Court of Appeal File No.: M42068
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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 SINO-FOREST CORPORATION

Applicant

APPLICATION UNDER THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., AND COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Leave to Appeal from Sanction Order)

March 1, 2013

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Appeal Court File No: M42068

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

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Tab 1

Case Name:

843504 Alberta Ltd. (Re)

IN THE MATTER OF the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended; and the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

[2011] A.J. No. 775

2011 ABQB 448

80 C.B.R. (5th) 177

523 A.R. 180

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2011 CarswellAlta 1152

46 Alta. L.R. (5th) 362

Docket: 0303 19663

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

J.E. Topolniski J.

Heard: January 20, and May 20, 2011.
Judgment: July 8, 2011.

(97 paras.)

Commercial law -- Secured transactions -- Definitions -- Purchase money security interest -- Security agreement -- Security agreement -- Effectiveness of security agreement -- Against third parties -

- Priorities -- Priority rules -- General rules -- Security interests perfected by registration -- Purchase-money security interests -- Registration -- Registration requirements -- Registered information -- Appeal by Transportaction from a disallowance of its claim to priority in Skyreach's restructuring dismissed -- Skyreach was insolvent -- GE held a general security agreement with Skyreach wherein GE held security interest in all of Skyreach's personal property -- Transportaction leased equipment to Skyreach under a master lease agreement, registered at APPR -- Skyreach sold pieces of leased equipment -- Transportaction claimed priority over leased equipment -- Transportaction's registration of its security interest respecting Skyreach was deficient in its description -- Transportaction did not have purchase money security interest priority -- General security agreement had priority over master lease.

Bankruptcy and insolvency law -- Creditors and claims -- Creditors -- Secured creditors -- Claims -- Disallowances of -- Priorities -- Secured claims -- Administration of estate -- Administrative officials and appointees -- Monitors -- Duties and powers -- Proofs of claim or security -- Disallowance -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Monitors -- Appointment -- Powers, duties and functions -- Proceedings -- Appeals and judicial review -- Appeal by Transportaction from a disallowance of its claim to priority in Skyreach's restructuring dismissed -- Skyreach was insolvent -- GE held a general security agreement with Skyreach wherein GE held security interest in all of Skyreach's personal property -- Transportaction leased equipment to Skyreach under a master lease agreement, registered at APPR -- Skyreach sold pieces of leased equipment -- Transportaction claimed priority over leased equipment -- Transportaction's registration of its security interest respecting Skyreach was deficient in its description -- Transportaction did not have purchase money security interest priority -- General security agreement had priority over master lease.

Appeal by Transportaction from a disallowance of its claim to priority over certain assets in Skyreach's restructuring. Skyreach was insolvent and met the threshold requirements for protection under the CCAA. A monitor was appointed. The monitor was permitted to release assets subject to security, or to retain possession of the assets and pay for their use. The information required of a person seeking priority claimant status included information as to the security, the assets subject to the security, a detailed calculation of the balance owing, and proof of delivery. GE held a first-place, valid and enforceable general security agreement with Skyreach wherein GE had a security interest in all of Skyreach's present and after acquired personal property. The general security agreement was registered at the APPR. Transportaction provided leasing and fleet management services to Skyreach under a master lease agreement that prohibited Skyreach from selling or subletting any vehicles or equipment, regardless of the circumstances. Transportaction registered the master lease at the APPR. Skyreach sold pieces of equipment that Transportaction believed it had leased to Skyreach. Transportaction submitted a claim in the CCAA proceedings, claiming priority over equipment it had leased to Skyreach. The monitor disallowed the claim on the basis that Transportaction did not have purchase money security interest priority and did not have priority to the equipment listed in its APPR registrations.

HELD: Appeal dismissed. The master lease was properly characterized as a security/financing/capitalized lease and was not a "permitted lien" under the general security agreement. The general security agreement neither expressly nor impliedly subordinated GE's priority in favour of the master lease. Transportaction's registration of the security interest granted to it by Skyreach

ws deficient as it did not describe the collateral in such a way as would enable the type or kind of collateral taken be distinguished from the types or kinds of collateral not taken. The general security agreement had priority over the master lease.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Personal Property Security Act, RSA 2000, c. P-7, s. 1(1)(p), S. 1(1)(y), s. 3(1), s. 3(2) c s. 25, s. 34(2) c

Personal Property Security Regulation, s. 1(1)(y), s. 34, s. 35, s. 36, s. 36(2)

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Kelly Bourassa, for EdgeStone Mezzanine Fund II Nominee Inc.

Memorandum of Decision

J.E. TOPOLNISKI J.:--

I. Introduction

1 This application concerns a 7.5 year old appeal of a monitor's disallowance of a lessor's claim to priority over certain assets in the restructuring of 843504 Alberta Ltd. (formerly Skyreach Equipment Ltd.) [Skyreach] under the *Companies' Creditors Arrangement Act,* RSC 1985 c C-36 [*CCAA*].

2 The restructuring of Skyreach's affairs under the *CCAA* was peculiar in many respects. The delayed prosecution of the lessor's appeal and the circumstances surrounding it add to the list of unusual events.

II. Background

3 A brief review of the *CCAA* proceedings and circumstances giving rise to this application is warranted.

A. The *CCAA* Proceedings

4 Skyreach was in the business of renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. Its restructuring began in the fall of 2003, when a mezzanine lender, EdgeStone Mezzanine Fund II Nominee Inc. [EdgeStone], initiated the *CCAA* application. Skyreach clearly was insolvent at the time and met the threshold requirements for protection under the *CCAA*. The directors largely had abandoned ship and allegations of corporate interference

and conflict of interest abounded in terms of the remaining director (who also was the chief executive officer).

5 An initial order in the *CCAA* proceedings was granted on October 9, 2003 [Initial Order], naming Pricewaterhouse Coopers as monitor [Monitor]. Skyreach's primary operating lender, GE Commercial Distribution Finance Inc. [GE], supported the application. Numerous other creditors did not. The Initial Order provided for the usual 30-day moratorium and permitted the Monitor to sell assets up to certain capped amounts without court approval. For a brief period of time, the Monitor was authorized to operate the business. That function was then assumed by a chief restructuring officer, who was allowed to sell unencumbered assets up to a maximum of $100,000 without court approval.

6 The Initial Order defined the following terms, among others:

> 2(e) "Inventory" - means Property which is inventory within the meaning of the applicable personal property legislation;
> (h) "Other Security Claimants" - means those creditors other than the Lenders with a registered security interest against certain of the Property, including... TransportAction Lease Systems Inc...
> (k) "Property" - means any present or future property, assets, business and undertakings of the Corporation of any kind or nature whatsoever whether real or personal wherever located and, for greater certainty, does not include any equipment or inventory which is the subject of a True Lease;
> (m) "True Lease" - means a lease of equipment or inventory to the Corporation, which at common law is in substance a true lease and with respect to which registration and any required notice has been properly effected under any applicable personal property security legislation such that the True Lessor has priority over the security interest of GE;
> (n) "True Lessor" - means a lessor under a True Lease; and
> (o) "True Lessor Property" - means equipment or inventory which is the subject of a True Lease in favour of a True Lessor [Emphasis added.]

7 The Initial Order also provided a mechanism for determining whether particular leases were "True Leases" and authorized the Monitor to elect whether to release equipment to a "True Lessor" or to retain it and pay for use of the equipment during the proceedings (clause 33).

8 Clause 34 of the Initial Order set out the requisite particulars to prove the status of a "Priority Claimant" whose security has priority over the GSA. "Priority Claimant" was defined as "[a]ny person claiming to hold security ranking in priority to GE's security with respect to any Property."

9 The Initial Order permitted the Monitor to release assets subject to such security, or to retain possession of the assets and pay for their use. The information required of a person seeking "priority claimant" status is the standard sort of information required in insolvency proceedings generally, including information as to the security, the assets subject to the security, a detailed calculation of the balance owing, proof of delivery, registration and notices of PMSI claims, if applicable, and any other information reasonably requested by the Monitor.

10 Given the nature of Skyreach's business operations, it was essential to resolve priorities of securities held by various creditors over the existing assets. All affected parties agreed that GE held a

first-place, valid and enforceable general security agreement [GSA]. Consequently, the claims process focussed on determining the claims of "true lessor" and "priority" claimants (as defined in the Initial Order).

11 The claims procedure itself was fairly typical of those in many *CCAA* proceedings. Creditors submitted their claims to the Monitor within a given time frame. The Monitor then decided which, if any, claims took priority to GE. If the Monitor disallowed a claim, a notice of disallowance was delivered and the creditor had a given period of time in which to appeal the disallowance to this court.

12 A report by the Monitor in late October 2003 indicated that Skyreach had sold 80 pieces of encumbered equipment between March 22, 2001 and September 19, 2003. The report did not disclose the name of the secured party.

13 Transportaction Lease Systems Inc. [Transportaction] is a fleet management company which provides leasing and fleet management services. In the course of the *CCAA* proceedings, Transportaction received information that at some time prior to granting of the Initial Order, Skyreach had sold a large number of vehicles or other pieces of equipment [Impugned Sales] that Transportaction believed it had leased to Skyreach under a master lease agreement dated June 1, 2000 [Master Lease].

14 Transportaction submitted a claim in the *CCAA* proceedings as a "true lessor" [Claim], claiming priority over vehicles, tractors and equipment which it had leased to Skyreach under the Master Lease. On December 19, 2003, the Monitor disallowed the Claim [Disallowance] on the basis that Transportaction did not have "purchase money security interest" [PMSI] priority to any inventory and did not have any priority to the equipment listed in its Alberta Personal Property Registry [APPR] registrations (other than over two pieces of equipment which are not at issue in this matter).

15 On December 23, 2003, Transportaction filed a notice of appeal of the Disallowance [Appeal]. At the time, the plan for Skyreach's restructuring was moving quickly. The intention was to sell the majority of Skyreach's assets to an arm's length third party. The remaining assets were to be transferred to a yet-to-be-incorporated company [Newco] without affecting the secured interests in them.

16 Given the promising outlook under the proposed plan, Transportaction adjourned the Appeal *sine die* by consent, after informing GE of its intention to do so. Later, Transportaction filed a "without prejudice" proof of claim for $790,866 as an unsecured creditor [Proof of Claim].

17 On January 27, 2004, a plan of arrangement incorporating the intended scheme [Plan] was sanctioned by the court. A vesting and receivership order was granted that day to facilitate implementation of the Plan by appointing a receiver to liquidate the Newco assets and to distribute the proceeds.

18 Article 9.1 of the Plan contained a release by Skyreach's creditors of the company, the chief restructuring officer, the Monitor, the company which was acquiring the majority of Skyreach's assets, and their officers, directors or employees, of any claims based on anything done or not done at or before the effective date of the Plan, but the release was not to apply to entitlements of GE and EdgeStone, affect the rights of any person to pursue recoveries for a claim that might be obtained against any other person otherwise obligated at law for the claim, and was not to affect the right of any person to pursue claims against directors and officers of Skyreach with respect to collateral

leased to or financed with Skyreach that was sold prior to the Initial Order without payment of the proceeds to the lessor or financier.

19 The vesting and receivership order expressly preserved the Appeal and required that it be heard in the *CCAA* proceeding. The order directed that:

> The issues of priority over GE raised by Notice of Motion dated December 23, 2003 of Transportaction Lease Systems Inc., filed pursuant to s. 34 of the Initial Order in these proceedings, shall be addressed and determined in these receivership proceedings, including any issues of priority with respect to other secured creditors.

20 After granting of the vesting and receivership order, GE, the Monitor, and (in hindsight, somewhat surprisingly) Transportaction all considered the Appeal to be a dead issue because the GE debt was to be retired without resort to any of the assets over which Transportaction claimed priority.

21 Only limited activity in the *CCAA* proceedings has occurred since granting of the vesting and receivership order on January 27, 2004.

B. Transportaction's Lawsuits Against GE and EdgeStone

22 In October 2005, Transportaction commenced an action against GE, alleging that the proceeds from the Impugned Sales were deposited into Skyreach's bank account, GE knew or ought to have known of the terms of the Master Lease, GE received a daily accounting of the funds in the bank account from Skyreach, and GE cleared the bank account on a daily basis, applying the funds to reduce the indebtedness of Skyreach. Transportaction claimed that GE was a constructive trustee of the proceeds and that it breached its duty as such. It also alleged unjust enrichment and conversion of over $836,000 of Transportaction's property [Litigation]. GE was not served with the statement of claim until October 2006.

23 GE argues that Transportaction's failure to raise its concern about Skyreach's pre-*CCAA* sale of encumbered assets before granting of the vesting and receivership order precludes it disputing those sales.

24 Sometime after 2006, GE applied unsuccessfully for summary dismissal, but in 2009 it succeeded in obtaining a temporary stay of the Litigation. Belzil J., who heard the stay application, rejected Transportaction's contention that the Appeal was moot. He found that permitting the Litigation to proceed without first having the Appeal determined would "amount to sanctioning unilateral abandonment by one party of a binding court ordered claims resolution process" (***Transportaction Lease Systems Inc. v GE Commercial Distribution Finance Canada Inc.***, 2009 ABQB 626 at para 42).

25 In a separate lawsuit, Transportaction sued EdgeStone, EdgeStone's nominee director of Skyreach, and the former president of Skyreach for damages resulting from the Impugned Sales [EdgeStone Litigation]. EdgeStone and its nominee director have settled the EdgeStone Litigation for (what it describes as) nuisance value.

26 As matters now stand:

* GE's debt has been fully retired.
* Transportaction has been paid $25,851.03 pursuant to its Proof of Claim.
* Skyreach has been inactive since at least early 2004.
* Newco continues as an inactive shell company.
* Newco's receiver remains in place, although no steps other than some distributions have been taken in the receivership since about 2004.
* The Litigation is temporarily stayed.

C. The Parties, Their Security, and Their Personal Property Registry Registrations

1. Transportaction

27 Transportaction's Master Lease, dated June 1, 2000, was for a term of more than one year.

28 The lease of each vehicle and piece of equipment was for a minimum six month term, commencing on the date of delivery, with successive monthly renewals. At the end of each term, Skyreach either had to return the unit or continue making monthly payments.

29 The Master Lease prohibited Skyreach from selling or subletting any vehicles or equipment, regardless of the circumstances.

30 Transportaction registered the Master Lease at the APPR on August 9, 2000, describing its "general collateral" as including: "... other vehicles of whatever year, make or model including after acquired property and including proceeds thereof." The reference to "serial number goods" on the filing form was deleted [2000 APPR Filing].

31 Transportaction subsequently registered the Master Lease at the British Columbia Personal Property Registry.

32 On October 9, 2003 (coincidentally, the date the Initial Order was granted), Transportaction filed a further registration at the APPR [2003 APPR Filing], listing 150 serial numbers. None of the vehicles or equipment sold in the Impugned Sales was registered by serial number prior to October 9, 2003.

2. GE

33 Pursuant to the GSA, Skyreach granted GE a security interest in all of its present and after acquired personal property. GE registered the GSA at the APPR on October 22, 1999.

34 It is common ground that GE was authorized to sweep (or clear) Skyreach's bank account on a daily basis before and during the *CCAA* proceedings.

3. EdgeStone

35 The Appeal was heard in two instalments. During the first instalment, it became apparent that EdgeStone could be affected by the outcome. Accordingly, I invited it to make submissions on the Appeal.

III. Issues

36 Transportaction and GE agree that evidence taken in the Litigation can be relied on by them for this Appeal. Their agreement in that regard is supportable by case law (***Walt Disney Productions v Fantasyland Hotel Inc.*** (1993), 141 A.R. 291 (CA)) and the *Alberta Rules of Court* (Rule 6.11(1)(f)).

37 Transportaction and GE are both parties to the Appeal and the Litigation. The core issue, the priority of security claims, is the same. Accordingly, their joint application to adduce evidence taken in the Litigation is granted.

38 The remaining issues to be decided on this Appeal include:

A. Is the Appeal moot?
B. Is the Master Lease an operating lease and, therefore a "Permitted Lien" as defined in the GSA?
C. Did GE subordinate its priority position to Transportaction?
D. If so, are Transportaction's APPR registrations sufficient for it to take priority?
E. Does the doctrine of laches preclude Transportaction from the relief sought?

IV. Analysis

A. Is the Appeal Moot?

39 Transportaction argues that the Appeal is moot given that GE has been paid in full and none of the assets that were the subject of the Master Lease were required to be sold to repay Skyreach's indebtedness to GE. Transportation states that as far as it is aware, no assets remain in the receiver's possession which could be used to satisfy any claim by GE which existed as at the date of the Initial Order or any present claim. Further, Transportation notes that it does not assert any priority to assets in the possession of Skyreach as at the date of the Initial Order which were used to retire the indebtedness to GE. It argues that the *CCAA* proceeding is not meant to deal with disputes between a creditor of the company and a third party, except perhaps for priority to assets in existence at the Initial Order. It maintains that a finding that it or GE has priority will not have any practical affect on the parties.

40 GE takes the position that the Appeal may be determinative of the Litigation. It argues that if it knowingly received proceeds from the Impugned Sales prior to the Initial Order, its justification for retaining those proceeds would be based on the priority of its security compared to that of Transportaction. If Transportaction has priority, GE would have to pay those proceeds to Transportaction, which would serve to revive its claim against Skyreach for the same amount. It suggests that it would have recourse not only against Skyreach but also Newco (both hollow entities), EdgeStone (which received the "next in line" payments under the Plan) or the Monitor and receiver (for not having sought court approval of distributions). GE asserts that if, on the other hand, its security has priority, Transportaction could not succeed in the Litigation.

41 The issue of whether the Appeal is moot was decided by Belzil J. on the stay application in the Litigation, which involved the same parties. In fact, it appears that Transportaction relied on the same authorities then as it does now. No new evidence or special circumstances have been raised by Transportaction.

42 In ***Ernst and Young Inc. v Central Guaranty Trust Co.***, 2006 ABCA 337, 397 AR 225 [***Ernst and Young***], the Alberta Court of Appeal discussed *res judicata*, issue estoppel, collateral

attack and abuse of process by re-litigation. According to the court (at para 29), the doctrine of *res judicata* has two branches, one of which is issue estoppel, which "precludes the litigation of an issue previously decided in another court proceeding." The party alleging issue estoppel must establish that the issue is the same as that decided in the prior judicial decision, that decision was final (even if made in an interlocutory proceeding), and the parties to both proceedings are the same (or their privies) (para 30).

43 At para 47, the court in ***Ernst and Young*** quoted the following description of the rule against collateral attach from ***Wilson v The Queen***, [1983] 2 S.C.R. 594 at 599:

> 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.

44 Courts have an inherent and residual discretion to prevent an abuse of process. The court in ***Ernst and Young*** at para 52 cited the following passage from ***Toronto (City) v Canadian Union of Public Employees, Local 79***, 2003 SCC 63 at para 37, [2003] 3 SCR 77:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel ... are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

45 In my view, the doctrines of issue estoppel, collateral attack and abuse of process by re-litigation apply in these circumstances. To permit Transportaction to re-litigate the question of mootness would sanction wasting the parties' and the court's resources, encourage forum shopping and create the potential of inconsistent decisions.

46 Even if I had found otherwise, I would have rejected Transportaction's contention that the issues in the Appeal are moot. The doctrine of mootness applies if the decision does not have the effect of resolving some controversy which affects or may affect the rights of the parties (***Borowski v Canada(Attorney General)***, [1989] 1 SCR 342 at paras 15-16). The outcome of the Appeal may well be determinative of the issues in the Litigation. The decision in this case will not be academic. It will resolve a live controversy that will affect the parties' rights.

B. Is the Master Lease an Operating Lease and, Therefore, a "Permitted Lien" as defined in the GSA?

47 Transportaction contends that characterization of the Master Lease as a True Lease or otherwise is irrelevant as the mechanism for determining that as provided for in the Initial Order was established only to assess whether equipment lessors should be paid during the *CCAA* proceedings for use of their equipment, and it makes no such claim.

48 However, Transportaction also asserts that the GSA contained a subordination of GE's priority in favour of those such as it with "Permitted Liens." In my view, in order to decide the priority issue as between Transportaction and GE, it is essential to determine whether the Master Lease was a "Permitted Lien" for purposes of the GSA, which in turn depends on whether it was an operating lease/true lease or a capitalized/security/financing lease.

49 I note that the distinction was the basis for the Monitor's Disallowance of the Claim.

50 Transportaction contends that GE's officer's acknowledgement under questioning that he thought the Master Lease was a "Permitted Lien" is evidence that it was. GE argues that the answers were given in the context of the defined term "Permitted Liens" as being "lessor's Liens arising from operating leases." I need not decide the issue as the officer's evidence only concerns what GE thought after the GSA was drafted. Whether the Master Lease was a "Permitted Lien" for purposes of the GSA does not depend on what the company thought but rather is a matter of law and interpretation.

51 The GSA provides in part:

> 10.4 Encumbrance of Assets: Borrower will not, and will not permit a Subsidiary to, mortgage, pledge, grant or permit to exist a security interest in or lien upon any of the Collateral, now owned or hereafter acquired except for the Permitted Liens.
>
> 12.1 Events of Default: Borrower will be in default under this Agreement, each a "Default": if...
>
> 12.1.14 Liens Other than Permitted Liens: Any of the Collateral becomes subject to any Lien, claim, encumbrance or security interest other than a Permitted Lien."

52 "Lien" is defined in the GSA as meaning (clause 1.1):

> ... any security interest, mortgage, pledge, lien, hypothec, hypothecation, judgment lien or similar legal process, charge, encumbrance, title retention agreement or analogous instrument or device (including, without limitation, the interest of lessors under capitalized leases and the interest of a vendor under any conditional sale or other title retention agreement), reservations, exceptions, encroachments, easements, rights of ways, covenants, conditions, restrictions, leases and other title exceptions and encumbrances affecting any of Borrower's property. [Emphasis added.]

53 "Permitted Lien" is defined as meaning, in part (clause 1.1):

(d) lessor's Liens arising from operating leases entered into in the ordinary course of business; [Emphasis added.]

54 The term "operating lease" is used interchangeably with the term "true lease" (see for example ***Re Woodward's Ltd.*** (1993), 84 B.C.L.R. (2d) 206 at para 24; ***J-1 Contracting Ltd. v John Deere Ltd.***, 2004 NLSCTD 50, 44 BLR (3d) 10; ***Robert Michaels Group v Shaw Communications Inc.***, 2004 ABQB 745; and ***CCLI (1994) Inc. v Canada***, 2007 FCA 185 at para 7, 365 N.R. 94). A true lease, in essence, is a bailment contract. Title to the leased goods remains with the lessor and the lessee pays for use of those goods.

55 A security agreement disguised as a lease is a security lease (R.C.C. Cuming, "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1983) 7 Can Bus LJ 251 at 256 (cited in ***Re Smith Brothers Contracting Ltd.*** (1998), 53 BCLR (3d) 264 at para 48 [***Smith Brothers***]). The terms "security lease," "financing lease" and "capitalized lease" are used interchangeably.

56 In***Re Winnipeg Motor Express Inc.***, 2009 MBQB 204, 243 Man R (2d) 31, leave to appeal ref'd 2009 MBCA 110, 245 Man R (2d) 274, Suche J. observed (at para 31) that: "... the true nature of arrangements involving the supply of equipment can be very difficult to peg."

57 Farley J. in ***Re Philip Services Corp.*** (1999) 15 CBR (4th) 107 at para 3 (Ont SCJ) [***Philip Services***] described the court's task as: "... not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed in the balance as to whether the scales would tip towards a true lease relationship - or alternatively against being a true lease relationship."

58 The characterization of a transaction involving a "lease" requires a functional analysis of the parties' relationship. What matters is substance, not form (***Smith Brothers***; ***Royal Bank of Canada v Cow Harbour Construction Ltd.***, 2010 ABQB 637 at para 32, 37 Alta LR (5th) 82, leave to appeal ref'd 2010 ABCA 394 [***Cow Harbour***]; ***Philip Services***; M.E. Burke, "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" (2009) 48 Can Bus LJ 289).

59 In ***Smith Brothers*** at para 67, Bauman J. (as he then was) considered the following factors in determining whether the contract at issue in that case constituted a true lease.

1. Whether there was an option to purchase for a nominal sum;
2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
3. Whether the nature of the lessor's business was to act as a financing agency;
4. Whether the lessee paid a sales tax incident to acquisition of the equipment;
5. Whether the lessee paid all other taxes incident to ownership of the equipment;
6. Whether the lessee was responsible for comprehensive insurance on the equipment;
7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
8. Whether the agreement placed the entire risk of loss upon the lessee;

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);
13. Whether there was a default provision in the lease inordinately favourable to the lessor;
14. Whether there was a provision in the lease for liquidated damages;
15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;
16. Whether the aggregate rental approximated the value of purchase price of the equipment.

60 As Yamauchi J. observed in ***Cow Harbour*** at para 32, no one factor "is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions..."

61 Applying the ***Smith Brothers*** factors to the Master Lease discloses the following:

1. Option to purchase for a nominal sum - None.
2. A provision in the lease granting the lessee an equity or property interest in the equipment - None.
3. The lessor's business was to act as a financing agency - No.
4. Whether the lessee paid a sales tax incident to acquisition of the equipment - No Evidence.
5. Whether the lessee paid all other taxes incident to ownership of the equipment - Yes.
6. Whether the lessee was responsible for comprehensive insurance on the equipment- Yes.
7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense- Yes
8. Whether the agreement placed the entire risk of loss on the lessee- Yes.
9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent on default by the lessee and granted remedies similar to those of a mortgagee - No.
10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - No evidence.
11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - No.
12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to the lessor - No.
14. Whether there was a provision in the lease for liquidated damages - No.
15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - No, but there were no representations or warranties, either express or implied.
16. Whether the aggregate rental approximated the value of the purchase price of the equipment - No Evidence.

62 M.E. Burke, in his article "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at pp 291-291, discusses how certain factors have been weighed by the courts:

> Although Canadian courts will refer to various factors as being relevant in their determination as to the characterization of a lease, they rarely indicate the relative weight given by them to each of the indicia or factors.
>
> It is possible, however, to make the following generalizations from the case law. First, from the universe of factors or indicia that have been mentioned in the jurisprudence, some factors or indicia (referred to in this paper as "primary factors") are clearly more important than other factors or indicia (referred to in this paper as "secondary factors"). Second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third, secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor. Fourth, in those situations where the primary factor is ambiguous or absent, then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.

63 The author identifies (at pp 292-294) the following as "primary factors: "

(a) Relevance of the purchase option price - whether the purchase option price is nominal or reflective of fair market value.
(b) Mandatory purchase options - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.
(c) Open-end leases/guaranteed residual clauses - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term.
(d) Sale-leaseback transactions- whether the transaction is structured as a sale and leaseback.

64 The Master Lease provides (clause 5) that after expiry of the six month minimum lease term for any vehicle and on notice to Transportaction, Skyreach may return the vehicle and Transportation will sell it. Skyreach remains responsible for payment of rent until the end of the month in which the returned vehicle is sold. If the sale proceeds of a vehicle exceed the termination book value, Skyreach keeps the surplus. If there is a shortfall, Skyreach pays it (clause 6). This provision

is indicative of a security lease since it renders the lessee liable for a deficiency on the sale at the end of the term ("Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at 294, citing ***Crop & Soil Service Inc. v Oxford Leaseway Ltd.*** (2000), 186 D.L.R. (4th) 85, 48 O.R. (3d) 291 at para 6 (CA); ***Re Cronin Fire Equipment Ltd.*** (1993), 14 O.R. (3d) 269).

65 The following are the "secondary factors" described by M.E. Burke in "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at 295-298:

(a) The ability to replace/exchange leased equipment is indicative of a true lease.
(b) The lessor's ability to accelerate payments and the residual value are generally inconsistent with a true lease. However, it is equally consistent with a true lease if the acceleration clause limits the lessor's damages to the present value of the remaining rents, plus the present value of the residual value at the end of the term, minus the value of net proceeds from a sale of the assets. If the acceleration clause is more narrowly crafted, it favours a security lease.
(c) A full payment lease may be indicative of either form of lease, depending on the language of the provision.
(d) A security deposit is indicative of a security lease.
(e) A substantial down payment is indicative of a security lease.
(f) Covenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease.
(g) Whether the lessor uses different forms for different types of transactions may be some evidence of intention.

66 Applying these (secondary) factors to the Master Lease discloses that:

(a) Ability to replace/exchange leased equipment - Yes.
(b) Acceleration clause - No.
(c) Full payment lease - Yes.
(d) Security deposit - No.
(e) Down payment - No.
(f) Maintenance, insurance and risk of loss - Skyreach was responsible for maintenance, operating costs and expenses, taxes, fees and penalties (clause 7), licensing and registration (clause 8), and insurance (clause 9). These are weak indicia of a security lease that may be equally consistent with a true lease. This is a neutral factor.
(g) Lessor's documentation - No evidence.

67 The secondary factors are, in and of themselves, not determinative of the proper characterization of the Master Lease. The presence of some secondary factors is insufficient to outweigh the clear effect of the primary factors.

68 In the result, I conclude that the Master Lease is properly characterized as a security/financing/capitalized lease. Accordingly, it is not a "Permitted Lien" under the GSA.

C. Did GE Subordinate its Priority Position to Transportaction?

69 The Alberta Court of Appeal in ***Chiips Inc. v Skyview Hotels Ltd.*** (1994), 155 AR 281 (CA) considered a debenture which permitted the assuming or giving of purchase money mortgages or other purchase money liens on property acquired by the company provided they were secured only by that property. The appellants argued this amounted to a subordination by the debenture holder. At para 56, Harradence JA, in separate and concurring reasons, stated: "[t]he question to be asked is: what did the debenture holders intend when they included this clause?"

70 Following a review of the authorities, he also indicated (at para 49):

> From the above cases, the parameters are clear. An explicit and specific waiver clearly gives rise to a valid subordination clause. A vague and non-specific clause is not to be construed as a subordination clause. The question that arises is simply where on the continuum do the purported subordination clauses in the case at bar lie?

71 In the present case, the GSA simply exempts "Permitted Liens" from the prohibition against encumbering the collateral. It does not afford a priority over the GSA to "Permitted Liens."

72 The GSA neither expressly nor impliedly subordinates GE's priority in favour of the Master Lease. Accordingly, Transportaction's argument in this regard fails.

73 I do not find ***Bank of Montreal v Dynex Petroleum*** (1995), 39 Alta LR (3d) 66 to be helpful in terms of this issue.

D. Are Transportaction's APPR Registrations Sufficient For It to Take Priority?

74 Transportaction asserts that it has PMSI super priority.

75 The Alberta *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies to the Master Lease as it captures transactions that create a security interest and true leases for a term of more than one year:

> 3(1) Subject to section 4, this Act applies to
>
> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
> (b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.
>
> (2) Subject to sections 4 and 55, this Act applies to...
>
> (b) a lease of goods for a term of more than one year, and

that does not secure payment or performance of an obligation.

76 Transportaction's security interest under the Master Lease was a PMSI:

> 1(1)(ll) "purchase-money security interest" means
>
> ...
>
> (iii) the interest of a lessor of goods under a lease for a term of more than one year,
>
> but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or loan.

77 Section 34(2) of the *PPSA* gives priority to a PMSI in the following circumstance:

> 34(2) A purchase-money security interest in
>
> (a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.
>
> has priority over any other security interest in the same collateral given by the same debtor. [Emphasis added.]

78 The *PPSA* defines "inventory" as follows:

> 1(1)(y) "inventory" means goods
>
> (i) that are held by a person for sale or lease, or that have been leased by that person,
> (ii) that are to be furnished by a person or have been furnished by that person under a contract of service,
> (iii) that are raw materials or work in progress, or
> (iv) that are materials used or consumed in a business.

79 "Equipment" in defined in s 1(1)(p) as meaning "goods that are held by a debtor other than as inventory or consumer goods."

80 Transportaction asserts that because Skyreach could neither sublet nor sell the equipment (subject to the Master Lease), the assets must be characterized as equipment rather than inventory. Given my conclusion with respect to the adequacy of the registration, I need not determine that issue.

81 A security interest in collateral is perfected under the *PPSA* by registration of a financing statement (s 25).

82 The Master Lease dealt with vehicles and trailers, which are considered "serial number goods" pursuant to s. 1(1)(y) of the *Personal Property Security Regulation*, AR 95/2001 [*Regulation*].

83 Section 34 of the *Regulation* provides that:

> 34(1) Where a financing statement is submitted for registration in respect of a security interest in collateral that is serial number goods,
>
> (a) if the goods are consumer goods, the secured party must provide a description of the goods by serial number in accordance with section 35, and
> (b) if the goods are equipment or inventory, the secured party may provide a description of the goods in accordance with section 36 or by serial number in accordance with section 35.

84 Section 35 of the *Regulation* outlines the requirements for description by serial number, which include the following:

> 35(1) Where collateral is required to be described under this section, the description must be set out in the space provided for serial number description, and must include
>
> (a) the last 25 characters of the serial number for the collateral or all the characters if the serial number contains less than 25 characters,
> (b) the 4 digits for the model year of the collateral,
> (c) the make and model of the collateral, and
> (d) the appropriate category of collateral as set out in Schedule 3.

85 Section 36 applies to serial number goods not described in accordance with s 35 in the case of inventory or equipment (s 36(1)(b)). Section 36(2) provides that:

> 36(2) Where collateral is to be described under this section, the secured party must set out the description under "Collateral: General" and must provide
>
> (a) a description of the collateral by item or kind or as "goods," "chattel paper," "investment property," "documents of title," "instruments," "money" or "intangibles,"
> (b) a statement indicating that a security interest is taken in all of the debtor's present and after-acquired personal property,
> (c) a statement indicating that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except personal property described as "goods," "chattel paper," "investment property," "documents of title," "instruments," "money" or "intangibles," or
> (d) a description of the collateral as inventory, but such a description is valid for the purposes of this section only while the collateral is held by the debtor as inventory.

86 The 2000 APPR Filing described the "general collateral" as being: "... other vehicles of whatever year, make or model including after acquired property and including proceeds thereof." Neither the 2000 APPR Filing nor the 2003 APPR Filing described the collateral "by item or kind;" that is, a description such as that given in Schedule "A" to the Main Lease or a description that would enable the type or kind of collateral taken to be distinguished from the types or kinds of collateral not taken. The 2000 APPR Filing did not set out serial numbers. The 2003 APPR Filing included serial numbers.

87 Since the Impugned Sales occurred before the 2003 APPR Filing, Transportaction's attempt to cure the 2000 APPR Filing fails. The 2000 APPR Filing was deficient.

88 The Master Lease could not take priority over the GSA.

E. Does the Doctrine of Laches Preclude Transportaction from the Relief Sought?

89 Given my findings, I need not address the issue of laches.

V. Conclusions

90 The parties' joint application to adduce evidence taken in the Litigation is granted.

91 The doctrines of issue estoppel, collateral attack and abuse of process by re-litigation apply to prevent Transportaction from arguing that the Appeal is moot. In any event, I find that it is not moot in the circumstances.

92 The Master Lease is properly characterized as a security/financing/capitalized lease and, therefore, is not a "Permitted Lien" as that term is defined in the GSA.

93 GE neither expressly nor impliedly subordinated its security interest in the GSA to Transportaction.

94 Transportaction's registration of the security interest granted to it by Skyreach is deficient.

95 The GSA has priority over the Master Lease.

96 The Appeal is dismissed.

97 If the parties cannot agree on costs, they may speak to me within 45 days.

J.E. TOPOLNISKI J.

cp/e/qlcct/qlvxw/qlcas/qlgpr/qlana/qlcas/qlgpr

Tab 2

Indexed as:

Borowski v. Canada (Attorney General)

Joseph Borowski, appellant;
v.
The Attorney General of Canada, respondent;
and
Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada, and Women's Legal Education and Action Fund (LEAF), interveners.

[1989] 1 S.C.R. 342

[1989] S.C.J. No. 14

File No.: 20411.

Supreme Court of Canada

1988: October 3, 4 / 1989: March 9.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal -- Mootness -- Abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- Canadian Charter of Rights and Freedoms, ss. 7, 15.

Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing as originally [page343] determined -- Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.

Appellant attacked the validity of s. 251(4), (5) and (6) of the Criminal Code relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the Charter as a foetus was not protected by either s. 7 or s. 15 of the Charter and also held that the s. 1 of Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the Charter applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the Charter; (2) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated the principles of fundamental justice contrary to s. 7 of the Charter; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the Charter; (4) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the Criminal Code were justified by s. 1 of the Charter. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in R. v. Morgentaler (No. 2).

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

[page344]

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the Criminal Code -- disappeared when s. 251 was struck down in R. v. Morgentaler (No. 2). None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the Charter and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of [page345] their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought be-

fore the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the Charter protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not [page346] the question raised in the original action. Indeed, what was sought -- a Charter interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Charter. Secondly, the legislative context of original claim disappeared when s. 251 of the Criminal Code was struck down. Standing could not be based on s. 24(1) of the Charter for an infringement or denial of a person's own Charter-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the Constitution Act, 1982 as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

Cases Cited

Referred to: R. v. Morgentaler (No. 2), [1988] 1 S.C.R. 30; Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575; Morgentaler v. The Queen (No. 1), [1976] 1 S.C.R. 616; Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69; Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363; Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117; Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385; Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111; Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58; International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628; Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481; R. v. Mercure, [1988] 1 S.C.R. 234; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Re Maltby and Attorney-General [page347] of Saskatchewan (1984), 10 D.L.R. (4th) 745; Hall v. Beals, 396 U.S. 45 (1969); United States v. W. T. Grant Co., 345 U.S. 629 (1953); Sibron v. New York, 392 U.S. 40 (1968); Vadebonc(oe)ur v. Landry, [1977] 2 S.C.R. 179; Bisaillon v. Keable, [1983] 2 S.C.R. 60; Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911); Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713; Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756; Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470; Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793; Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90; Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).
Constitution Act, 1982, s. 52(1).
Constitution of the United States of America, Art. III, s. 2(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).
Rules of the Supreme Court of Canada, SOR/83-74, s. 32.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. [page348] 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

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Edward Sojonky, Q.C., for the respondent.
Mary Eberts and Helena Orton, for the intervener Women's Legal Education and Action Fund (LEAF).

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Solicitor for the respondent: Frank Iacobucci, Ottawa.
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The judgment of the Court was delivered by

1 **SOPINKA J.**:-- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in R. v. Morgentaler, [1988] 1 S.C.R. 30 (hereinafter R. v. Morgentaler (No. 2)).

2 From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the [page349] appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

3 In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

4 Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

> (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the Criminal Code invalid and inoperative;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is ultra vires and unlawful;
> (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
> (d) The costs of this action; and
> (e) Such further and other relief as to this Honourable Court seems just and expedient.

5 Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, was that Mr. Borowski

had standing to attack the provisions of the Code referred to in his statement of claim. [page350] Martland J., speaking for the majority, stated, at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

6 Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

7 An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the Canadian Bill of Rights, R.S.C. 1970, App. III, were repeated. Allegations based upon the Canadian Charter of Rights and Freedoms, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

> (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the Criminal Code to be ultra vires, unconstitutional, invalid, inoperative and of no force or effect;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the Criminal Code are ultra vires, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:
> (c) The costs of this action; and
> (d) Such further and other relief as to this Honourable Court seems just.

8 The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the Canadian Bill of Rights. [page351] Matheson J. held that both Morgentaler v. The Queen, [1976] 1 S.C.R. 616 (hereinafter Morgentaler v. The Queen (No. 1)) and Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation.

9 Matheson J. noted that Mr. Borowski's principal argument under the Charter was that the foetus is a person and therefore should be afforded the protection of s. 7 of the Charter. It was held, however, that s. 251(4), (5), and (6) did not violate the Charter as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

10 On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that

neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

11 Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the Charter. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the Rules of the Supreme Court of Canada, SOR/83-74, stated the following constitutional questions:

1. Does a child en ventre sa mère have the right to life as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the principles of fundamental justice, contrary to Section 7 of the Canadian Charter of Rights and Freedoms? [page352] 3. Does a child en ventre sa mère have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms?
4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the rights guaranteed by Section 15?
5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the Criminal Code justified by Section 1 of the Canadian Charter of Rights and Freedoms, and therefore not inconsistent with the Constitution Act, 1982?

12 On January 28, 1988, after leave to appeal was granted, this Court decided R. v. Morgentaler (No. 2), supra, in which all of s. 251 was found to violate s. 7 of the Charter. Accordingly, s. 251 in its entirety was struck down.

13 In July of 1988 in light of this Court's judgment in R. v. Morgentaler (No. 2), supra, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the Criminal Code had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child en ventre sa mère is entitled to the protection of ss. 7 and 15 of the Charter respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

14 I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

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Mootness

15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

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When is an Appeal Moot? -- The Authorities

17 The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

18 In The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

19 A challenged municipal by-law was repealed prior to a hearing in Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: Attorney-General for Alberta v. Attorney- General for Canada, [1939] A.C. 117 (P.C.)

20 Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385, and Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111. In Coca-Cola v. Mathews, Rinfret C.J. held the result of the undertaking was to eliminate any further lis between the parties such [page355] that the Court would have been forced to decide an abstract proposition of law.

21 As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

22 The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (R. v. Mercure, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

23 As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: Re Maltby v. Attorney-General of Saskatchewan (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

24 The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, [page356] or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Su-

preme Court" (1974), 88 Harvard L.R. 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in Hall v. Beals, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in United States v. W. T. Grant Co., 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in Sibron v. New York, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

25 The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, American Constitutional Law (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

[page357]

Is this Appeal Moot?

26 In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the Criminal Code having been struck down in R. v. Morgentaler (No. 2), supra, the raison d'être of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 Charter rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the Criminal Code. They were a mere step in the process of measuring the impugned provision against the Charter.

27 In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: Vadebonc(oe)ur v. Landry, [1977] 2 S.C.R. 179, at pp. 187-88, and Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the Rules of the Supreme Court of Canada are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

> 32. (1) When a party to an appeal
>
> (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
> (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court [page358] of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

28 By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

29 Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

30 In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

31 The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully [page359] argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in Vic Restaurant Inc. v. City of Montreal, supra. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

32 In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that col-

lateral consequences of an already completed cause of action warrant appellate review was most clearly stated in Sibron v. New York, supra. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

> ... most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

[page360]

33 In Canada, the cases of Law Society of Upper Canada v. Skapinker, supra, and R. v. Mercure, supra, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

34 The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", Charter Litigation.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

35 The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in Vic Restaurant Inc. v. City of Montreal, supra.

36 Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713, and Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

37 There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470, and Kates and Barker, supra, at pp. 1429-1431. Locke J. alluded to this in Vic Restaurant Inc. v. City of Montreal, supra, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

38 This was the basis for the exercise of this Court's discretion in the Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. [page362] In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

39 Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90.

40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, and Tribe, American Constitutional Law (2nd ed. 1988), at p. 67.)

41 In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369, at p. 373:

> The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it [page363] is a matter

> of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

42 In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Exercise of Discretion: Application of Criteria

43 Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

44 The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical [page364] course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

45 None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

46 Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See R. v. Morgentaler (No. 2), supra, per Dickson C.J., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the [page365] appellant's position that a foetus is protected by s. 7 from the date of conception would decide the

issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

47 Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the Canadian Charter of Rights and Freedoms in the absence of legislation or other governmental action which would otherwise bring the Charter into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the Criminal Code. He now wishes to ask a question that relates to the Canadian Charter of Rights and Freedoms alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

48 Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

49 Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the Criminal Code [page366] violated the s. 1 right to life of the Canadian Bill of Rights: Minister of Justice of Canada v. Borowski, supra. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

50 Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, and Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

51 The Court relied heavily upon the decision in Thorson, supra, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised .... [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

52 There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Secondly, by holding s. 251 to be of no force and effect in R. v. Morgentaler (No. 2), supra, the legislative context of this claim has disappeared.

53 By virtue of s. 24(1) of the Charter and 52(1) of the Constitution Act, 1982, there are two possible [page367] means of gaining standing under the Charter. Section 24(1) provides:

> 24. (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

54 In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a Charter-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

55 Nor can s. 52(1) of the Constitution Act, 1982 be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the Thorson, McNeil, Borowski trilogy expansion of the doctrine.

56 Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the Constitution Act, 1982 is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the Charter. What the appellant now seeks is a naked interpretation of two provisions of the Charter. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

57 Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in [page368] lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

qp/i/qlcvd

Tab 3

Case Name:

Canada Mortgage and Housing Corp. v. Iness

Between
Eleanor Iness, respondent (moving party), and
Canada Mortgage and Housing Corporation, applicant (responding party), and
Caroline Co-Operative Homes Inc. and Ontario Human Rights Commission, respondents (responding party)

[2002] O.J. No. 4334

62 O.R. (3d) 255

220 D.L.R. (4th) 682

166 O.A.C. 38

118 A.C.W.S. (3d) 620

2002 CanLII 15707

Docket Nos. M29024 and M29044 (M28836)

Ontario Court of Appeal
Toronto, Ontario

Weiler J.A.
(In Chambers)

Heard: October 9, 2002.
Judgment: November 15, 2002.

(17 paras.)

Counsel:

Raj Anand and Marie-Andrée Vermette, for the respondent (moving party).
Alan L.W. D'Silva and Sophie Vlahakis, for the applicant (responding party).
Margaret Leighton, for the Board of Inquiry.

1 **WEILER J.A.**:-- Eleanor Iness has brought an application for leave to appeal a decision of the Divisional Court. In support, she has filed two affidavits on the public importance of the legal issue raised. The Canadian Mortgage and Housing Corporation ("CMHC") has brought a motion to strike these affidavits from the record, leaving this court to decide the narrow issue of whether or not affidavit evidence may be filed on the question of public importance of the appeal.

2 The background to the motion is as follows. Iness filed a complaint with the Ontario Human Rights Commission (the "Commission") on May 15, 1995 against Caroline Co-operative Homes Inc., (the "Co-op"), a rent-geared-to-income co-op operating pursuant to an agreement with CMHC. Up until that time Iness, and all other persons living at the Co-op, had been charged rent geared-to-income amounting to 25% of income regardless of its source. On January 1, 1995, the Co-op changed its policy and Iness was charged the maximum amount of her shelter allowance as rent. The result was that she now had to pay $27.50 per month toward hydro and insurance costs out of the living portion of her allowance. Other residents of the Co-op not in receipt of public assistance continued to simply pay 25% of income. Iness alleged discrimination against her on the prohibited ground of receipt of provincial social assistance. A Board of Inquiry was appointed and both Iness and the Co-op sought to add CMHC as a party.

3 The Co-op's position was that it was obliged to comply with a directive from CMHC stating that housing costs for members in receipt of social assistance were to be calculated in a different manner from those income tested members not in receipt of social assistance. CMHC opposed the motion to add it as a party on the basis that it is a federal crown corporation operating pursuant to federal legislation and exercising its federal spending power pursuant to s. 91(1A)of the Constitution Act 1867, (U.K.), 1867, c. 3. As such, it claims it is not subject to provincial human rights legislation but only the Canadian Human Rights Act, R.S.C. 1985, c. H.6, which is a complete code regarding human rights in the federal sphere. On June 13, 2001, the Board of Inquiry held that CMHC was subject to the Ontario Human Rights Code, R.S.O. 1990, c. H.19, and added CMHC as a party. CMHC sought judicial review of the Board's decision before the Divisional Court and, on July 8, 2002, the Divisional Court agreed with CMHC's position, quashing the Board's order: Canada Mortgage and Housing Corp. v. Iness, [2002] O.J. No. 2761.

4 Innes is seeking leave to appeal to this court. Under s. 6(1)(a) of the Courts of Justice Act, R.S.O. 1990, c. C.43, appeals from a decision of the Divisional Court will only be granted with leave on a question that is not a question of fact alone. The possibility that there may be an error in the judgment or order sought to be appealed will not generally be a ground in itself for granting leave. Matters considered in granting leave include a) whether the Divisional Court exercised appellate jurisdiction (in which case the applicant for leave is seeking a second appeal) or whether the Divisional Court was sitting as a court of original jurisdiction; b) whether the appeal involves the interpretation of a statute or regulation including its constitutionality; c) the interpretation, clarification or propounding of some general rule or principle of law; and d) whether the interpretation of the law or agreement in issue is of significance only to the parties or whether a question of general interest to the public or a broad segment of the public would be settled for the future: Re United Glass and Ceramic Workers of North America, [1973] 2 O.R. 763; Re Sault Dock Co. Ltd. and City of Sault Ste. Marie, [1973] 2 O.R. 479 (C.A.).

5 The two affidavits filed by Innes as part of her leave motion are intended to support her position that the questions of law raised are a matter of pubic importance. The affidavits purport to address the number of co-ops and non-profit housing corporations that are, like the Co-op, funded by CMHC's "s. 56.1" program and to further describe how that funding program works. CMHC opposed the filing of the affidavits on the basis that they do not comply with the test for the admission of fresh evidence set out in R. v. Palmer, [1980] 1 S.C.R. 759 at 775 and it also disagrees with much of the content in the affidavits.

6 Iness took the position she was entitled as of right to file the affidavits based on the endorsement of Simmons J.A. (in chambers) on August 8, 2002 in Thomas Furniture Ltd. v. Borooah, Docket M28743. Alternatively, Iness seeks leave to file the affidavits. The first question, therefore, is whether a moving party may file affidavits on a motion for leave to appeal to address the issue of public importance, and if so, whether the filing of such an affidavit is as of right or whether leave is required. If such affidavits may be filed, but only with leave, the question then becomes when leave should be granted.

7 Rule 61.03.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 governs motions for leave to appeal to the Court of Appeal. Subrule 2 of rule 61.03.1 states that a motion record, factums and transcripts, if any, are to be served. The documents to be contained in the motion record are those listed in rule 61.03(2).[1] The rule does not state that the motion record cannot contain any other materials. In Thomas Furniture, supra, Simmons J.A. dealt with the question whether affidavit material on the public importance of the matter could nonetheless be filed. She endorsed the record in part as follows:

> I do not read rule 61.03.1 as prohibiting a party from filing evidence on a motion for leave to appeal to address whether the proposed appeal raises an issue of public importance, nor, in my view, have any authorities been filed that establish that such evidence should be prohibited.
>
> In the motion before her, however, she held that there was no basis for concluding that the affidavit of David Butler was admissible as addressing an issue of public importance. Rather, it dealt with matters relevant to the interpretation of the by-law that could have been raised previously.

8 I do not read the decision of Simmons J.A. as indicative that affidavit evidence on the question of public importance can be filed as of right. Rather, it supports the conclusion that the court may grant leave to file such an affidavit in appropriate circumstances. This conclusion is further supported by an examination of the approach taken in two other jurisdictions where the filing of such affidavit material is expressly permitted.

9 The Rules of the Supreme Court of Canada, S.O.R./2002-156, s. 25(1)(b) expressly permit the filing of "any affidavits in support of the application for leave to appeal." No separate leave is required to file such an affidavit, though the responding party may make a motion to strike the affidavit out if it is not relevant or contains improper submissions: Ballard Estate v. Ballard Estate, [1991] S.C.C.A. No. 239. Similarly, the British Columbia Court of Appeal Rules, B.C. Reg. 297/2001, r. 7 and Form 4 also envisage the filing of such affidavit material. In the absence of any rule expressly permitting the filing of an affidavit concerning the issue of the public importance of an appeal, I am of the opinion that the matter is discretionary and leave must be obtained.

10 The question therefore is whether this is an appropriate case in which to grant leave and allow the affidavits to be filed. The Palmer test is of no assistance on the issue before me; it is directed to the admissibility of fresh evidence affecting the substance of a decision as opposed to its process. The decision of the Supreme Court in Markevich v. Canada, [2001] S.C.C.A. No. 371 is much more pertinent to a motion to strike an affidavit filed in support of granting leave to appeal. Markevich implicitly states that the affidavit in question must be relevant to the issue of public importance. The extent of the impact of the court's decision is one factor to be considered in determining the question of public importance. In that case, the impact centred on a dollar figure - the ability of the public purse to collect tax debts. Affidavit evidence filed by the appellant seeking leave to appeal stated that significant amounts of taxes would become uncollectible if the judgment of the lower court was allowed to stand. This was held to be entirely relevant to the issue of the national importance of the legal question raised, and the affidavit evidence was allowed. In addition, the request of the respondent on appeal for leave to examine the individual who had filed the affidavit was rejected. All the Supreme Court wanted to know was that a "substantial amount may be involved". They did not wish to become bogged down in superfluous debate over the exact figure.

11 The affidavit evidence before me similarly establishes the wide impact of the Divisional Court's decision. While it focuses on the number of persons affected rather than a dollar value, the affidavits are relevant in that they go to the importance of the Court's decision on the broader public beyond the parties involved directly. Relevance, however, is not the only question to consider when granting leave to file affidavits on the issue of public importance. The Supreme Court struck out affidavits in Ballard Estate, supra, when they simply expressed matters of opinion on the very issues raised on appeal. Ballard Estate contrasted this opinion evidence to "statistical data as to the effects of a decision [which] may be of great assistance." Any affidavit submitted on the issue of public importance should limit itself to factual information. Otherwise, expert legal opinion to the effect that the issue between the parties raises questions of public importance is inappropriate as this is the very issue for the court to decide on the leave application.

12 An examination of the affidavits of J. David Hulchanski and Mary Todorow reveals that, for the most part, they confine themselves to statistical data. While CMHC claims that the affidavits go to the substantive issues in this matter by discussing CMHC's role in the housing industry and funding, these paragraphs are incidental to the main purpose of the affidavit, namely, a demonstration of the wide impact that the court's decision will have. The fact that this evidence was available to counsel at the time of the initial motion before the Board of Inquiry is irrelevant, it is only at this stage that Iness must demonstrate the public importance of the issues raised.

13 CMHC further objects to the affidavits on the basis of form, claiming that they do not meet the standard of rule 39.01. On the whole, both affidavits are acceptable to the court in that each affiant states that they have "knowledge of the matters herein deposed": Affidavit of J. David Hulchanski at para. 2, Affidavit of Mary Todorow at para. 3. Hulchanski's affidavit, however, steps over the line into opinion in para. 9 where he states, in part, "Protection from discrimination in access to subsidized rental units is of critical importance for disadvantaged groups in Ontario, including social assistance recipients." Paragraph 10 also deviates from an analysis of the number of people affected by the CMHC and the structure of its programs. Paragraph 14 of Todorow's affidavit similarly crosses into opinion when she states that "CMHC is the author of the shelter component requirement, which is potentially discriminatory under the [Ontario Human Rights] Code." I would therefore strike para. 9 and 10 from the affidavit of J. David Hulchanski and para. 14 of the affidavit of

Mary Todorow, but grant leave to adduce the remainder of these two affidavits as evidence as to the public interest.

14 Finally, CMHC disagrees with some of the statements in the affidavits. It wishes to cross-examine on them and also wishes to file affidavit evidence. I cannot see that cross-examination on the affidavits will serve a useful purpose. As in Markevich, the exact number of persons affected by the decision is not pertinent. It is the general picture which is important. Consequently, leave to cross-examine on the affidavits is denied. CMHC is at liberty to file contradictory affidavit evidence in response to those portions of the affidavit that it submits are inaccurate.

15 In the future, it seems to me that the party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Similarly, any response to the affidavit should be filed with the responding materials on the leave motion. The panel hearing the application for leave to appeal would then consider the motion to admit the evidence on the issue of public importance when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material would properly be made to the chambers judge.

16 CMHC's motion for an order striking out the affidavits of Hulchanski and Todorow is therefore dismissed, but only in part. Paragraphs 9 and 10 of the affidavit of J. David Hulchanski and paragraph 14 of the affidavit of Mary Todorow shall be struck out, and leave to admit the remainder of these affidavits is granted.

17 Both sides have agreed to bear their own costs of this motion.

WEILER J.A.

cp/e/nc/qlrme/qlkjg

1 Rule 61.03.1(4) states in part: "The moving party shall serve a motion record ... as provided in subrule 61.03(2) ..." Rule 61.03(2) describes the contents of the motion record as follows:

(i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,

(ii) a copy of the notice of motion,

(iii) a copy of the order or decision from which leave to appeal is sought, as signed and entered,

(iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,

(iv. 1) a copy of any order or decision that was the subject of the hearing before the court or tribunal from which leave to appeal is sought,

(iv. 2) a copy of any reasons for the order or decision referred to in d. 1), with a further typed or printed copy if the reasons are handwritten, O.Reg. 61/96, s. 5(3).

(v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,

(vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and

(vii) a copy of any other material in the court file that is necessary for the hearing of the motion.

Tab 4

Case Name:

Country Style Food Services Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985 C. c-36, as amended
AND IN THE MATTER OF the Courts of Justice Act, R.S.O. 1990, C. c-43, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Country Style Food Services Inc., Country Style Food Services Holdings Inc., Country Style Realty Limited, Melody Farms Specialty Foods and Equipment Limited, Buns Master Bakery Systems Inc. and Buns Master Bakery Realty Inc.
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985 C. c-36

[2002] O.J. No. 1377

158 O.A.C. 30

112 A.C.W.S. (3d) 1009

Docket No. M28458

Ontario Court of Appeal
Toronto, Ontario

Feldman J.A.
(In Chambers)

Heard: April 15, 2002.
Judgment: April 16, 2002.

(24 paras.)

Creditors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval -- Appeal -- Leave to appeal -- Fresh evidence, bars.

Application by the franchisees for leave to appeal an order that sanctioned a plan of arrangement for the debtor, Country Style Food Services. Within the framework of the Companies' Creditors Arrangement Act, a plan of arrangement for Country Style was submitted. One of its creditors pro-

posed to oppose the sanction until an out-of-court settlement was reached prior to the sanction motion. The plan was subsequently approved by a substantial percentage of the unsecured creditors and by the secured creditor. No one opposed the approval of the plan at the sanction hearing. Following the approval, the franchisees became aware of facts that they alleged vitiated the approval process. According to the franchisees, they became aware that some franchisees over-contributed to Country Style's national advertising fund, such that they were entitled to claim as creditors against Country Style for unjust enrichment in the plan process. Country Style objected to the admission of the fresh evidence and relied on the fact that due diligence has not been met. The opposing creditor filed a motion record with the court that contained affidavits outlining some of the allegations on which the franchises relied.

HELD: Application dismissed. The franchisees did not demonstrate that the evidence could not have been obtained by due diligence. The court was not satisfied that the circumstances militated in favour of the exercise of its discretion. There was nothing to suggest that the plan, as sanctioned and approved, was not fair and reasonable. If leave to appeal was granted, the progress of the action would be hindered and the restructuring might not proceed. If the appeal was succeeded and the process was reopened, the franchisees did not propose any alternative to the plan, such that the significance to the action appeared to be procedural, but not substantive.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 13, 18.1.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 134(4).

Counsel:

Craig R. Colraine and Mitchell D. Goldberg, for Tozeng Limited, 1124019 Ontario Ltd. and 665371 Ontario Ltd. (applicants).
Joanna Board, for 1304271 Ontario Limited and 995804 Ontario Inc. (supporting the applicants).
Patrick J. O'Kelly and Ashley J. Taylor, for Country Style (respondent).
Frank J.C. Newbould, Q.C., for the Bank of Nova Scotia (respondent).
Mahesh Uttamchandani, for CAI, DIP Lender (respondent).

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1 **FELDMAN J.A.**:-- This is an application for leave to appeal the order of Spence J. made on March 7, 2002, whereby he sanctioned a Plan of Arrangement (the "Plan" under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") for the respondent, Country Style Group of Corporations. The application is brought under s. 13 of the CCAA which provides:

> s. 13 Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

2 The application was originally brought before Spence J. but as he was unable to hear it before April 16, 2002, the date scheduled for the closing of the plan transaction, he suggested that the application be brought to this court.

3 All three applicants are Country Style franchisees. Only one, Tozeng Limited, is also a creditor that filed a proof of claim and voted in the proceeding.

4 The applicants concede that on the record before him, Spence J. did not make any error in approving the Plan which was approved by a substantial percentage of the unsecured creditors and by the secured creditor. In fact, no one opposed the approval of the plan at the sanction hearing. The basis for this application is that immediately after the hearing approving the Plan, the applicants became aware of facts which they say vitiate the approval process in three ways:

(1) Over a period of time, some franchisees had contributed to Country Style's national advertising fund while others had not. The applicants claim that to the extent that some franchisees thereby overcontributed, they were entitled to claim as creditors against the company for unjust enrichment in the Plan process. However, because they did not know about the overcontribution and unequal treatment until it was too late to claim in the plan process, they have been denied both the amount of their claim and the opportunity to vote for or against the Plan and to participate in the process.
(2) The company was offering improper incentives to creditors to vote for the Plan.
(3) The Monitor was in a conflict of interest.

The applicants rely on fresh evidence in order to assert these claims and rely on s. 134(4) of the Courts of Justice Act R.S.O. 1990, c. C-43, which allows a court in a proper case, to accept fresh evidence. In R. v. Palmer, [1980] 1 S.C.R. 759 at 775, the Supreme Court of Canada set out four criteria for the admission of fresh evidence on appeal, summarized as follows:

(1) by due diligence, the evidence could not have been adduced in the proceeding below;
(2) it is relevant to a decisive or potentially decisive issue;
(3) it is reasonably capable of belief;
(4) if believed, it may reasonably have affected the result.

5 The respondents object to the admission of the fresh evidence on this application and rely heavily on the assertion that the first criterion, due diligence, has not been met in this case. They also suggest that the record discloses that Mr. English, the principal of Tozeng Limited, did know about the differential treatment of franchisees as long as one year ago.

6 Mr. O'Kelly on behalf of Country Style, points to the fact that a creditor, Tarragon Mercantile Inc., did propose to oppose the sanction order until an out-of-court settlement was reached on the evening before the sanction motion. Tarragon filed a motion record with the court that contained affidavits outlining some of the allegations on which the applicants now rely (in particular, the alleged irregularities with the proxy solicitation process and the alleged conflict of interest of the Monitor) and raised other matters as well. I am told that Spence J. was advised on the return of the motion that Tarragon was withdrawing its opposition. The plan was thereupon sanctioned by the court. I am advised that no one opposed the order.

7 Mr. O'Kelly's submission is that because Tarragon was in a position to find out the information necessary to bring forth some of the allegations now asserted by the applicants, the applicants could have done so as well had they exercised due diligence. In my view, on the face of it, there is merit in that submission.

8 The one issue which is not fully detailed in the Tarragon material is the national advertising fund issue. However, the information relied on in respect of the fund is contained in an affidavit of Catherine Mauro dated March 25, 2002 and filed on this application. She is the former director of marketing and product development who was terminated by Country Style on February 4, 2002. Ms Mauro also provided one of the affidavits which is included in the Tarragon material. Again, therefore, it appears that the applicants could have discovered further information from Ms. Mauro prior to the March 7 hearing had they acted with due diligence in speaking with her.

9 Even more significant, however, is the fact that in his affidavit filed in connection with the original material seeking court protection, Mr. Gibbons, the President of Country Style, disclosed as part of his description of the financial status of the debtor companies that one of the historical responses by management when a franchisee developed financial difficulties was "deferring or accepting reduced royalty, advertising and/or sign rental payments for a period of time" (affidavit para. 37). This information was also included in the Management proxy circular which was sent out to all creditors, of which Mr. English was one.

10 The applicants' position is that until they talked to Catherine Mauro after the sanction hearing, they did not know that some franchisees were not paying the full 3.5% of monthly gross sales to the national advertising fund, and that the 13 corporate stores, taken over from failed franchisees, paid nothing into the fund. The applicants also take the position that the company and the monitor made it impossible for the franchisees to learn of this by failing to disclose it to the franchisees. Their evidence is that representations were made to franchisees by senior management that all franchisees paid the same percentage of their sales into the national advertising fund.

11 However, it appears that there was disclosure of the differential treatment of franchisees in respect of the advertising fund in Mr. Gibbons' affidavit and the Management circular. Counsel also pointed out that franchisees could ask to be added to the service list for all of the documentation and that some were added, including Ms. Board's clients who have been represented by her here in support of the application.

12 I conclude, based on the material currently before the court, that it cannot be said that there was non-disclosure of the differential treatment of franchisees in respect of the contribution to the national advertising fund, or that the applicants could not have discovered this evidence if they had exercised due diligence. Although it appears that the potential significance of the different contributions as a possible claim against Country Style based on unjust enrichment, may not have been considered by the applicants until after the sanction motion, a failure to appreciate the significance of information does not meet the due diligence test.

13 Finally, the respondents point to the fact that Mr. English has deposed that in May 2000, he sought and obtained differential treatment in respect of the royalty fees he was paying and that he has been trying to retain the so-called "tiered store" status for his stores which allows them to pay lower fees. Therefore, Mr. English was aware of differentiation among franchisees in respect of some of the amounts payable to the franchiser and wanted to preserve that differentiation when it benefited him. The respondents say this shows that the new evidence should not be accepted and

that furthermore, there is no merit to the suggestion that the franchisees have any claim against the debtor company based on alleged overpayments. As a result, they argue that the new evidence would not have affected the outcome of the sanction hearing had it been available at that hearing.

14 I am satisfied that I need not deal with this part of the submission on this motion, as the due diligence criterion is not met.

15 Even if the fresh evidence met the test for admission, which it does not on the due diligence criterion, the court must be satisfied that this is a case where leave to appeal ought to be granted. The jurisprudence in this area dictates that leave to appeal in CCAA proceedings should be granted sparingly: Re Consumers Packaging Inc. (2001), 27 C.B.R. (4th) 197 at 199 (Ont. C.A.); Re Blue Range Resources Corp. (1999), 12 C.B.R. (4th) 186 at 190 (Alta. C.A.). In order to grant leave the court must be satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": Re Multitech Warehouse Direct Inc. (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.). This is determined in accordance with a four-pronged test as follows:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point is of significance to the action;
(c) whether the appeal is prima facie meritorious or frivolous;
(d) whether the appeal will unduly hinder the progress of the action.

See Blue Range Resource Corp., supra at 190; Cineplex Odeon Corp. (2001), 24 C.B.R. (4th) 201 at 202 (Ont. C.A.)

16 As I understand it, the main issue on appeal is the submission that the applicant franchisees and other franchisees, some of whom have filed affidavits in support, over-contributed to the national advertising fund in relation to other franchisees and the company in connection with its corporate stores. This overcontribution entitled them to make a claim against the company for unjust enrichment. However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process; they therefore did not have the right to participate as unsecured creditors, and they did not have the right to vote for or against the Plan.

17 Counsel for the applicants concedes that there is no evidence in the record to demonstrate that had the affected franchisees made claims and voted, the Plan would have been defeated or amended in any way.

18 Counsel also concedes that no alternative plan has been proffered at any stage. He suggests, however, that because of the circumstances set out, the Plan cannot be considered fair and reasonable. The Monitor has made it clear in its reports that the only alternative to the Plan is bankruptcy or receivership, whereunder there would be nothing for the unsecured creditors. Counsel suggested in argument that his clients would be prepared to see the debtor company go bankrupt rather than proceed with the sanctioned Plan. There is no affidavit evidence to this effect, and I frankly find it hard to accept that franchisees with viable operations would prefer to see the corporate entity with which they are associated be liquidated in a bankruptcy or receivership.

19 Based on the record, there is nothing to suggest that the Plan as sanctioned and approved by the court is not "fair and reasonable." If leave to appeal is granted, the progress of the action will clearly be hindered and the restructuring may not go ahead at all. If the appeal were to be successful and the process reopened, the applicants do not propose any alternative to the plan, so that the significance to the action appears to be procedural but not substantive.

20 For all of these reasons, the applicants have not satisfied the test for the court to exercise its discretion to grant leave to appeal.

21 During argument, counsel for the applicants suggested that one of the problems facing his clients is that they owe money to the debtor company, but are not able to make a claim against the company in respect of the overpayment into the advertising fund because of the orders made in the CCAA process. In response, counsel for Country Style took the position that s. 18.1 of the CCAA preserves the applicants' ability to assert a right of set-off against the company in respect of their claims against any monies which they may owe to the company. In other words, their claims against the company are not necessarily barred.

22 As this was not an issue for resolution on this leave to appeal motion, I make no comment on (1) the effect of s. 18.1 of the CCAA on post-Plan claims by or against the debtor company; or (2) on the effect of the claims bar order in respect of claims by people who were not listed or served as creditors in the proceeding, or people who did not know that they had claims against the company.

23 Finally, I note that the franchisees as a group were not considered to be people to be officially served with and included in the CCAA process. I was advised by a representative of the Monitor who was present in court for this appeal, that Mr. Gibbons did send a letter to all franchisees enclosing the original stay order and advising them of the Monitor's website where much of the CCAA material would be posted. Although the process under the Act contemplates the participation and protection of creditors, the debtor company, and possibly the shareholders, in cases where the debtor company is a franchisor, the franchisees may have an interest in the ultimate structure of the franchise operation as proposed by the Plan process. It may therefore be appropriate where a franchisor seeks CCAA protection, to consider whether the franchisees ought to be given notice of the proceedings and the opportunity to request the ability to participate on an appropriate basis.

CONCLUSION

24 Leave to appeal is denied.

FELDMAN J.A.

cp/e/nc/qlsar/qlkjg

Tab 5

Case Name:

Edgewater Casino Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, as amended
AND IN THE MATTER OF Edgewater Casino Inc. and Edgewater Management Inc.
Between
Canadian Metropolitan Properties Corp., Appellant, (Applicant), and
Libin Holdings Ltd., Gary Jackson Holdings Ltd., and Phoebe Holdings Ltd., Respondents, (Respondents)

[2009] B.C.J. No. 174

2009 BCCA 40

265 B.C.A.C. 274

51 C.B.R. (5th) 1

2009 CarswellBC 213

308 D.L.R. (4th) 339

Dockets: CA035922 and CA035924

British Columbia Court of Appeal
Vancouver, British Columbia

R.E. Levine, D.F. Tysoe and D.M. Smith JJ.A.

Heard: January 7, 2009.
Judgment: February 6, 2009.

(31 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Appeal by landlord from the dismissal of its application for leave to appeal from two orders by judge supervising Companies Creditors' Arrangement Act (CCAA) proceedings allowed -- Same test applicable to all other leave applications was to be utilized when considering application for leave to appeal from CCAA order -- Appeals from two orders would not have delayed or otherwise jeopardized reorganization process.

Appeal by the landlord, Canadian Metropolitan Properties, from the dismissal of its application for leave to appeal from two orders pronounced by the judge supervising the Companies Creditors' Arrangement Act (CCAA) proceedings concerning Edgewater. Edgewater commenced the CCAA proceedings and the CCAA judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. The landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the landlord for the utilities it alleged had been improperly charged by the landlord and had been paid by mistake. The CCAA judge determined the property tax and utility disputes summarily in favour of Edgewater.

HELD: Appeal allowed and landlord granted leave to appeal both orders. The same test applicable to all other leave applications was to be utilized when considering an application for leave to appeal from a CCAA order. The plan of arrangement made by Edgewater had been implemented, and appeals from the two orders would not have delayed or otherwise jeopardized the reorganization process. There was no prospect that the outcome of the appeals would have affected the continuing viability of Edgewater. There was no reason to give substantial deference to the CCAA judge. The appeals were not frivolous, and if the utilities dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the CCAA proceeding, and the landlord would have had an appeal as of right.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 18A

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12, s. 13

Court of Appeal Act, RSBC 1996, CHAPTER 77, s. 9(6)

Counsel:

J.J.L. Hunter, Q.C. and J.A. Henshall: Counsel for the Appellant.

J.R. Sandrelli and A. Folino: Counsel for the Respondents.

Reasons for Judgment

The judgment of the Court was delivered by

D.F. TYSOE J.A.:--

Introduction

1 This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

3 The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

4 Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

5 On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

6 The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect

of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

7 By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

8 In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

9 In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

10 In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

11 The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

12 The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

13 The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

> [30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> [31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> [32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (BCCA Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (BCCA Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

14 The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

> [58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold.

> The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

15 The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

16 The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA* proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

17 However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

> (a) whether the point on appeal is of significance to the practice;
> (b) whether the point raised is of significance to the action itself;
> (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (d) whether the appeal will unduly hinder the progress of the action.

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (BCCA Chambers).

18 This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

19 The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are lim-

ited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

20 First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

21 The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing - some refer to *CCAA* proceedings as "real-time" litigation.

22 The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

23 Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

> [13] This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;
> (2) Whether the point raised is of significance to the action itself;
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) Whether the appeal will unduly hinder the progress of the action.
>
> [14] In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the

> proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp., Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc.*, each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

24 As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

25 The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

26 I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

27 I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

28 There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim

would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

29 I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.
2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).
3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.
4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

30 A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

31 I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

D.F. TYSOE J.A.
R.E. LEVINE J.A.:-- I agree.
D.M. SMITH J.A.:-- I agree.

cp/e/qlaxs/qlcnt/qlrxc/qlaxw/qlbrl/qlmxl/qlhcs

Tab 6

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.

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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:

Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury, for the appellant.

Fred D. Cass, John D. McCamus and John J. Longo, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

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 comply

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 recovered 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 custom-

ers, 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.

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(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.

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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.

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

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

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