Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC.
and NOVAR INC.

Applicants

BRIEF OF AUTHORTIES OF THE SUPERINTENDENT OF FINANCIAL SERVICES ON EXECUTIVE PLAN AND US TRUSTEE ISSUES

(Motion Returnable July 24, 2013)

July 19, 2013

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TO: THE SERVICE LIST

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Indexed as:

R. v. Wilson

James Stephen Wilson, appellant;
and
Her Majesty The Queen, respondent.

[1983] 2 S.C.R. 594

File No.: 16931.

Supreme Court of Canada

1983: March 14 / 1983: December 15.

Present: Laskin C.J. and Dickson, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts -- Collateral proceedings -- Superior court wiretap authorizations -- Evidence obtained pursuant to authorizations found inadmissible by inferior court -- Whether or not superior court can be collaterally attacked in any court and in particular by an inferior court -- Criminal Code, R.S.C. 1970, c. C-34, 55. 178.12(1)(b),(g), 178.13(1)(b), 178.14, 178.16(1)(a), 178.16(3)(b).

Appellant was acquitted in provincial court on the collapse of the Crown's case following the judge's ruling that the Crown's wiretap evidence was inadmissible as illegally obtained. The ruling was based on the information obtained from the cross-examination of the deponent of the affidavits that were made in support of the applications for authorization to wiretap in the Court of Queen's Bench. The authorizations were valid on their face and the trial judge did not open the sealed packets. The Manitoba Court of Appeal allowed an appeal from the acquittals and ordered a new trial. At issue here is whether or not a judge of an inferior court can look behind the apparently valid order of a superior court and rule the evidence obtained under that order inadmissible.

Held: The appeal should be dismissed.

Per Laskin C.J. and Estey and McIntyre JJ.: A court order that has not been varied or set aside on appeal cannot be collaterally attacked and must receive full effect according to its terms. This rule has not been altered with respect to wiretap authorizations by Part IV.1 of the Code except to the

extent that a trial judge must consider the admissibility of wiretap evidence, but without going beyond the face of the authorization. In the absence of the right of appeal from an authorization, and given the inapplicability of certiorari, any application for review of an authorization must be made to the court that made it. As it is not always practical or possible to apply for review to the same judge who made the order, another judge of the same court can review an ex parte order if: 1) he has the power to discharge the order, 2) he acts with the consent of, or in the event of the unavailability of, the judge who made the order, and 3) he hears the motion de facto as to both the facts and the law involved. A judge reviewing a wiretap authorization must, in addition, not substitute his discretion for that of the authorizing judge.

Per Dickson and Chouinard JJ.: Subsections 178.16(1) and 176.16(3) in combination require a trial judge to go behind an apparently valid authorization to consider its validity and therefore have modified the rule that a court order not be impeached except by appeal, by action to set aside or by prerogative writ. These subsections make no distinction between information on the face of the record and information dehors the record, and to restrict a trial judge to considering only the former as a matter of statutory interpretation would unnecessarily fetter his ability to determine admissibility. Section 178.16, too, makes no suggestion as to review of an authorization by anyone but the trial judge and s. 178.14 contemplates that the packet be opened by any judge of a superior court of criminal jurisdiction or by a judge as defined by s. 482. The common law doctrine that the authorization could only be reviewed by the Court making it, and preferably by the actual judge, was therefore overridden. Further, it was implicit in the language of ss. 176.16(1) and (3)(b) that an inferior court judge could attack a superior court's authorization.

Prima facie evidence of fraud, non-disclosure or misleading disclosure are valid reasons for opening the sealed packet. Once a foundation for opening the packet is established, a trial judge within the contemplation of s. 178.14 can open the packet and make a full review for compliance with Part IV.I. Section 178.16(3)(b) grants a discretion to cure non-substantive defects, but substantive defects in the application render the evidence inadmissible. The trial judge cannot decide that he would have exercised his discretion differently from the authorizing judge.

The deponent of an affidavit supporting an authorization request can be cross-examined to determine if the pre-conditions of s. 178.13(b) have been met. The questions can be put so as not to disclose information considered confidential by the judge and yet uncover any basis on which to argue invalidity.

The trial judge here was not authorized to order the opening of the sealed packet. The trial should have been adjourned to allow an application under s. 178.14 for an order to open the packet and the judge acting under that section would determine if the packet should be opened. The trial judge, however, would examine the packet's contents and decide if the authorization was valid. The ruling by the trial judge that admitting evidence obtained from unlawful wiretaps would bring the administration of justice into disrepute was irrelevant here. Section 178.16(2) does not deal with primary evidence of this kind but rather with derivative evidence.

Cases Cited

Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, affirming sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury, [1953] 1 D.L.R. 385; Royal Trust Co. v. Jones, [1962] S.C.R. 132; Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58, considered; Pashko v. Canadian Acceptance Corp. Ltd. (1957), 12 D.L.R. (2d) 380; Gibson v. Le Temps Publishing Co.

(1903), 6 O.L.R. 690; Clark v. Phinney (1896), 25 S.C.R. 633; Maynard v. Maynard, [1951] S.C.R. 346; Badar Bee v. Habib Merican Noordin, [1909] A.C. 615; R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363; R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506; Charette v. The Queen, [1980] 1 S.C.R. 785, affirming R. v. Parsons (1977), 37 C.C.C. (2d) 497; Dickie v. Woodworth (1883), 8 S.C.R. 192; Stewart v. Braun, [1924] 3 D.L.R. 941; Re Stewart and The Queen (1976), 30 C.C.C. (2d) 391, affirming (1975), 23 C.C.C. (2d) 306; Re Turangan and Chui and The Queen (1976), 32 C.C.C. (2d) 254, affirming (1976), 32 C.C.C. (2d) 249; Bidder v. Bridges (1884), 26 Ch. D. 1; Boyle v. Sacker (1888), 39 Ch. D. 249; Gulf Islands Navigation Ltd. v. Seafarers' International Union (1959), 18 D.L.R. (2d) 625; R. v. Dass (1979), 47 C.C.C. (2d) 194; R. v. Gill (1980), 56 C.C.C. (2d) 169; R. v. Ho (1976), 32 C.C.C. (2d) 339; Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257; Goldman v. The Queen, [1980] 1 S.C.R. 976; R. v. Miller and Thomas (No. 4) (1975), 28 C.C.C. (2d) 128; R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431; R. v. Johnny and Billy (1981), 62 C.C.C. (2d) 33; R. v. Bradley (1980), 19 C.R. (3d) 336; Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3) (1978), 40 C.C.C. (2d) 212; Re Zaduk and The Queen (1977), 37 C.C.C. (2d) 1; R. v. Haslam (1977), 36 C.C.C. (2d) 250; Re Regina and Kozak (1976), 32 C.C.C. (2d) 235; R. v. Kalo. Kalo and Vonschober (1975), 28 C.C.C. (2d) 1; R. v. Blacquiere (1980), 57 C.C.C. (2d) 330; Re Regina and Collos (1977), 37 C.C.C. (2d) 405, reversing on other grounds (1977), 34 C.C.C. (2d) 313; R. v. Robinson (1977), 39 C.R.N.S. 158; R. v. Hollyoake (1975), 27 C.C.C. (2d) 63; R. v. Crease (No. 2) (1980), 53 C.C.C. (2d) 378; R. v. Cardoza (1981), 61 C.C.C. (2d) 412; R. v. Gabourie (1976), 31 C.C.C. (2d) 471; R. v. Hancock and Proulx (1976), 30 C.C.C. (2d) 544, referred to.

APPEAL from a judgment of the Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, allowing an appeal from appellant's acquittals by Dubienski Prov. Ct. J. Appeal dismissed.

Robert L. Pollack, for the appellant.
John D. Montgomery, Q.C., for the respondent.

Solicitors for the appellant: Skwark, Myers, Baizley and Weinstein, Winnipeg.
Solicitors for the respondent: Manitoba Department of the Attorney-General, Winnipeg.

The judgment of Laskin C.J. and Estey and McIntyre JJ. was delivered by

McINTYRE J.:-- The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV.1 of the Criminal Code from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;

> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the Code had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> ...
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

No objection was taken by the Crown to this line of examination.

On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> "No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency."

As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the Criminal Code and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of

the Code. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in Canadian Transport (U.K.) Ltd. v. Alsbury, [1953] 1 D.L.R. 385, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex parte injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the Trade-unions Act and the Laws Declaratory Act; (3) that the injunction was in permanent form and no Court could grant a permanent injunction ex parte.
>
> To this the general answer is made that the order of a Superior Court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, viz. Scott v. Bennett (1871), L.R. 5 H.L. 234 at p. 245; Revell v. Blake (1873), L.R. 8 C.P. 533 at p. 544; Scotia Construction Co. v. Halifax, [1935] 1 D.L.R. 316, S.C.R.

> 124; and to these I might add Re Padstow (1882), 20 Ch.D. 137 at p. 145, and Hughes v. Northern Elec. etc. Co. (1915), 21 D.L.R. 358 at pp. 362-3, 50 S.C.R. 626 at pp. 652-3. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th ed., p. 668, and 7 Hals., p. 32, which include the authoritative decision in Eastern Trust Co. v. MacKenzie, Mann & Co., 22 D.L.R. 410 at pp. 418-9, [1915] A.C. 750 at p. 761, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are Leberry v. Braden (1900), 7 B.C.R. 403, and Bassel's Lunch Ltd. v. Kick, [1936], 4 D.L.R. 106 at p. 110, O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.

Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

> The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

> In Eastern Trust Co. v. MacKenzie. Mann & Co., 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."

Duff C.J.C., approved the same principle in Scotia Construction Co. v. Halifax, [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."

In my opinion these submissions must be rejected.

On appeal to this Court, sub nom. Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

> I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal, both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

The case was referred to in Pashko v. Canadian Acceptance Corp. Ltd. (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

In addition to these authorities and those referred to in judgments of the majority in the Canadian Transport case, reference may be made as well to the words of Osler J.A. in Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690, at pp. 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osler J.A. said:

> If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, 1902, p. 655; Yearly Practice, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: Nelson v. Pastorino (1883), 49 L.T.N.S. 564. Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule 228.

Further authority in support of the rule against collateral attack may be found in Clark v. Phinney (1896), 25 S.C.R. 633; Maynard v. Maynard, [1951] S.C.R. 346; Badar Bee v. Habib Merican Noordin, [1909] A.C. 615; and particularly in Royal Trust Co. v. Jones, [1962] S.C.R. 132. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground

> of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, is a valid judgment of the Court binding upon all those who were parties to it.

The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363 (Ont. C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(b) [now s. 178.16(3)(b)].

In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506, where he asserted a broader power in the trial judge to go behind the authorization.

The question then is: has Parliament by the enactment of Part IV.1 of the Criminal Code altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the Code. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine

whether evidence has been rendered inadmissible only by a defect or an irregularity of a none substantive nature.

It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the Code. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge qua trial judge has not, and was not intended to have, access to the materials necessary to review the granting of the authorization. This makes any collateral attack on the authorization a virtual impossibility.

It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance of his task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in Charette v. The Queen, [1980] 1 S.C.R. 785, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in R. v. Parsons (1977), 37 C.C.C. (2d) 497, and that Dubin J.A. said in that case, at pp. 501-02:

> A voir dire is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the trial judge is limited to matters appearing on its face, and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

Since no right of appeal is given from the granting of an authorization and since prerogative relief by certiorari would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an ex parte application. In civil matters, there is a body of jurisprudence which deals with the review of ex parte orders. There is a widely recognized rule that an ex parte order may be reviewed by the judge who made it. In Dickie v. Woodworth (1883), 8 S.C.R. 192, Ritchie C.J. said, at p. 195:

> The judge having in the first instance made an ex parte order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted ....

This view is reflected in the words of Mathers C.J.K.B. in the case of Stewart v. Braun, [1924] 3 D.L.R. 941 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders ex parte, where only one side is represented and where the order granted is not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an ex parte order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it ....

Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in Re Stewart and The Queen (1975), 23 C.C.C. (2d) 306 (County Court, Ottawa-Carleton Judicial District (Ont.)), application for certiorari dismissed: (1976), 30 C.C.C. (2d) 391 (Ont.H.C.); Re Turangan and Chui and The Queen (1976), 32 C.C.C. (2d) 249 (B.C.S.C.), appeal dismissed for lack of jurisdiction (1976), 32 C.C.C. (2d) 254 (B.C.C.A.)

The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an ex parte order. See, for example, Bidder v. Bridges (1884), 26 Ch.D. 1 (C.A.), and Boyle v. Sacker (1888), 39 Ch.D. 249 (C.A.) In the case of Gulf Islands Navigation Ltd. v. Seafarers' International Union (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's ex parte order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, e.g., where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it de novo as to both the law and facts involved.

I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the ex parte review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the Criminal Code and the confusion thereby created, the practice above-described should be adopted.

An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in Wong (No. 1), supra) an application to review the authorization could be made to him directly, rather than incurring extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

The reasons of Dickson and Chouinard JJ. were delivered by

DICKSON J.:-- The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications in admissible in evidence.

I The Facts and Judicial History

The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to adduce wiretap evidence. Dubienski Prov. Ct. J. ruled the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

> ... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(g) and 178.13(1)(b) of the Criminal Code:

> 178.12 (1) An application for an authorization shall be made ex parte and in writing...
>
> and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:
>
> ...
>
> (g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
>
> 178.13 (1) An authorization may be given if the judge c to whom the application is made is satisfied

> (a) that it would be in the best interests of the administration of justice to do so; and
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(b) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

> My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

He further commented:

> I am inclined to say the police have developed a pattern of application based on routine.

It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the Code, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

An authorization to intercept a private communication is an ex parte order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the Criminal Code, or a judge, as defined in s. 482. That means that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

The collateral attack issue is this: in the absence of an actual application to set aside the authorization, can a trial judge, qua trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of R. v. Dass (1979), 47 C.C.C. (2d) 194 (Man. C.A.), Huband J.A., speaking for a five judge Court, said this, at p. 214:

> A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench ... . There is a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see Re Sproule (1886), 12 S.C.R. 140 at p. 193. In this instance, however, defence counsel does not complain that an application to intercept communications was made. He does not complain that an order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(b)(iii) was applied.) Despite its asseveration to the contrary, it is hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in Dass.

I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.I of the Criminal Code, ss. 178.16(1) and 178.16(3)(b):

> 178.16(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> ...
>
> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
>
> (a) is relevant to a matter at issue in the proceedings, and
> b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,
>
> he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In Charette v. The Queen, [1980] 1 S.C.R. 785, affirming, sub nom. R. v. Parsons (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In Charette this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

> A voir dire is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a voir dire. [Emphasis added.]

The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV.I of the Criminal Code. The fact that an authorization purports to be made under Part IV.I is insufficient. Section 178.16(3)(b) gives the trial judge discretion to admit unlawfully obtained evidence if there is a non-substantive defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is substantive, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s. 178.16(3)(b). The combination of ss. 178.16(1)(a) and 178.16(3)(b) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

Does the same rationale apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization invalid for all purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

I am of the view that ss. 178.16(1)(a) and 178.16(3)(b) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is dehors the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In many

cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(b) refer to defects or irregularities in the giving of the authorization, but also in the application for the authorization. Once again, since s. 178.16(3)(b), in effect, gives a discretion to cure for non-substantive defects or irregularities it would seem to follow as a necessary inference that substantive defects or irregularities in the application for the authorization will result in the evidence being inadmissible. In R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

> Subsection (2)(b) [now 178.16(3)(b)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.
>
> I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(a). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, 32 C.R.N.S. 192, and with the reasons of McDonald J. of the Alberta Supreme Court, Trial Division, in Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58, [1976] W.W.D. 100.

A view similar to that of Lambert J.A. was expressed by Meredith J. in R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. Wong (No. 1) involved, as does the present case, a question of compliance with s. 178.13(1)(b).

> Notwithstanding what has been said by D.C. McDonald, J., in the case cited above, it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the ex parte order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

R. v. Ho (1976), 32 C.C.C. (2d) 339 (Vancouver Co. Ct. (B.C.)) is to the same effect. See Krever J. in Re Stewart and The Queen (1976), 30 C.C.C. (2d) 391 (Ont. H.C.), at p. 400. See also Manning, The Protection of Privacy Act, (1974) at pp. 135-37; Bellemare, La révision d'une autorisation en écoute électronique (1979), 39 R. du B. 496.

As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58 (Alta. S.C.), and by Anderson J. in Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257 (B.C.S.C.) I will refer specifically to the arguments raised by McDonald J. in Donnelly and Acheson, considerably influenced by the wording of s. 178.14:

> 178.14(1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> (a) opened or the contents thereof removed except
>
> (i) for the purpose of dealing with an application for renewal of the authorization, or
> (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
>
> (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).
>
> (2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

McDonald J. started with the assumption that, but for s. 178.16(2)(b) (now 3(b)), he would have thought "lawfully made" in s. 178.16(1)(a) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(b) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging that this relegated portions of s. 178.16(2)(b) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(b) were interpreted to enable a trial judge to go behind an apparently valid authorization.

> (1) That which was on its face lawfully done, pursuant to an order (i.e., the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.

> (2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.
>
> (3) The Protection of Privacy Act, 1973-74, c. 50, amended both the Criminal Code and the Crown Liability Act, R.S.C. 1970, c. C-38.
>
> 7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.
>
> (2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of
>
> (a) was lawfully made; (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or (c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.
>
> Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(a) of the Criminal Code must surely be given also to s. 7.2(2)(a) of the Crown Liability Act, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the Crown Liability Act, the contention of the defence would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced by an argument along the same line in Goldman v. The Queen, [1980] 1 S.C.R. 976, at pp. 998-99. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made pub-

lic. As Stanley A. Cohen suggests in his work Invasion of Privacy: Police and Electronic Surveillance in Canada (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

I therefore conclude that s. 178.16(1)(a) and 178.16(3)(b) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(b) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in Wong (No. 1), supra, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(g) and 178.13(1)(b) and hence make the authorizations valid. I therefore conclude Dubienski Prov. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s. 178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; R. v. Gill, supra; Re Stewart and The Queen, supra; R. v. Miller and Thomas (No. 4) (1975), 28 C.C.C. (2d) 128 (Yale Co. Ct. (B.C.)); R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431 (B.C.S.C.); R. v. Johnny and Billy (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); R. v. Bradley (1980), 19 C.R. (3d) 336 (Que. S.C.); Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3) (1978), 40 C.C.C. (2d) 212 (Alta. S.C.); Re Zaduk and The Queen (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); R. v. Has lam (1977), 36 C.C.C. (2d) 250 (Nfld. District Ct.); Re Regina and Kozak (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); contra R. v. Kalo, Kalo and Vonschober (1975), 28 C.C.C. (2d) 1 (Peel Co. Ct. (Ont.)) It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that prima facie evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a primafacie finding of either misleading disclosure or non-disclosure.

Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong--he signed an order not in accordance

with the Criminal Code. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him--the invalidity arose because the evidence was false or incomplete--the fault of others.

Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(b) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(g) or 178.13(1)(b) would, in my view, amount to a substantive and non-curable defect.

Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude, contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the Criminal Code.

(iv) Cross-examination of the Deponent

Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(b) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in R. v. Blacquiere (1980), 57 C.C.C. (2d) 330 (P.E.I. S.C.); Re Regina and Collos (1977), 37 C.C.C. (2d) 405 (B.C.C.A.), reversing on other grounds (1977), 34 C.C.C. (2d) 313 (B.C.S.C.); R. v. Haslam, supra; R. v. Robinson (1977), 39 C.R.N.S. 158 (Vancouver Co. Ct. (B.C.)) The rationale was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in R. v. Johnny and Billy, supra, and in R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) I prefer the latter view. These authorizations are made ex parte and in camera. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

v) Review by a Judge Other than the Trial Judge

I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of

Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an ex parte order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a review.

The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14 seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition that only the judge or court that made the order can review an authorization.

There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the Criminal Code does not grant an appeal.

The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

As earlier noted, in Charette v. The Queen, supra, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> ... it is for the trial Judge to pass upon such matters as the validity of the authorization ....

> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge...

The appeal case in Charette discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

Other examples of an inferior trial court assessing the validity of a superior court authorization are: R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363 (Ont. C.A.); R. v. Crease (No. 2) (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (York Co. Ct. (Ont.)); R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); R. v. Hancock and Proulx (1976), 30 C.C.C. (2d) 544 (B.C.C.A.)

None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(a) and (3)(b) give the trial judge, qua trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, supra). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether to order opening of the packet. He may refuse, and if so the provincial court judge will have to abide by that decision: see Re Regina and Kozak, supra.

III Bringing the Administration of Justice into Disrepute

After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

> 178.16(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

Section 178.16(2) deals with derivative evidence only, i.e. evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, i.e. evidence of the private communication itself--the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(b) are applied.

IV Conclusion

I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the sealed packet, that none of the three alternate preconditions of s. 178.13(1)(b) had been met.

I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

Appeal dismissed.

In the Matter of the Bankruptcy of I. Waxman & Sons Limited

[Indexed as: I. Waxman & Sons Ltd. (Re)]

100 O.R. (3d) 561

2010 ONCA 447

Court of Appeal for Ontario,

Goudge, MacPherson and MacFarland JJ.A.

June 17, 2010

Bankruptcy and insolvency -- Priorities -- Canada Revenue Agency obtaining jeopardy order under Income Tax Act permitting it to take collection action on amounts owed by taxpayer on basis that taxpayer's looming receivership would preclude collection of tax debt -- Taxpayer declared bankrupt after CRA collected funds and applied them to tax debt -- Trustee bringing motion for order directing that funds seized pursuant to jeopardy order be returned to Trustee for purpose of distribution in accordance with priorities set out in Bankruptcy and Insolvency Act or for order directing Trustee to set off amounts garnished by CRA against dividend amount to be distributed to CRA as unsecured creditor in taxpayer's estate -- Motion judge correctly dismissing motion -- Motion constituting collateral attack on jeopardy order -- Jeopardy order not constituting interim preservation order -- Sections 70(1) and 86(1) of BIA not applying -- CRA's conduct not inequitable -- No basis existing for exerc ise of court's equitable jurisdiction to subordinate CRA's claim -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 70(1), 86(1) -- Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

The Canada Revenue Agency ("CRA") obtained a jeopardy order under the Income Tax Act from the Federal Court permitting it to take collection action on the outstanding amounts owed by IWS on the basis that IWS's looming receivership would preclude collection of the tax debt. IWS was subsequently declared bankrupt. The Trustee brought a motion for an order directing that the funds seized by the CRA from IWS pursuant to the jeopardy order be returned to the Trustee for the purpose of distribution in accordance with the priorities set out in the Bankruptcy and Insolvency Act or, alternatively, an order directing the Trustee to set off the amounts garnished by the CRA against the dividend amount to be distributed to the CRA as an unsecured creditor in the IWS estate. The motion was dismissed. The Trustee appealed.

Held, the appeal should be dismissed.

The Trustee, by suggesting that the collection pursuant to the jeopardy order was invalid by reason of the provisions of the BIA, was challenging the validity of the jeopardy order. To suggest that the Trustee was not challenging the jeopardy order, but only its effect, was to ignore the fact that the collection by the CRA could not have occurred absent the order. The Trustee's motion was a collateral attack on the jeopardy order.

The jeopardy order was not an interim preservation order. The language of the ITA does not speak in terms of "preserving the assets of a taxpayer" or otherwise use language that suggests a jeopardy order is merely an interim device pending the final adjudication of the tax dispute. To the contrary, it restores the CRA's right to immediately enforce payment of the amount assessed, which was suspended when IWS filed a notice of objection. The CRA collected the funds and applied them to IWS's indebtedness long before IWS was declared bankrupt. Section 70(1) had no application in the circumstances, as the payment to the creditor [page562] was completely executed by the time of the bankruptcy. The jeopardy order did not constitute an improper Crown priority. Section 86(1) of the BIA had no application to the facts of this case. There was no basis for exercising the court's equitable jurisdiction to subordinate the CRA's claims. The CRA's conduct was not inconsistent with the BIA, and it did not engage in inequitable conduct. It was statutorily entitled to seek a jeopardy order and, upon obtaining such an order, to immediately collect what was owed.

Cases referred to

Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, J.E. 2004-931, 186 O.A.C. 128, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 130 A.C.W.S. (3d) 32, distd

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 70 [as am.], (1) [as am.], 73(4) [as am.], 86(1) [as am.]

Business Corporations Act, R.S.O. 1990, c. B.16 [as am.]

Courts of Justice Act, R.S.O. 1990, c. C.43 [as am.]

Criminal Code, R.S.C. 1985, c. C-46, s. 347 [as am.]

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 158 [as am.], 225.1(1) [as am.], (a)-(g) [as am.], (7), 225.2 [as am.], (2) [as am.]

APPEAL from the order of Pepall J., [2009] O.J. No. 4461, [2010] C.T.C. 259 (S.C.J.) dismissing the motion by the trustee in bankruptcy.

Alan Merskey and Jessica Caplan, for Deloitte & Touche Inc. as trustee in bankruptcy of the estate of I. Waxman & Sons Ltd. (moving party/appellant).

Nancy Arnold and Tamara Sugunasiri, for Canada Revenue Agency (respondent/respondent in appeal).

Gideon Forrest, for Morris Waxman.

[1] **MACFARLAND J.A.** (MACPHERSON J.A. concurring): -- This is an appeal from the order of Pepall J. dated October 20, 2009, dismissing the Trustee's motion for an order:

(a) directing that the funds seized from I. Waxman & Sons Limited by Canada Revenue Agency ("CRA") pursuant to an ex parte jeopardy order be returned to the Trustee for the purpose of distribution in accordance with the priorities set out in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3; and

(b) in the alternative, directing the Trustee to set off the CRA dividend against the funds held by CRA under the jeopardy order and directing payment of the remainder by CRA.

Overview

[2] This appeal is primarily concerned with the correct interpretation of, and relationship between, certain provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA") and the [page563] Bankruptcy and Insolvency Act (the "BIA"). Under the provisions of the ITA, the Canada Revenue Agency (the "CRA") is able to seek jeopardy orders, which allow for it to take collection action on outstanding amounts assessed owing by a taxpayer, notwithstanding the fact that the taxpayer has filed a notice of objection. Here, the CRA successfully obtained such an order from the Federal Court by arguing that the looming receivership of I. Waxman & Sons Limited ("IWS") would preclude collection of the tax debt. The Trustee submits that the effect of the jeopardy order -- that is, the CRA garnishing funds from its bank account -- conflicts with the provisions of the BIA which specify that the Crown is an unsecured creditor in a bankruptcy procee ding and that a bankruptcy order takes precedence over all other interim judgments and orders.

The Facts

[3] As of September 18, 2006, IWS owed the CRA $1,273,452.10 in respect of corporate tax, penalties and interest for 2002, 2003 and 2004, arising from reassessments issued in August and September 2006. On October 6, 2006, the CRA received a notice of objection from IWS with respect to its 2002 taxation year, and on November 1, 2006, the CRA received notices of objection with respect to its 2003 and 2004 taxation years.

[4] On February 19, 2007, the CRA issued a requirement to pay notice to the Canadian Imperial Bank of Commerce ("CIBC") to collect the amount of $621,415.06 owed by IWS. This amount consisted of the portion of the tax debt the CRA was permitted to collect at that time pursuant to s. 225.1(7) of the ITA. Section 225.1(7) of the ITA allows the CRA to collect from a corporation for a taxation year in which it is a "large corporation" (which it is undisputed the appellant was at all material times) certain amounts determined by the formulae set out in the subsection, notwithstanding any objection or appeal of the assessment for that year by the corporation. CIBC complied with the requirement to pay notice and the CRA received payment of that amount. This appeal does not relate to the payment of this sum by CIBC to the CRA.

[5] By notice of motion dated February 28, 2007, Morris Waxman brought an application for the appointment of Deloitte & Touche Inc. as the receiver of IWS pursuant to the provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 (the "OBCA") and the Courts of Justice Act, R.S.O. 1990, c. C.43. The CRA received notice of the application in early March 2007. The appli-

cation, originally returnable on March 7, 2007, was [page564] adjourned and heard on March 26, 2007, at which time Deloitte & Touche Inc. was appointed as receiver.

[6] On March 5, 2007, after having applied the sum of $621,415.06 to IWS's outstanding debt for 2002 and 2003, IWS's debt was reduced to $704,735.53. The notices of objection filed by IWS precluded the CRA from taking collection action in respect of the remaining outstanding amount absent a court order authorizing it to do so under s. 225.2 of the ITA, commonly called a "jeopardy order".

[7] In the time between receiving notice of application to appoint a receiver and the application being heard, the CRA sought a jeopardy order. Specifically, on March 19, 2007, the CRA, as the Minister of National Revenue, brought an ex parte application under s. 225.2(2) before the Federal Court seeking authorization to take collection action in respect of the outstanding amount. On the application, the CRA submitted evidence of IWS's unwillingness to pay its debt and of IWS's imminent receivership, and argued that, because it could take no steps to attempt to collect or to secure its position vis-à-vis other creditors, the collection of the debt would be jeopardized by a delay in the collection thereof. The CRA explained that if the receivership order were granted, the CRA's claim in the receivership would be unsecured and the stay of proceedings resulting from the receivership order would preclude the CRA from doing anything to improve its position in the future. As an unsecured claim ant, the CRA would only realize its pro rata share of any funds that remained after the secured creditors, including the Ontario Ministry of Finance, were paid. As the other unsecured claims were upwards of $50 million, it was unlikely that the CRA would recover much, if any, of the debt unless a jeopardy order were granted. On the same day, March 19, 2007, Blanchard J. of the Federal Court issued the requested order, which authorized the Minister of National Revenue to take forthwith any of the collection measures specified in s. 225.1(1)(a) to (g) of the ITA (the "jeopardy order").

[8] By requirement to pay notice, dated March 21, 2007, served on CIBC, the CRA collected the sum of $707,278.16, which was applied to the outstanding liability of IWS.

[9] On April 18, 2007, the receiver filed an application in the Federal Court to set aside the jeopardy order, but in July of that year counsel for both parties agreed to defer the scheduling of the application until other issues in the IWS estate were addressed. To date, that application has not been heard.

[10] On September 4, 2007, IWS was declared bankrupt and Deloitte & Touche Inc. was appointed as the trustee in bankruptcy (the "Trustee"). [page565]

[11] The CRA has filed unsecured proofs of claim in the bankruptcy as follows:

(1) a Proof of Claim dated September 20, 2007 for the employer's portion of Canada Pension Plan contributions and Employment Insurance contributions with penalties and interest in the amount of $4,413.81;
(2) an Amended Proof of Claim dated December 6, 2007 for unpaid GST in the amount of $37,809.24; and
(3) an Amended Proof of Claim dated September 4, 2008 for unpaid income tax, penalties and interest for the 2004 and 2006 taxation years in the amount of $746,962.26.

[12] The latter amount ($746,962.26) is the liability that remains owing to the CRA after the payment received from CIBC in March 2007, pursuant to the jeopardy order, was applied to the debt.

[13] To date, the IWS estate has made three interim distributions representing approximately 62 cents on the dollar; however, no payments have been made to the CRA. Based on its proofs of claim, the CRA is entitled to approximately $489,330.

[14] By letter dated December 23, 2008, the Trustee wrote to the CRA to advise that it was asserting a right of set-off of the amounts garnished by the CRA from CIBC in March 2007, plus the interest earned on those funds, against the dividend amount to be distributed to the CRA as an unsecured creditor in the IWS estate. The Trustee advised the CRA that the set-off was being asserted on the grounds that the jeopardy order obtained by the CRA was ill-founded as there was no evidence of asset dissipation or movement out of the jurisdiction, and that the effect of the jeopardy order was to create a preference for the benefit of the CRA contrary to the order of priorities as set out in the BIA.

[15] Thereafter, the Trustee moved unsuccessfully before the motion judge for the orders detailed in paragraph one of these reasons.

The Decision Below

[16] In her reasons, the motion judge referenced s. 70(1) of the BIA, which provides that a bankruptcy order takes precedence over all judicial or other attachments, judgments, executions and other process, except those that have been completely executed by payment to the creditor. She concluded that it fell to her to determine whether a jeopardy order is an interim order [page566] and, if not, whether the process was completely executed by payment to the CRA.

[17] She found that nothing in the statutory language or scheme suggested that the order was interim in nature or designed to preserve funds; rather, the order authorized the CRA to take the collection action notwithstanding an objection having been filed by the taxpayer. She noted that Parliament imposed certain constraints, including the need for a court order in which terms that are fit may be imposed, and the ability of a taxpayer to seek a review of the jeopardy order. Applying a contextual and purposive approach, she concluded that the jeopardy order was not an interim preservation order. Moreover, CIBC's payment of funds to the CRA, and the CRA's application of those funds to IWS's indebtedness, constituted a complete execution of the process and, as such, s. 70(1) of the BIA did not operate to require the CRA to repay the amount or to permit the Trustee to exercise any set-off.

[18] Further, the motion judge determined that the exercise of the jeopardy order was not contrary to s. 86(1) of the BIA, which specifies that, in the bankruptcy context, Crown claims rank as unsecured claims. The CRA complied completely with the statutory provisions of the ITA. Further, s. 70 of the BIA permitted the CRA to collect its debt unaffected by any subsequent insolvency. Barring certain exceptions, such as fraud, completed executions survive a bankruptcy.

[19] In relation to the Trustee's argument that she should exercise her equitable jurisdiction to subordinate the Crown's claims, she concluded that while the Supreme Court of Canada had left open the question of whether the doctrine of equitable subordination should be recognized in Canada, the case before her reflected no need to address the issue. The CRA's conduct was not incon-

sistent with the BIA, nor could it be said that it had engaged in inequitable conduct. It acted pursuant to a court order that it was entitled to seek.

[20] In relation to s. 73(4) of the BIA, which sets out that "[a]ny property of a bankrupt under seizure for . . . taxes shall . . . be delivered without delay to the trustee . . .", she concluded that the section was not directed toward facts comparable to those in the case before her. The jurisprudence on the section tended to relate to a landlord or municipality acting on rights of distress for unpaid rent or taxes. A distress that has been completely executed prior to bankruptcy precludes a trustee from recovery under the section since, once executed, the proceeds cease to be property of the bankrupt. In this case, CIBC paid the CRA the funds and the funds were applied to IWS's [page567] indebtedness in March 2007. IWS was not declared bankrupt until September 4, 2007.

[21] In the court below, the CRA objected to the Trustee's motion on the basis that it constituted a collateral attack on the jeopardy order. The motion judge did not address this issue in her reasons.

[22] For the reasons that follow, I would dismiss the appeal. I agree with the decision of the motion judge and, in addition, I am of the view that the Trustee's motion does constitute a collateral attack on the jeopardy order.

Issue one: Is the Trustee's motion in the Superior Court of Justice, and its appeal in this court, a collateral attack on the jeopardy order granted by the Federal Court?

[23] The Trustee argues that this question must be answered in the negative. Bifurcation was inevitable since the CRA initiated ex parte proceedings before the Federal Court rather than the Superior Court of Justice, which was already seized of the receivership application. The Trustee remains of the view that the jeopardy order was not well-founded under the ITA, but does not seek to litigate that question before this court. Instead, the Trustee argues that upon the occurrence of bankruptcy, further questions arose as to the effect of executing the jeopardy order. These are questions of bankruptcy -- involving, for example, the interpretation and application of ss. 70(1), 73(4) and 86(1) of the BIA -- over which the Federal Court has no jurisdiction. In short, the Trustee says it is not attacking the legal validity of the jeopardy order, only its legal effect.

[24] The CRA argues that the proper mechanism to challenge the jeopardy order of Blanchard J. is set out in the ITA and involves an application to the Federal Court for review. While veiled as a BIA matter, the Trustee's objection to the CRA's conduct is that it obtained an authorization to proceed with collection on the eve of insolvency; this is a challenge to the jeopardy order. The implication of the Trustee's argument is that the purpose of the jeopardy provision in the ITA is not to resurrect the CRA's collection mechanisms on the eve of an insolvency where a taxpayer has objected to an otherwise valid and binding assessment.

[25] The Trustee relies on the decision of the Supreme Court of Canada in Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21. In Garland, the appellant had been charged late payment penalties ("LPPs") by the respondent gas company. The appellant commenced a class action seeking restitution for unjust enrichment of the respondent from the LPPs it received [page568] in violation of s. 347 of the Criminal Code, R.S.C. 1985, c. C-46. (In an earlier appeal to the Supreme Court, it was held that charging the LPPs as it had, amounted to charging a criminal rate-of-interest under s. 347 of the Criminal Code. In that appeal, the Supreme Court remitted the matter back to trial for further consideration.)

[26] The gas company argued that the appellant's action for unjust enrichment could not succeed because LPPs had been authorized by an order of the Ontario Energy Board which qualifies as a disposition of law, a well-established category of juristic reason. At para. 48 of his reasons, Iacobucci J. stated:

> In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the Criminal Code.

[27] It was also argued that the appellant was by his action mounting a collateral attack on the orders of the Ontario Energy Board that authorized the LPPs. In considering this argument, Iacobucci J. stated, at paras. 70-71:

> . . . the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.
>
> . . . this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial reviews). In Wilson v. The Queen, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

(Citations omitted) [page569]

[28] In my view, the case at bar is clearly distinguishable from Garland. In Garland, the orders were only challenged insofar as they purported to authorize what was clearly unlawful. Insofar as the orders of the Board sought the collection of amounts that were unlawful, they were inoperative.

The remainder of the orders were not subject to attack and remained in full force and effect. The object of the action was not to invalidate or render inoperative the Board orders, but rather to recover money that was illegally collected by the gas company as a result of the Board's orders. As the court noted, at paras. 72 and 73 of its reasons:

> Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (R. v. Litchfield, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.
>
> In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[29] In this case, the order authorized the collection of the amount assessed owing. Absent the order, the CRA had no authority to collect. The Trustee in this proceeding, by suggesting the collection was invalid by reason of the provisions of the BIA, challenges the validity of the order.

[30] The objective of the Trustee is to either require the CRA to pay over the amount it received from CIBC pursuant to the jeopardy order or to obtain a credit in the same amount against amounts additionally owed by IWS to the CRA. Those additional amounts are the amounts represented by the claims filed by the CRA in the bankruptcy. To suggest that the Trustee is not challenging the jeopardy order, but only its effect, is in my view to ignore the reality. In fact, this case is a standard example of the use of the doctrine. As Iacobucci J. noted [at para. 71], "[g]enerally, [the doctrine of collateral attack] is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that [page570] party has not used the direct attack procedures that were open to it."

[31] The collection by the CRA could not have occurred absent the order. To say the collection was unauthorized can only mean the order pursuant to which it was collected was unauthorized. In my view, this amounts to a collateral attack on the jeopardy order and, on this ground alone, I would dismiss the appeal.

[32] The appellant, however, raises additional arguments. For completeness, I will deal with those arguments.

Issue two: Is the jeopardy order a "completely executed" order within the meaning of s. 70(1) of the BIA?

The Trustee's position

[33] In essence, the Trustee argues that the jeopardy order is an exceptional interim measure that functions as a preservation mechanism pending the resolution of a taxpayer's dispute with the CRA. This concept is echoed throughout the general policy scheme of the ITA assessment process, which is not complete until objections are resolved. Jeopardy orders are not final; they operate to "freeze" security or in a Mareva-like manner pending the determination of the validity of a tax assessment. The fact that the CRA collected the funds does not alter the nature of the order itself: loss of possession does not automatically result in a completely executed course of action since it remains inextricably linked to an incomplete overall process.

The CRA's position

[34] The CRA argues that the jeopardy order is not an interim collection measure, nor is it a collection measure at all. Rather, it is a court order authorizing the CRA to take the collection measures specified in s. 225.1(1) of the ITA. Under the ITA, a tax debt is due and owing to the CRA from the moment it becomes payable. Unless and until successfully challenged, the tax liability confirmed by the Minister by the notice of assessment is valid, binding and final. Even where a notice of objection is filed, the tax assessed is still payable forthwith. The characterization of a jeopardy order as an interim measure would render any collection action taken by the CRA under such an order between the time a notice of assessment is issued and the time any such assessment is finally adjudicated, ineffective against a trustee. This is a result contrary to the spirit and intent of the jeopardy provision of the ITA. [page571]

Analysis

[35] Section 70(1) of the BIA provides:

> 70(1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

[36] It will be recalled that by requirement to pay notice dated March 21, 2007, served on CIBC, the CRA collected the sum of $707,278.16, which it then applied to IWS's outstanding debt. On September 4, 2007, IWS was declared bankrupt and the appellant was appointed as trustee in bankruptcy.

[37] The ITA provides a regime for the collection of taxes.

[38] Section 158 of the ITA provides:

> 158. Where the Minister mails a notice of assessment of any amount payable by a taxpayer, that part of the amount assessed then remaining unpaid is payable forthwith by the taxpayer to the Receiver General.

[39] In other words, once the assessment is made and mailed, the amount is immediately due and payable. Section 225.1(1) of the ITA provides that where a taxpayer is liable for payment of an

amount assessed, the Minister cannot until after the collection-commencement date take action to collect the assessed amount:

> 225.1(1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:
>
> (a) commence legal proceedings in a court,
> (b) certify the amount under section 223,
> (c) require a person to make payment under subsection 224(1),
> (d) require an institution or a person to make a payment under subsection 224(1.1),
> (e) [Repealed, 2006, c. 4, s. 166]
> (f) require a person to turn over monies under subsection 224.3(1), or
> (g) give a notice, issue a certificate or make a direction under subsection 225(1).

[40] The collection-commencement date is defined in the legislation to be either 90 days or one year after the day on which the notice of assessment was mailed to a taxpayer, depending on the [page572] basis of the assessment. The ITA also provides that where a taxpayer serves a notice of objection, the Minister shall not take any collection action until 90 days after the Minister has either mailed a notice confirming or varying the assessment.

[41] There are, as the motion judge noted, two exceptions to this general rule. First, in dealing with large corporations, as IWS was, these collection restrictions are inapplicable to one half of the amount assessed. This explains the ability of the CRA to collect the sum of $621,415.06 from the CIBC on February 19, 2007 despite the notice of objection filed by IWS.

[42] The second exception is set out in s. 225.2 of the ITA. Under this section, the CRA may obtain an order on an ex parte application (a "jeopardy order") authorizing it to collect the amount outstanding notwithstanding the filing of a notice of objection. The ITA provides that a taxpayer may apply for a review of any such authorization. If the taxpayer does so, the judge is mandated to determine the question summarily and may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate. There is no appeal from the review order.

[43] The motion judge concluded that the jeopardy order was not an interim preservation order and I agree with her conclusion. The language of the ITA does not speak in terms of "preserving the assets of a taxpayer" or otherwise use language that suggests a jeopardy order is merely an interim device pending the final adjudication of the tax dispute. To the contrary, it restores the CRA's right to immediately enforce payment of the amount assessed. Here, those moneys were paid to the CRA by CIBC in March 2007, and the CRA applied those moneys to the indebtedness of IWS. This was long before IWS was declared bankrupt on September 4, 2007. Hence, s. 70(1) of the BIA can have no application in these circumstances because the payment to the creditor was completely executed by the time of the bankruptcy.

[44] In summary, the assessment of tax owing was immediately owing and payable when the notice of assessment was sent. The filing of the notice of objection by the taxpayer provided the tax-

payer with at least a 90-day grace period during which time the CRA was precluded from taking collection proceedings. That temporary stay ended when the jeopardy order was issued authorizing the CRA to proceed with collection, which it did. The payment was fully executed in March 2007. [page573]

Issue three: Does the jeopardy order constitute an improper Crown priority?

i. Section 86(1) of the BIA

[45] The Trustee argues that it is the explicit intent of Parliament that the Crown not receive a priority over other creditors. Section 86(1) of the BIA provides:

> 86(1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called "workers' compensation body", rank as unsecured claims.

[46] In my view, this section simply has no application to the facts of this case. Section 70 of the BIA provides that debts which have been completely executed are unaffected by subsequent bankruptcy, be they debts paid to the CRA or any other creditor. Provided the collection is complete, they are unaffected by any subsequent bankruptcy, subject to certain exceptions which have no application here.

[47] In respect of the moneys that are the subject of this application, the CRA followed the statutory provisions available to it.

ii. Section 73(4) of the BIA

[48] The Trustee argues that s. 73(4) has application to funds in possession at the CRA and further strengthens the Trustee's interpretation of s. 70(1) by again emphasizing Parliament's intent that the Crown not receive priority over other creditors. Section 73(4) of the BIA provides:

> 73(4) Any property of a bankrupt under seizure for rent or taxes shall on production of a copy of the bankruptcy order or the assignment certified by the trustee as a true copy be delivered without delay to the trustee, but the costs of distress or, in the Province of Quebec, the costs of seizure are a security on the property ranking ahead of any other security on it, and, if the property or any part of it has been sold, the money realized from the sale less the costs of distress, or seizure, and sale shall be paid to the trustee.

[49] For the Trustee's argument to succeed, the jeopardy order would need to be treated as an interim preservation order. This is the argument the Trustee made and, for reasons given earlier, is rejected. There is no "property under seizure" on the facts of this case. To the contrary, there has been a completed payment of a debt prior to the bankruptcy. In accordance with s. 70(1) of the BIA, such payments survive a bankruptcy. [page574]

iii. Equitable subordination

[50] Lastly, the Trustee notes that the CRA recovered all of its tax debt for the years set out in the notice of assessment and that the CRA has related debts against IWS's income earned in subsequent years. The Trustee argues that it is inequitable within the meaning of the doctrine of equitable subordination that the CRA fully recover some of its tax debts using the jeopardy order, at the expense of other creditors, while maintaining a pro rata claim for other tax debts.

[51] In my view, this argument is summarily and correctly dealt with by the motion judge, in para. 29 of her reasons, wherein she stated:

> . . . the CRA's conduct was not inconsistent with the BIA nor can it be said that it engaged in inequitable conduct. Indeed it acted pursuant to a court order that it was entitled to seek. Unsecured creditors who had similarly executed on their judgments would be treated similarly. No unfair advantage has been conferred on the CRA.

[52] I agree with the motion judge. The CRA is statutorily entitled to seek a jeopardy order and, upon obtaining such an order, to immediately collect what is owed. There is nothing unfair about the process.

Disposition

[53] For these reasons, I would dismiss the appeal.

[54] If the parties are unable to agree on costs, they may make brief written submissions to the court, by the CRA within ten days of the release of these reasons and by the Trustee within ten days thereafter.

[55] GOUDGE J.A. (concurring): -- I concur with the reasons of MacFarland J.A., with one exception.

[56] In my view, the Trustee's motion is not a collateral attack on the jeopardy order granted by the Federal Court. In the proceeding before us, the Trustee fully accepts the validity of that order. Its argument is that a valid jeopardy order coupled with provisions of the BIA produces, as a matter of law, the result it contends for. I would not characterize this as a collateral attack on the jeopardy order. In this motion, the Trustee is not seeking to indirectly challenge the validity of that order.

[57] Otherwise, I entirely agree with my colleague and would dismiss the appeal as she proposes.

Appeal dismissed.

Indexed as:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, interveners.

[2004] 1 S.C.R. 629

[2004] S.C.J. No. 21

2004 SCC 25

File No.: 29052.

Supreme Court of Canada

Heard: October 9, 2003;
Judgment: April 22, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant [page630] commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment [page631] in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the

enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally [page632] collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2 S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, [page633] 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002]

1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576.

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Constitution Act, 1867, ss. 91(19), (27), 92(13).

Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 45.02.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [page634] [2000] O.J. No. 1354 (QL). Appeal allowed.

Counsel:

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Alan H. Mark and Kelly L. Friedman, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and M. Paul Michell, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 **IACOBUCCI J.**:-- At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution [page635] Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers

could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average [page636] bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> **18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any [page637] person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B

> **25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> **15.** No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

> **347.** (1) Notwithstanding any Act of Parliament, every one who
>
> (*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory [page638] language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect [page639] to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly com-

ply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no [page640] jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the [page641] respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's [page642] claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent [page643] to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recov-

ered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative [page644] by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?
(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?
(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?
(c) Is the appellant engaging in a collateral attack on the orders of the Board?
(d) Does the "regulated industries" defence exonerate the respondent?
(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?
(b) Should this Court make a declaration that the LPPs need not be paid?
(c) What order should this Court make as to costs?

[page645]

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel, supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter, supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element -- absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward [page646] economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter, supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry

C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains [page647] that the "straightforward economic approach" from *Peter, supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel, supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP [page648] in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus, supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter, supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> ... The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a [page649] corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell, supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel, supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust [page650] Enrichment -- Restitution -- Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel, supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional

categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in [page651] my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and [page652] that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel, supra,* where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec,* S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment

because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code.* The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra,* Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax,* [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra,* at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust [page653] enrichment. In the leading Canadian text, *The Law of Restitution, supra,* McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra,* stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra,* Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the [page654] OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code,* then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code.*

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment [page655] outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; [page656] *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers'

Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer [page657] reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

[page658]

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position [page659] defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a [page660] fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the [page661] provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an

> order may not be attacked [page662] collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[page663]

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the [page664] defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

[page665]

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto*

doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

[page666]

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts [page667] of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future [page668] LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

[page669]

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be [page670] avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

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Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

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Solicitors for the intervener Union Gas Limited: Torys, Toronto.

cp/e/qw/qllls

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985, R.S.C. c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

Court File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **Toronto**

BRIEF OF AUTHORITIES OF THE SUPERINTENDENT OF FINANCIAL SERVICES ON EXECUTIVE PLAN AND US TRUSTEE ISSUES

(MOTION RETURNABLE JULY 24, 2013)

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