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Backgrounder

LRC 48—Report on the Recovery of Unauthorized Disbursements of Public Funds

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This short report concerns a very narrow issue. The issue is the right of the government to recover expenditures of public money that have been made without proper statutory authority. The commission was considering this issue as part of a broader study on benefits conferred under a mistake of law.* But, the Commission decided to publish its work on this topic in a separate report in response to moves by the Ministry of Finance to reform the *Financial Administration Act*, which would have had the effect of strengthening the existing common law rule.

The traditional rule developed by the courts holds that the government has an unqualified right to recover money paid out of public funds (which is usually called a *disbursement* in this context) without the requisite statutory authority. This rule is not a part of the rules that make up the law of restitution. Rather, its rationale appears to rest on the constitutional principle of parliamentary control over the executive. The absolute nature of this rule has the potential to cause hardships for innocent third parties who may receive such disbursements. These third parties would not be able to raise restitutionary defences in an action by the government to recover the funds.

This report reviewed the development of the common law rule in cases decided in England and elsewhere. It noted that the application of the rule in British Columbia is far from clear, due to a lack of case law and some ambiguity in the drafting of a number of relevant statutes. Then, the report considered the case for reforming of the law, noting that the common law rule is not an effective means of enhancing legislative authority, there are other, more direct means of enhancing legislative authority, the Legislative Assembly does not exercise specific control over the disbursement of funds, and permitting a recipient of public fund to raise defences will serve to put that recipient on an equal footing with the government. The report concluded by recommending that legislation be enacted to abrogate the common

* Law Reform Commission of British Columbia, *Report on Benefits Conferred Under a Mistake of Law* (LRC 51) (Vancouver: The Commission, 1981).

law rule and to readjust the balance between private and public rights by permitting the recipient of an improper disbursement to raise any defence available on the facts of the case.

Further Developments

See *Financial Administration Act*, S.B.C. 1981, c. 15, s. 67 (now *Financial Administration Act*, R.S.B.C. 1996, c. 138, s. 87).