probable that British Columbia courts would feel compelled to adopt a similar view. If this rule is to be reformed, it appears preferable to do so by legislation.

We do not feel that it would be appropriate to deprive the Crown of its traditional right to bring an action to recover funds paid without statutory authority. In this respect, we see no need to differentiate payments so made

from other kinds of *ultra vires* actions. It has long been established that where payment is demanded under colour of a statutory right in consideration for the performance of a duty in fact owed for nothing, the payment may be recovered simply n the ground that it mas not authorized by statute. In *Steele* v. *Williams*, Baron Martin stated:

> ... As to whether the payment was voluntary, that has in truth nothing to do with the case. it is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration to call it a voluntary payment is an abuse of language. If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, "I wish to make you some compensation for your time," that would be a voluntary payment. But where a party says, "I charge you such a sum by virtue of an Act of Parliament," it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back.

We are of the view that payments of public money made without statutory authority should continue to be invalid, and that the Crown should retain its *prima facie* right to recover money so disbursed.

The Crown's right to recover money should not however be absolute. A recipient of public funds paid out in error should be permitted to raise any restitutionary defence to the action which is open to him on the facts of the case. The potential for injustice when a citizen is denied the right to raise a defence seems to us to be of greater concern than the problematical benefits which accrue from the strict application of the rule in the *Auckland Harbour Board* case. In arriving at this conclusion, we have considered the following points:

A. The Rule is not an Effective Means of Enhancing Legislative Authority

To the extent that the rule is designed to enhance the authority of Parliament, the usefulness of depriving the citizen of any defence may be doubted. The main justification for imposing liability on a citizen is that the money received was paid out by a public servant in excess of his authority. Yet the rule visits the consequences of the act upon the person who in many cases will be the victim, and not the perpetrator of the error. This was the case in *Commonwealth of Australia* v. *Burns* itself, where the defendant had been assured by the government's agents that she was entitled to the money. The value of the absolute rule in enhancing Parliament's authority may be doubted, since a precondition of its application is that money be paid out without legislative authority.

B. There are More Direct Means of Enhancing Legislative Control of Public Money.

It is within the competence of Parliament to assert directly its control over public revenue. Section 26 of the draft *Financial Administration Act* permits the Treasury Board to require a person who makes a requisition contravening the Act to "make good the amount irregularly expended." To control flagrant abuses of authority, the Legislature could impose other penal sanctions on public servants who disburse money without statutory authority. To the extent that the common law rule is a gloss on financial control statutes we feel that it is an unnecessary one, and that its effect on the executive is too remote to warrant its strict application.

C. Parliament does not Exercise Specific Control over the Expenditure of Funds

While Parliament both votes money and approves estimates, it does not oversee the dayto-day administration of the funds. It is therefore difficult to see in every mistaken payment a challenge to the Legislature's constitutional position. Only rarely, if ever, will such a challenge be made, and it is unlikely that the recipient of funds would be a party to the ensuing contest. In many cases, the error may occur as a result of an honest misinterpretation of a statutory provision, whose application may turn on difficult questions of fact or law. Denying the recipient the benefit of any defence where both the constitutional control of the Legislature and the *ultra vires* nature of the payment are admitted serves little purpose.

D. Permitting the Recipient of Funds to Raise a Defence will put him on an Equal Footing with the Crown.

The most objectionable feature of the common law rule is its conferral upon the Crown of an advantage not enjoyed by private litigants who have paid money in error. In an early Report dealing with the legal position of the Crown, we stated:

> It is important to state early a basic assumption adhered to by the Commission in examining the present state of the law regarding the legal position of the Crown. The most singular fact about the existing law is the specific position and advantage which the Crown enjoys. This means that the individual subject is, in a multitude of ways, placed at a disadvantage, which is often very onerous, when he turns to the law to seek recourse against the government. This Report has sought to identify and scrutinize the special advantages and prerogatives of the Crown and to determine whether there is any justification for these privileges. The Commission's premise in making its recommendations is similar to that expressed by the Attorney General of Ontario in introducing his Government's Crown reform legislation in 1952:
>
> > We, being a Government of enlightened members and realizing that perfect as we may be, there still may be certain cases where mistakes are made, are prepared to submit all such cases to the courts, and if a citizen in this country suffers a wrong at the hands of any Crown official or department or employee, we think he should not be put in a worse position than he would be if that unlawful act had been committed by some ordinary individual or by a servant of some private corporation.
> >
> > The above philosophy of justice for the government and its subjects is, in essence, an embodiment of the fundamental principle that the rule of law governs our society.

We feel this view to be equally applicable to the rule in issue in this report.

Aside from any question of the fundamental fairness of the Crown's special position under the common law rule, the position of a private citizen who pays money into the Consolidated Revenue Fund is unenviable in comparison to the Crown's rights in respect of payments out of that fund. One would have thought it to be a principle of equal importance that the Crown not be permitted to retain an impost collected by its servants without legislative authority. Nevertheless, it is clear that where money is paid into the Consolidated Revenue Fund, the Crown may raise any restitutionary defence open to it on the facts of the case, notwithstanding that the statute on which it relied did not authorize the impost levied. In fact, the general rule when a taxpayer pays money into the Consolidated Revenue Fund under a mistake of law is that the payment cannot be recovered unless the taxpayer can bring himself within one of the exceptions to the general rule that money paid under a mistake of law is not recoverable.

CHAPTER IV RECOMMENDATION

We have concluded that the common law rule conferring an absolute right in the Crown to recover expenditures of public money should be partially abrogated. The recognition of the Legislature's right to control the public purse need not have as a consequence a rule framed so broadly as to create the potential for unjust results. The balance between private and public right is best adjusted by permitting the recipient of improper disbursements to raise any defence available to him on the facts of the case.

The right of the Crown to recover is functionally analogous to a claim respecting money paid under a mistake of fact, and hence the recipient of an unauthorized expenditure should be able to raise the defences which would be available to him if the Crown had based its claim on such a mistake. The defendant could, for example, plead either an estoppel or the fact that he has materially changed his position in reliance upon the receipt of the payment. These

two defences would undoubtedly be those most relied upon by defendants. Their extent and nature are fully discussed elsewhere, and are in any event beyond the scope of this Report.

The Commission recommends:

A provision comparable to the following be enacted:

Where money is paid to a person:

(a) in excess of the authority conferred by an enactment;

(b) without the authority of an enactment, or

(c) contrary to an enactment, and

a right is asserted to recover the payment or to retain other money in full or partial satisfaction of a claim arising out of the payment, then the person against whom the right is asserted may rely on any matter of fact or law, including estoppel, which would constitute a defence in a proceeding brought to recover the payment as if it had been made under a mistake of fact.

The inclusion in this recommendation of a reference to the defences which could be raised in a case respecting a payment made under a mistake of fact is a means of vesting a right in the defendant to plead and rely upon facts which might, if ignored, result in an injustice. This recommendation, when implemented, will not result in the assimilation of the Crown's position to that of a private litigant pursuing a claim involving a mistake of fact. The Crown will not carry the burden of proving the payment to have been made as the result of a mistake, but need only prove that the payment was made to the defendant in excess of the authority of an enactment, without the authority of an enactment, or contrary to an enactment. These are the matters it must prove under the current law in order to establish its cause of action. If the proposed change is implemented, the burden of establishing the new defences made available hereby will rest on the defendant. If he is unsuccessful the *prima facie* right of the Crown will prevail.

It is to be noted that in setting up defences, the recipient of public funds disbursed in error is subject to the same limitations as any other private citizen. So, for example, if the defendant had defrauded the government, any defence he might raise would not succeed. Our proposal gives no greater rights to a defendant than those enjoyed by any defendant to a restitutionary claim.

The practical effect of our recommendation may best be judged by applying it to two cases discussed earlier in this Report. In *Commonwealth of Australia* v. *Burns*, the Crown brought an action to recover pension payments made in error. The Crown proved that the payments were paid out of revenue to the defendant without statutory authority. The defendant was required to pay the funds back on that basis, and was not permitted to argue that the defences of estoppel or change of position would bar the Crown's claim.

Under our recommendations, the defendant would have been permitted to raise both defences. Whether she would have been successful is another matter. For example, it is possible that her plea of estoppel might require her to prove that the civil servant who represented to her that she was entitled to the money in issue was under a duty to advise her correctly. Even where she successful in establishing such a duty, she would also have had to prove herself to be without fault, and that she materially changed her position in reliance on the representation. In the absence of a representation or duty to be accurate, the defence of change of position might lie. To establish that defence, the defendant would have had to show that she had changed her position in such a manner that it would be unfair to

make her return the money. For example, the defendant could not resist the Crown's claim if she had expended the money on items which she would in any event have purchased with her own money. She would, however, have had a valid defence if the money had been dissipated in reliance upon her ownership in purchasing shares which were worthless at the time of the Crown's action.

By way of contrast one may compare the case of *Auckland Harbour Board* v. *The Queen,* where the Crown claimed the right to setoff a sum admittedly payable by the Government against an amount which had been paid to the Board in contravention of an enactment. Under our recommendation, the Crown would have been claiming a right to "retain other money ... in full satisfaction of a claim arising out of [a] payment" made without statutory authority. The claim of the Board to recover the money setoff by the Crown would therefore have rested on the Board showing that it would have been able to resist a claim brought by the Crown directly to recover the funds expended. To resist that claim, the Board would have had to show that, had the payment been made under a mistake of fact, one or another restitutionary defence would apply. Failing that, the Crown's right to setoff the money due against that paid to the plaintiff without statutory authority would have prevailed.

In the result, permitting the defendant to rely on any defence available on the facts strikes a fair balance between public and private rights. It recognizes the absolute right of the Legislature to control public money without creating the potential for injustice in individual cases.

We wish to express our thanks to Mr. Fred Hansford of the Commission's research staff for his assistance in the preparation of this Report.

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September 26, 1980