125 I have been able to identify nothing in the *Superannuation Acts*, the *FAA*, or the *PPRA* that supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the Plan members, with respect to the actuarial surplus — the specific interest at issue here.

126 By contrast, Bill C-78 establishes a legislated undertaking on the part of the Board (the administrator of the new Pension Funds) to act in the best interest of contributors, but only in respect of post-April 1, 2000 contributions. Section 4(1)(*a*) of Bill C-78 provides that the Board is "to manage amounts that are transferred to it ... in the best interests of the contributors and beneficiaries under those Acts". These words are not found in the *Superannuation Acts* in respect of the Superannuation Accounts.

127 I am reinforced in the view that there was no undertaking here by the Chief Justice's comment in *Elder Advocates* that, where the issue relates to the exercise of a government power or discretion, the required undertaking will generally be lacking. As the Chief Justice said, at para. 44, an undertaking of a duty of loyalty by the government

> is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

And further, "[i]f the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it" (para. 45). The *Superannuation Acts* do not. Accordingly, I would conclude that there has been no undertaking to act in accordance with a duty of loyalty with respect to the actuarial surplus at issue here. There is not, therefore, a fiduciary relationship between the government and the Plan members. However, for the sake of completeness, I will consider the other elements of the test.

(3) Were the Plan Members Vulnerable to the Exercise of Discretion by the Government?

128 The second element of an *ad hoc* fiduciary relationship, following *Elder Advocates*, at para. 33, requires (1) a defined *person or class of persons* (i.e., the beneficiary or beneficiaries), who is or are (2) *vulnerable* to the fiduciary, (3) in that the fiduciary has a *discretionary power* over them.

129 In this case, there is no doubt that there is a defined class of persons capable of being the beneficiaries in the alleged fiduciary relationship. The class consists of the current and former employee-contributors and their beneficiaries. The issue is whether the government had a discretionary power over this class of persons in relation to the Superannuation Accounts. Following Bill C-78, the Pension Investment Board and the Treasury Board had clear discretionary powers in relation to the management of the new Pension Funds, including the setting of employee contribution rates (the latter only following January 1, 2004). As the appellants seek an equitable interest in the Superannuation Accounts as they stood on March 31, 2000, the question is whether the government had a discretionary power in relation to the administration of the Superannuation Accounts prior to Bill C-78 coming into force (April 1, 2000).

130 If, as the trial judge found, the *Superannuation Acts* constituted a complete code with respect to the actuarial surplus, the government would have no discretionary power to exercise with respect to the surplus so as to affect any interest the Plan members may have in the surplus. The concept of a "complete code" was discussed in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (S.C.C.). In that case, the Department of Fisheries and Oceans seized and sold spawn that Donald and William Gladstone were accused of attempting to sell in violation of the *Fisheries Act*, R.S.C. 1985, c. F-14. Pursuant to that Act, the Department deposited the net proceeds of the sale in the CRF. The proceedings against the Gladstones were eventually stayed, and the net proceeds from the sale were paid to them. However, the Attorney General refused to pay interest.

131 This Court concluded that the *Fisheries Act* is a "complete code" dealing with the return of seized property (*Gladstone*, at para. 9). Major J. reasoned that the Act "creates a comprehensive framework for dealing with issues arising from seizure" (para. 10). Thus, the Act did not create an obligation on the Crown to pay interest on the proceeds of seized property.

132 I agree with Gillese J.A. that the *Superannuation Acts* were not "complete codes" as these are described in *Gladstone*, before the amendments made by Bill C-78 on April 1, 2000. Prior to that bill coming into force, the *Superannuation Acts* did not address the surpluses in the Superannuation Accounts. While the *Superannuation Acts* dealt with the accounting of deficits, there was no mention of surpluses. Thus, the *FAA* — which gave the President of the Treasury Board and the Minister of Finance discretion to include adjustment accounts in the Public Accounts — was employed to supplement the accounting rules in the *Superannuation Acts* (*FAA*, s. 64(2)(*d*)). The government was entitled to exercise its discretion to amortize the surplus because of the absence of provisions in the *Superannuation Acts* governing the actuarial surpluses. Gillese J.A. correctly concluded that the *Superannuation Acts* were not a complete code prior to April 1, 2000.

133 However, as I have explained, the accounting treatment of the surpluses (the amortization) in respect of which the government exercised a discretion did not alter the accounting balances in the Superannuation Accounts; it only altered the representation of the financial position of the Government of Canada in the Public Accounts.

134 As earlier determined, prior to Bill C-78 coming into force, the government exercised discretion in respect of the surplus in the Public Accounts. Section 63(2) of the *FAA* provides that the Receiver General "shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada". Further, s. 64(2)(*d*) of the *FAA* provides that the Public Accounts shall include "such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada".

135 While the *FAA* requires the Receiver General to present fairly the financial position of Canada, the President of the Treasury Board and the Minister of Finance have flexibility when it comes to establishing the necessary accounts and adjustments. The amortization, which included the creation of the "Estimate of Pension Adjustments" accounts to set off the overstated liabilities (the actuarial surplus) in the Superannuation Accounts, may be seen as an example of a discretionary decision directed at the accurate presentation of the Public Accounts.

136 Prior to Bill C-78, the surpluses reflected in the Superannuation Accounts were left intact. The surpluses were not debited until Bill C-78 required such debiting after April 1, 2000. The amortization in the 1990s was reflected only in the Public Accounts, for the purpose of accurately presenting the true net state of Canada's deficit or surplus and net debt. This was an accounting decision, not a decision going to the substance of the Plan members' entitlements or interests. As the appellants' expert accountant asserted on cross-examination, accounting does not determine the substance of a transaction.

137 I agree that there was a discretionary power exercised in connection with the amortization of the Superannuation Accounts in the 1990s. However, this particular discretion existed for, and was exercised in connection with, the presentation of the Public Accounts, rather than the administration of the Plan members' pensions. The Plan members' entitlement to their statutorily defined benefits, remained unchanged and remained subject to Parliament's legislative prerogative, not the government's discretion. Therefore, the discretion exercised by the government in respect of the Public Accounts was irrelevant to the existence of a fiduciary duty in favour of the Plan members. I conclude that the appellants are unable to establish vulnerability to the government's exercise of discretion.

(4) Did the Plan Members Have a Substantial Legal or Practical Interest in the Actuarial Surplus?

138 In order to establish an *ad hoc* fiduciary relationship, the purported beneficiary must have an "identifiable legal or vital practical interest that is at stake" (*Elder Advocates*, at para. 35). In *Elder Advocates*, the Chief Justice

gave the following examples of sufficient interests: "... property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person" (para. 51). A statutory interest may also qualify in some circumstances: "... a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest" (para. 51).

139 As I have concluded that the Superannuation Accounts do not contain assets, the amortization of the surpluses cannot have put any of the Plan members' legal or equitable interests at risk. However, the Court of Appeal suggested that the members had a vital practical interest at stake. According to that court, "the exercise of Discretion led to the situation where the employees were obliged to contribute more towards the cost of their pensions" (para. 90).

140 Though the Court of Appeal did not finally decide the matter, in my respectful opinion, its perception of the effect of the exercise of discretion on contribution rates is not supported by the evidence. I cannot agree that the amortization or debiting of the Superannuation Accounts caused increases in contribution rates. The government says that in 2006 the Minister started exercising the discretion conferred upon him by Bill C-78 to raise the employee contribution rates up to a maximum of 40 percent of the total required from both employees and the government. In oral argument, the government indicated that during Parliamentary debates on Bill C-78, the government explained that the Minister would be given discretion to increase rates because the contribution ratios between government and Plan members had gone from 60/40, historically, to 70/30, and were projected to go to 80/20. The government indicated that it desired a return to the historical 60/40 contribution rate.

141 In any event, as the Chief Justice explained in *Elder Advocates*, the interest at issue must be a specific private law interest, and the entitlement at stake "must not be contingent on future government action" (para. 51). Federal employees are not entitled to any specific contribution rate, whether the contribution is determined by Parliament (as it was prior to January 1, 2004), or by the Treasury Board (starting January 1, 2004). The Plan members did not have a specific private law interest in any prescribed contribution rates such as to ground a fiduciary duty.

(5) Conclusion on Fiduciary Relationship

142 For these reasons, I conclude that there was no *ad hoc* fiduciary relationship between the government and the Plan members with respect to the actuarial surplus reflected in the Superannuation Accounts. Most importantly, the government did not undertake, either expressly or impliedly, to act in the best interests of the Plan members with respect to the actuarial surplus. Without such an undertaking of loyalty in favour of these particular stakeholders, the government's duty was to act in the best interests of society as a whole. This is inconsistent with the existence of a fiduciary duty. Moreover, while the government exercised discretion in its accounting treatment of the surpluses in the Superannuation Accounts, the Plan members were not vulnerable to that discretion, nor did they have any legal or practical interest at stake. The effect of the amortization was to disclose more accurately Canada's actual pension obligations, not to affect Plan members' statutory entitlements under the Plans.

C. Should a Constructive Trust Be Imposed Over the Balances in the Superannuation Accounts as of March 31, 2000?

(1) Equitable Obligation

143 In order to succeed, the appellants must establish that they have an equitable interest in the actuarial surplus reflected in the Superannuation Accounts, as their legal interest is limited to their entitlement to statutorily defined benefits. They have not pursued their express trust argument on appeal; they have not argued that a resulting trust has arisen in their favour; therefore, a constructive trust is the only basis upon which an "equitable interest" might be recognized in the actuarial surplus (A. F., at para. 142).

144 Since this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment. The appellants have argued both in this appeal.

145 In *Soulos*, McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.

146 Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [*Soulos*, at para. 45]

147 I have found that the government was not subject to a fiduciary obligation in relation to its management of the Plans, and the appellants have not argued that the government has breached any other equitable obligation that it had to the Plan members. The appellants' argument fails on the first requirement of the *Soulos* test. I therefore turn to the other basis on which a constructive trust may be imposed: unjust enrichment.

(2) Unjust Enrichment

148 As this Court found in *Elder Advocates*, it is possible to claim unjust enrichment against the government (provided the issue is not restitution for taxes paid under an *ultra vires* statute).

149 In order to prove a claim in unjust enrichment, the plaintiff must establish: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) ("*Pacific National*"), at para. 14). Where these elements are satisfied, the remedy of constructive trust may be available, if (1) "monetary damages are inadequate", and (2) "there is a link between the contribution that founds the action and the property in which the constructive trust is claimed" (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 988).

150 As Binnie J. explained in *Pacific National*, at para. 15, "[a]n enrichment may 'connot[e] a tangible benefit' ..., or it can be relief from a 'negative', such as saving the defendant from an expense he or she would otherwise have been *required* to make" (emphasis in original).

151 Following this Court's decision in *Peter v. Beblow*, the enrichment must correspond with a deprivation from the plaintiff. While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), cited by Cory J. in his concurring reasons in *Peter v. Beblow*, at p. 1012, the enrichment and the detriment are "essentially two sides of the same coin".

152 The "straightforward economic approach", as described in *Pacific National*, to enrichment and detriment, is properly understood to connote a transfer of wealth from the plaintiff to the defendant (para. 20). As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant.

153 Accordingly, the first inquiry is not whether the government was somehow enriched or benefitted by amortizing or removing the surpluses in the Superannuation Accounts. Rather, the question is whether the government was enriched at the appellants' expense. Even if it could be shown that the government benefited in some way by reducing the stated financial obligations of Canada, it would not assist the appellants unless the gain corresponded to the appellants' loss.

154 As the Superannuation Accounts are mere accounting records, and do not contain assets in which the appellants have an interest, no enrichment and corresponding deprivation can be found in either (1) the government's decision prior to April 1, 2000, to amortize the surpluses for accounting purposes under the *FAA*, or (2) Parliament's decision to enact Bill C-78 to require the debiting of a portion of the surplus directly from the Accounts.

155 The Court of Appeal found that there was no enrichment because "whatever benefit there was to such actions enured to all Canadian taxpayers" (para. 106). I do not understand the nature of the inquiry in the same way. The enrichment and corresponding deprivation elements ask whether there was a transfer of wealth from the plaintiff to the defendant. The fact that the defendant is a public body is irrelevant to whether such a transfer of wealth took place. Indeed, this reasoning would have the effect of insulating the government from any claim for unjust enrichment.

156 The Court of Appeal indicated that there might have been a deprivation because the government's actions "were detrimental to plan members if for no other reason than the fact that those actions apparently led to increases in plan member contribution rates" (para. 107). As I observed in connection with the issue of whether the Superannuation Accounts contained assets, the evidence does not support such an alleged deprivation.

157 Further, if the increase in contribution rates did constitute a deprivation, the corresponding enrichment could only be the additional deductions taken from employee pay cheques following the rate hikes, and not the amount of the surpluses amortized and removed. But the appellants have sought a declaration that they have an equitable interest in the balances in the Superannuation Accounts as at March 31, 2000, and not the return of the increased contributions after Bill C-78 came into force. Accordingly, on the argument that increased contribution rates constituted a deprivation, there is no link between the alleged deprivation and the property right they seek, the return of the amortized surplus and subsequently debited surplus.

158 I conclude that there was no enrichment and corresponding deprivation, and that the appellants have not established a *prima facie* case of unjust enrichment. The third branch of the test for unjust enrichment, the absence of a juristic reason for the enrichment, need not be analyzed.

D. Did Bill C-78 Authorize the Government to Debit the Actuarial Surpluses in the Superannuation Accounts?

159 The courts below ruled that any interest Plan members had in the balances and surpluses in the Superannuation Accounts was extinguished by Bill C-78. The appellants have argued that Bill C-78 did not disclose an explicit intention to expropriate their interest, on the basis of the presumption against expropriation without compensation in statutory interpretation (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 478-82).

160 In *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 (S.C.C.), this Court affirmed the principle that "potentially confiscatory legislation ought to be construed cautiously so as not to strip individuals of their rights without the legislation being clear as to this intent" (para. 26). In order to confiscate an interest, Parliament must "express [it]self extremely clearly where there is an intention to expropriate or confiscate without compensation" (para. 26).

161 I have concluded that the courts below did not err in determining that the Plan members have no equitable interest in the surpluses in the Superannuation Accounts. Bill C-78 thus could not have expropriated the Plan members' property. Further, I would agree with the courts below that s. 44(9) to (13) of the *PSSA* are unambiguous in establishing that the Minister *may* debit any actuarial surplus and *must* debit all amounts exceeding 110 percent of the estimated liability under the Plans.

162 Moreover, it is "extremely clea[r]" that Parliament did not intend any compensation to be given to the Plan members for these debits, whether or not this constituted expropriation. It would be absurd to read Bill C-78 as requiring the government to debit excess amounts and then compensate the Plan members for the amounts debited. Such an interpretation would be to convert the relevant provisions of Bill C-78 into a distribution mechanism — where the surpluses would be reduced and the Plan members would receive some form of compensation in lieu of having surpluses in the Accounts — which was quite clearly not Parliament's intent. If s. 44(9) to (13) amount to confiscatory legislation, the intention was to confiscate without compensation.

163 The corresponding amendments to the *CFSA* (s. 55(9) to (13)) and the *RCMPSA* (s. 29(9) to (13)) are to the same effect, and are equally clear.

VI. Conclusion

164 The Superannuation Accounts are legislated records and do not contain assets in which the appellants have a legal or equitable interest. The Plan members' interests are limited to their interest in the defined benefits to which they are entitled under the Plans. The government was not under a fiduciary obligation to the Plan members, nor was it unjustly enriched by the amortization and removal of the pension surpluses. Finally, the Plan members had no legal or equitable interest in the actuarial surplus reflected in the Superannuation Accounts to be expropriated by Bill C-78.

165 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

2. (1) The following definitions apply in this Act.

. . . . .

"employee", except in Part 2, means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;

(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;

(e) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;

(f) a person employed on a casual basis;

(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(h) a person employed by the Board;

(i) a person who occupies a managerial or confidential position; or

(j) a person who is employed under a program designated by the employer as a student employment program.

. . . . .

"public service", except in Part 3, means the several positions in or under

(a) the departments named in Schedule I to the *Financial Administration Act*;

(b) the other portions of the federal public administration named in Schedule IV to that Act; and

(c) the separate agencies named in Schedule V to that Act.

. . . . .

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if

(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or

(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

Public Service Superannuation Act, R.S.C. 1985, c. P-36

4. (1) Subject to this Part, an annuity or other benefit specified in this Part shall be paid to or in respect of every person who, being required to contribute to the Superannuation Account or the Public Service Pension Fund in accordance with this Part, dies or ceases to be employed in the public service, which annuity or other benefit shall, subject to this Part, be based on the number of years of pensionable service to the credit of that person.

(2) The Superannuation Account, established in the accounts of Canada pursuant to the *Superannuation Act*, is hereby continued.

. . . . .

43. (1) All amounts required for the payment of benefits for which this Part and Part III make provision shall be paid out of the Superannuation Account if the benefits are payable in respect of pensionable service to the credit of a contributor before April 1, 2000.

(2) The amounts deposited in the Public Service Superannuation Investment Fund under subsection 44.1(2) shall be transferred to the Public Sector Pension Investment Board within the meaning of the *Public Sector Pension Investment Board Act* to be dealt with in accordance with that Act.

(3) If there are insufficient amounts in the Superannuation Account to pay all the benefits referred to in subsection (1), the amounts required for the payment of those benefits shall be charged to the Public Service Superannuation Investment Fund and paid out of the assets of the Public Sector Pension Investment Board.

. . . . .

44. (1) There shall be credited to the Superannuation Account in each fiscal year

(a) [Repealed, 1999, c. 34, s. 95]

(b) in respect of every month, such amount in relation to the total amount paid into the Account during the preceding month by way of contributions in respect of past service as is determined by the Minister; and

(c) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 46 of the *Public Service Superannuation Regulations*, as that section read on March 31, 1991.

(2) to (5) [Repealed, 1999, c. 34, s. 95]

(6) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there shall be credited to the Account, at the time and in the manner set out in subsection (7), the amount that in the opinion of the Minister will, at the end of the fifteenth fiscal year following the tabling of that report or at the end of the shorter period that the Minister may determine, together with the amount that the Minister estimates will be to the credit of the Account and the Public Service Superannuation Investment Fund at that time, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(7) Subject to subsection (8), the amount required to be credited to the Superannuation Account under subsection (6) shall be divided into equal annual instalments and the instalments shall be credited to the Account over a period of fifteen years, or such shorter period as the Minister may determine, with the first such instalment to be credited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(8) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (7), the instalments remaining to be credited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(9) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there may be debited from the Account, at the time and in the manner set out in subsection (11), an amount that in the opinion of the Minister exceeds the amount that the Minister estimates, based on the report, will be required to be to the credit of the Account and the Public Service Superannuation Investment Fund at the end of the fifteenth fiscal year following the tabling of that report or at the end of a shorter period that the Minister may determine, in order to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(10) If the total of the amounts in the Account and in the Fund referred to in subsection (9) exceeds, following the laying of the report referred to in that subsection, the maximum amount referred to in subsection (13), there shall be debited from the Account, at the time and in the manner set out in subsection (11), the amount of the excess.

(11) Subject to subsection (12), the amount that may be debited under subsection (9) and the amount that must be debited under subsection (10) shall be debited in annual instalments over a period of fifteen years, or a shorter period that the Minister may determine, with the first such instalment to be debited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(12) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (11), the instalments remaining to be debited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and

the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(13) At the end of the period, the total of the amounts that are to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund must not exceed one hundred and ten percent of the amount that the Minister estimates is required to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(14) The costs of the administration of this Act, as determined by the Treasury Board, with respect to benefits payable under this Act in respect of pensionable service that is to the credit of contributors before April 1, 2000, shall be paid out of the Superannuation Account.

Public Sector Pension Investment Board Act, S.C. 1999, c. 34

4. (1) The objects of the Board are

(a) to manage amounts that are transferred to it under subsections 54(2) and 55.2(5) and section 59.4 of the *Canadian Forces Superannuation Act*, subsections 43(2) and 44.2(5) of the *Public Service Superannuation Act* and subsections 28(2) and 29.2(5) of the *Royal Canadian Mounted Police Superannuation Act* in the best interests of the contributors and beneficiaries under those Acts; and

(b) to invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the funding, policies and requirements of the pension plans established under the Acts referred to in paragraph (*a*) and the ability of those plans to meet their financial obligations.

(2) The costs associated with the operation of the Board shall be paid out of the funds.

(3) The Minister shall determine from which funds the costs shall be paid, but no amount shall be taken out of the Canadian Forces Pension Fund or the Canadian Forces Superannuation Investment Fund — or, if regulations are made under section 59.1 of the *Canadian Forces Superannuation Act*, from the fund referred to in section 59.3 of that Act — without consulting the Minister of National Defence, or from the Royal Canadian Mounted Police Pension Fund or the Royal Canadian Mounted Police Superannuation Investment Fund without consulting the Minister of Public Safety and Emergency Preparedness.

Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.)

7. Where, in the review of a pension plan, actuarial assumptions or methods are used that differ from those used for the immediately preceding review in respect of which a cost certificate was filed pursuant to section 5 and such different assumptions or methods result

(a) in a decrease in the going concern unfunded actuarial liability but do not result in an excess of going concern assets over the going concern actuarial liabilities, the outstanding special payments shall be recalculated by multiplying each of the amounts thereof by a factor having, as numerator, the going concern unfunded actuarial liability and, as denominator, the sum of the present values of the previously determined special payments where the present values are calculated on the basis of the actuarial assumptions used at the current review; or

(b) in an excess of the going concern assets over the going concern actuarial liabilities, the valuation report referred to in section 6 shall include a statement as to the method, if any, proposed for the disposition of such excess.

8. (1) The Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, ... the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police*

Superannuation Act ... to be made and a report thereof to be filed with the Minister at the same time as a cost certificate is filed pursuant to subsection 5(1).

(2) The certification and the assets report referred to in subsection (1) shall be made by the Comptroller General of Canada.

9. (1) The Minister shall lay before Parliament any cost certificate, valuation report or assets report filed with the Minister pursuant to this Act, within thirty sitting days of their being filed if Parliament is then sitting, or if Parliament is not then sitting, on any of the first thirty days thereafter that Parliament is sitting.

Financial Administration Act, R.S.C. 1985, c. F-11

2. In this Act,

. . . . .

"Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

. . . . .

"money" includes negotiable instruments;

"negotiable instrument" includes any cheque, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument;

. . . . .

"public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

(b) money borrowed by Canada or received through the issue or sale of securities,

(c) money received or collected for or on behalf of Canada, and

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

. . . . .

17. (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

(2) The Receiver General may establish, in the name of the Receiver General, accounts for the deposit of public money with

(a) any member of the Canadian Payments Association;

(b) any local cooperative credit society that is a member of a central cooperative credit society having membership in the Canadian Payments Association;

(c) any fiscal agent that the Minister may designate; and

(d) any financial institution outside Canada that the Minister may designate.

. . . . .

(4) Subject to any regulations made under subsection (5), every person employed in the collection or management of, or charged with the receipt of, public money and every other person who collects or receives public money shall pay that money to the credit of the Receiver General.

. . . . .

63. (1) Subject to regulations of the Treasury Board, the Receiver General shall cause accounts to be kept in such manner as to show

(a) the expenditures made under each appropriation;

(b) the revenues of Canada; and

(c) the other payments into and out of the Consolidated Revenue Fund.

(2) The Receiver General shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada.

(3) The accounts of Canada shall be kept in the currency of Canada.

64. (1) A report, called the Public Accounts, shall be prepared by the Receiver General for each fiscal year and shall be laid before the House of Commons by the President of the Treasury Board on or before December 31 next following the end of that fiscal year or, if the House of Commons is not then sitting, on any of the first fifteen days next thereafter that the House of Commons is sitting.

(2) The Public Accounts shall be in such form as the President of the Treasury Board and the Minister may direct, and shall include

(a) a statement of

(i) the financial transactions of the fiscal year,

(ii) the expenditures and revenues of Canada for the fiscal year, and

(iii) such of the assets and liabilities of Canada as, in the opinion of the President of the Treasury Board and the Minister, are required to show the financial position of Canada as at the termination of the fiscal year;

(b) the contingent liabilities of Canada;

(c) the opinion of the Auditor General of Canada as required under section 6 of the *Auditor General Act*; and

(d) such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada or as are required by this Act or any other Act of Parliament to be shown in the Public Accounts.

End of Document

11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hope v. Parkdale No. 498 (Rural Municipality) | 2016 SKCA 19, 2016 CarswellSask 78, 476 Sask. R. 10, 666 W.A.C. 10, 263 A.C.W.S. (3d) 229, 396 D.L.R. (4th) 84, 48 M.P.L.R. (5th) 91 | (Sask. C.A., Feb 10, 2016)

2004 SCC 25, 2004 CSC 25
Supreme Court of Canada

Garland v. Consumers' Gas Co.

2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 2004 CSC 25, [2004] 1 S.C.R. 629, [2004] A.C.S. No. 21, [2004] S.C.J. No. 21, 130 A.C.W.S. (3d) 32, 186 O.A.C. 128, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 72 O.R. (3d) 80 (note), 72 O.R. (3d) 80, 9 E.T.R. (3d) 163, J.E. 2004-931, REJB 2004-60672

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

Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: October 9, 2003
Judgment: April 22, 2004 *
Docket: 29052

Proceedings: reversing (2001), 19 B.L.R. (3d) 10 (Ont. C.A.); affirming (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.); and reversing (2000), 2000 CarswellOnt 1673 (Ont. S.C.J.); additional reasons to (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.)

Counsel: Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury for appellant
Fred D. Cass, John D. McCamus and John J. Longo for respondent
Christopher M. Rupar for intervener Attorney General of Canada
Thomson Irvine for intervener Attorney General for Saskatchewan
Alan H. Mark and Kelly L. Friedman for intervener Toronto Hydro-Electric System Limited
Mark M. Orkin, Q.C., for intervener Law Foundation of Ontario
Patricia D.S. Jackson and M. Paul Michell for intervener Union Gas Limited

Subject: Criminal; Public; Restitution

Headnote

Public utilities --- Operation of utility — Collection of utility charges — General

Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.

Restitution --- General principles — Bars to recovery — Miscellaneous issues

Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.

Public utilities --- Actions by and against public utilities — Practice and procedure — General

Plaintiff in action against gas company for restitution of late payment penalties entitled to his costs throughout.

Services publics --- Exploitation d'un service public — Recouvrement des redevances aux services publics — En général

Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie de gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.

Restitution --- Principes généraux — Motifs empêchant le recouvrement — Questions diverses

Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie du gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.

Services publics --- Actions intentées par ou contre les services publics — Procédure — En général

Demandeur dans le cadre de l'action qu'il avait intentée contre la compagnie de gaz afin d'obtenir la restitution des pénalités pour paiement en retard avait droit aux dépens devant toutes les cours.

The plaintiff brought a class action on behalf of more than 500,000 customers of a gas company. He claimed that the late payment penalties charged by the gas company on overdue payments violated s. 347 of the Criminal Code. The case reached the Supreme Court of Canada, which held that the penalties constituted the charging of a criminal rate of interest contrary to s. 347 of the Code. The plaintiff brought a second action claiming restitution for unjust enrichment of charges received by the gas company in violation of s. 347. The gas company moved for summary judgment dismissing this action. The motions judge granted the gas company's motion, finding that the action was a collateral attack on the order of the Ontario Energy Board, which had approved the creation of the late payment penalties. The plaintiff appealed. The appeal was dismissed. A majority of the Ontario Court of Appeal disagreed with the motions judge's reasons but held that the plaintiff's unjust enrichment claim could not be made out. The plaintiff appealed.

Held: The appeal was allowed.

The receipt of late payment penalties by the gas company constituted unjust enrichment giving rise to a restitutionary claim. The gas company was ordered to repay those penalties, collected from 1994 forward, that were in excess of the interest limit set out in s. 347 of the Criminal Code.

When money is transferred from plaintiff to defendant, there is an enrichment. Without doubt, the gas company received the money from the late payment penalties and the money was available to it to carry on its business. The availability of that money constituted a benefit to the gas company and there was no juristic reason for the enrichment.

The proper approach to the juristic reason analysis has two parts. First, the plaintiff must show that there is no juristic reason from an established category, such as a contract or a disposition of law, to deny recovery. If there is no juristic reason, then the plaintiff has made out a prima facie case. The prima facie case can be rebutted if the defendant demonstrates another reason to deny recovery. A de facto burden of proof is placed on the defendant to show why the enrichment should be retained.

In this case, the only possible juristic reason from an established category (disposition of law) that could be used to justify the enrichment was the existence of Ontario Energy Board orders creating the late payment penalties. The

orders were not a juristic reason for the enrichment, however, because they were rendered inoperative to the extent of their conflict with s. 347 of the Criminal Code. The plaintiff had made out a prima facie case for unjust enrichment and it fell to the gas company to show a juristic reason for the enrichment outside the established categories.

From 1981 to 1994 the gas company's reliance on the inoperative orders of the Ontario Energy Board provided a juristic reason for the enrichment. Section 347 of the Criminal Code was enacted in 1981 and the action was commenced in 1994. Between 1981 and 1994 no suggestion could be made that the gas company knew that the late payment penalties violated s. 347 of the Code. The gas company's reliance on the board's orders in the absence of actual or constructive notice that the orders were inoperative was sufficient to provide a juristic reason for the enrichment during this period. When the plaintiff commenced the first action in 1994, however, the gas company was put on notice that it might be violating the Code. This possibility became a reality in 1998, when the Supreme Court of Canada held, in the first action, that the late payment penalties were in excess of the s. 347 limits. After the gas company was put on notice of a serious possibility of a Criminal Code violation, the gas company could no longer reasonably rely on the board's orders to authorize the penalties. After the commencement of the action in 1994, there was no longer a juristic reason for the enrichment of the gas company. After 1994 the plaintiff was entitled to restitution of the portion of the penalties paid that exceeded the 60 per cent rate of interest set out in s. 347 of the Criminal Code.

The gas company could not rely on the defence of change of position. The penalties were obtained in contravention of the Criminal Code and, as a result, it could not be unjust for the gas company to have to return them.

Neither could the gas company rely on the defence set out in s. 25 of the Ontario Energy Board Act. This defence must be read down to exclude protection from civil liability that arises out of Criminal Code violations.

The doctrines of exclusive jurisdiction and collateral attack were likewise not defences on which the gas company could rely. The Ontario Energy Board did not have exclusive jurisdiction over this dispute. Although the dispute involved rate orders, at its heart it was a private law matter within the competence of the civil courts and the board had jurisdiction to order the remedy sought by the plaintiff. Furthermore, the action did not constitute an impermissible collateral attack on the board's orders. The object of the plaintiff's action was not to invalidate or render inoperable the board's orders but rather to recover money that had been illegally collected by the gas company as a result of the board orders. The plaintiff was not the object of the orders, and he was not seeking to avoid the orders by bringing the action.

The regulated industries defence was unavailable to the gas company. The language in s. 347 of the Criminal Code does not support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state.

Because the gas company was not a government official acting under colour of authority, it could not rely on the de facto doctrine to exempt it from liability. The underlying purpose of the de facto doctrine is to preserve law and order and the authority of the government. Those interests were not at stake in this litigation.

A preservation order was not appropriate. The gas company had ceased to collect the late payment penalties at a criminal rate and, if a preservation order was made, there were no future late payment penalties to which it could attach. For those late payment penalties paid between 1994 and 2004, a preservation order would serve no practical purpose. The plaintiff did not allege that the gas company was impecunious or that there was any reason to believe that it would not satisfy a judgment against it. Furthermore, the plaintiff did not satisfy the criteria set out in R. 45.02 of the Rules of Civil Procedure.

The plaintiff was entitled to his costs of all the proceedings throughout, regardless of the outcome of any future litigation.

Le demandeur a exercé un recours collectif au nom de plus de 500 000 clients d'une compagnie de gaz. Il a soutenu que les pénalités pour paiement en retard imposées par la compagnie à l'égard des paiements dus contrevenaient à l'art. 347 du Code criminel. L'affaire s'est rendue jusqu'en Cour suprême du Canada, qui a statué que les pénalités pour paiement en retard constituaient un taux d'intérêt criminel contrevenant à l'art. 347 du Code. Le demandeur a intenté une deuxième action, cette fois en restitution pour enrichissement sans cause des pénalités pour paiement en retard perçues par la compagnie en contravention de l'art. 347. La compagnie a présenté une requête en jugement sommaire afin d'obtenir le rejet de la deuxième action. Le juge saisi de la requête de la compagnie l'a accueillie au motif qu'il s'agissait d'une contestation indirecte de l'ordonnance de la Commission de l'énergie de l'Ontario approuvant la création des pénalités pour paiement en retard. Le demandeur a interjeté appel. Le pourvoi a été rejeté. Les juges majoritaires de la Cour d'appel étaient en désaccord avec les motifs du premier juge, mais ils ont quand même estimé que l'enrichissement sans cause n'avait pas été établi. Le demandeur a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

La perception par la compagnie des pénalités pour paiement en retard constituait un enrichissement sans cause donnant ouverture à une demande de restitution. La compagnie s'est vu ordonner de rembourser les pénalités payées à partir de 1994, lesquelles excédaient le taux d'intérêt maximal prévu par l'art. 347 du Code criminel.

Le transfert d'un montant d'argent du demandeur au défendeur constitue un enrichissement. Il n'y avait aucun doute que la compagnie avait perçu l'argent provenant des pénalités et qu'elle aurait pu l'utiliser dans l'exploitation de son entreprise. La disponibilité de l'argent constituait un avantage pour la compagnie et il n'existait aucun motif juridique pouvant justifier un tel enrichissement.

Il convient de scinder en deux l'étape de l'analyse du motif juridique. Premièrement, le demandeur doit démontrer qu'il n'existe aucun motif juridique appartenant à une catégorie établie permettant de refuser le recouvrement. S'il n'existe aucun motif juridique appartenant à une catégorie établie, alors le demandeur a prouvé sa cause de façon prima facie. Le défendeur peut réfuter la preuve prima facie en démontrant qu'il existe une autre raison justifiant de refuser le recouvrement. Le défendeur a l'obligation de facto de démontrer pourquoi il devrait conserver ce dont il s'est enrichi.

En l'espèce, le motif juridique appartenant à une catégorie établie (disposition légale) qui pouvait servir à justifier l'enrichissement était l'existence des ordonnances de la Commission de l'énergie de l'Ontario ayant créé les pénalités pour paiement en retard. Ces ordonnances ne constituaient cependant pas un motif juridique justifiant l'enrichissement puisqu'elles étaient inopérantes dans la mesure où elles entraient en conflit avec l'art. 347 du Code criminel. Le demandeur avait prouvé l'enrichissement sans cause de façon prima facie et c'était alors à la compagnie qu'il revenait de démontrer l'existence d'un motif juridique n'appartenant pas aux catégories qui puisse justifier l'enrichissement.

Le fait que, à partir de 1981 jusqu'en 1994, la compagnie se soit fondée sur les ordonnances inopérantes de la CEO était un motif juridique justifiant l'enrichissement. L'article 347 du Code criminel a été adopté en 1981 et cette action a été intentée en 1994. Rien ne prouvait que la compagnie savait, entre 1981 et 1994, que les pénalités contrevenaient à l'art. 347 du Code. Le fait que la compagnie se soit fondée sur les ordonnances de la Commission, sans savoir véritablement ou vraisemblablement qu'elles étaient inopérantes, suffisait pour fournir un motif juridique justifiant l'enrichissement pendant cette période. La compagnie a par ailleurs été avisée de la possibilité qu'elle puisse contrevenir au Code lorsque le demandeur a intenté son action en 1994. Cette possibilité est

devenue réalité lorsque la Cour suprême du Canada a statué, dans le cadre de la première action, que les pénalités excédaient les limites de l'art. 347. Dès que la compagnie a été avisée qu'il existait une réelle possibilité que les pénalités puissent violer le Code, elle ne pouvait alors plus raisonnablement se fonder sur les ordonnances de la Commission pour autoriser les pénalités. Elle n'avait donc plus de motif juridique justifiant l'enrichissement dès après l'institution de l'action en 1994. Le demandeur avait donc droit, à partir de 1994, à la restitution de la portion des pénalités payées qui excédaient le taux d'intérêt de 60 pour cent prévu par l'art. 347 du Code criminel.

La compagnie ne pouvait invoquer le moyen de défense fondé sur le changement de situation. Les pénalités ont été obtenues en contravention du Code criminel et, par conséquent, il ne pouvait être injuste pour la compagnie d'avoir à les rembourser.

La compagnie ne pouvait non plus invoquer le moyen de défense prévu par l'art. 25 de la Loi sur la Commission de l'énergie de l'Ontario. Ce moyen de défense doit recevoir une interprétation stricte afin de pouvoir exclure la protection contre la responsabilité civile pouvant découler de contraventions au Code criminel.

La compagnie ne pouvait pas non plus invoquer les théories de la compétence exclusive et de la contestation indirecte. La Commission de l'énergie de l'Ontario n'avait pas compétence exclusive à l'égard du litige. Même si ce dernier impliquait des ordonnances en matière de taux, il portait principalement sur une question de droit privée relevant de la compétence des tribunaux civils, et la Commission n'avait pas compétence pour ordonner la réparation demandée par le demandeur. De plus, l'action ne constituait pas une contestation indirecte inacceptable des ordonnances de la Commission. L'action du demandeur ne visait pas à obtenir que les ordonnances de la Commission soient invalidées ou déclarées inopérantes, mais plutôt à obtenir le recouvrement de l'argent illégalement perçu par la compagnie en raison des ordonnances de la Commission. Le demandeur n'était pas régi par les ordonnances et il n'y avait aucune crainte qu'il ait cherché à éviter les ordonnances en intentant l'action.

Le moyen de défense fondé sur la réglementation de l'industrie ne pouvait non plus être invoqué par la compagnie. Rien dans l'art. 347 du Code criminel ne pouvait appuyer la théorie qu'un régime de réglementation provincial ne pouvait être contraire à l'intérêt public ni constituer une infraction contre l'État.

La compagnie n'était pas un fonctionnaire qui agissait avec une apparence d'autorité et ne pouvait donc se fonder sur le principe de la validité de facto pouvant l'exonérer de toute responsabilité. L'objectif sous-jacent du principe de la validité de facto était d'assurer le respect de la loi et l'ordre ainsi que de l'autorité du gouvernement. De tels intérêts n'étaient pas en jeu dans ce litige.

Il n'était pas approprié d'accorder une ordonnance de conservation. La compagnie avait cessé de percevoir les pénalités pour paiement en retard qui étaient à un taux criminel; une telle ordonnance ne pouvait se rattacher à aucune pénalité à venir. Quant aux pénalités payées de 1994 à 2004, une ordonnance de conservation ne serait d'aucune utilité pratique. Le demandeur n'a pas allégué que la compagnie était démunie ou qu'il existait des raisons de croire qu'elle n'exécuterait pas un jugement rendu contre elle. De plus, le demandeur n'a pas satisfait au critère énoncé dans la règle 45.02 des Règles de procédure civile.

Le demandeur avait droit aux dépens devant toutes les cours, quelle que soit l'issue de tout autre litige ultérieur.

Table of Authorities

Cases considered by *Iacobucci J.*:

Amax Potash Ltd. v. Saskatchewan, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 11 N.R. 222, 71 D.L.R. (3d) 1, 1976 CarswellSask 76, 1976 CarswellSask 115 (S.C.C.) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — followed

Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275, 8 C.P.C. 100, 90 D.L.R. (3d) 481, 23 N.R. 298, 1978 CarswellOnt 462, 1978 CarswellOnt 596 (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia), 1982 CarswellBC 133, 1982 CarswellBC 743, [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1 (S.C.C.) — considered

Garland v. Consumers' Gas Co., 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, 114 O.A.C. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77, [1998] 3 S.C.R. 112 (S.C.C.) — considered

Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, [1991] 3 W.L.R. 10, [1992] 4 All E.R. 512 (U.K. H.L.) — considered

M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., 1999 CarswellMan 368, 1999 CarswellMan 369, [1999] 9 W.W.R. 356, 176 D.L.R. (4th) 585, 245 N.R. 165, [1999] 2 S.C.R. 961, 35 C.P.C. (4th) 1, 138 Man. R. (2d) 161, 202 W.A.C. 161 (S.C.C.) — referred to

Mack v. Canada (Attorney General), 2002 CarswellOnt 2927, 217 D.L.R. (4th) 583, 96 C.R.R. (2d) 254, 60 O.R. (3d) 737, 60 O.R. (3d) 756, 165 O.A.C. 17, 24 Imm. L.R. (3d) 1 (Ont. C.A.) — referred to

Mahar v. Rogers Cablesystems Ltd., 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690, 1995 CarswellOnt 1195 (Ont. Gen. Div.) — referred to

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — referred to

Oldfield v. Transamerica Life Insurance Co. of Canada, 2002 SCC 22, 2002 CarswellOnt 724, 2002 CarswellOnt 725, 210 D.L.R. (4th) 1, [2002] I.L.R. I-4058, 284 N.R. 104, 35 C.C.L.I. (3d) 165, 156 O.A.C. 310, 59 O.R. (3d) 160 (note), [2002] 1 S.C.R. 742 (S.C.C.) — referred to

Ontario Hydro v. Kelly, 159 D.L.R. (4th) 543, 1998 CarswellOnt 1695, 39 O.R. (3d) 107, 17 C.C.P.B. 186, 8 Admin. L.R. (3d) 128 (Ont. Gen. Div.) — referred to

Peel (Regional Municipality) v. Canada, (sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 1992 CarswellNat 659 (S.C.C.) — followed

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

R. v. Jorgensen, 43 C.R. (4th) 137, 102 C.C.C. (3d) 97, 129 D.L.R. (4th) 510, 189 N.R. 1, 87 O.A.C. 1, 32 C.R.R. (2d) 189, (sub nom. *R. v. Hawkins)* 25 O.R. (3d) 824, 1995 CarswellOnt 1185, [1995] 4 S.C.R. 55, 1995 CarswellOnt 985 (S.C.C.) — followed

R. v. Litchfield, 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — followed

RBC Dominion Securities Inc. v. Dawson, 111 D.L.R. (4th) 230, 114 Nfld. & P.E.I.R. 187, 356 A.P.R. 187, 1994 CarswellNfld 308 (Nfld. C.A.) — referred to

Reference re Excise Tax Act (Canada), (sub nom. *Reference re Goods & Services Tax)* 2 Alta. L.R. (3d) 289, (sub nom. *Reference re Goods & Services Tax)* 20 W.A.C. 161, (sub nom. *Reference re Bill C-62)* [1992] G.S.T.C. 2, (sub nom. *Reference re Goods & Services Tax)* [1992] 4 W.W.R. 673, (sub nom. *Reference re Goods & Services Tax)* 138 N.R. 247, (sub nom. *Reference re Goods & Services Tax)* 127 A.R. 161, (sub nom. *Reference re Goods & Services Tax)* [1992] 2 S.C.R. 445, (sub nom. *Reference re Goods & Services Tax (Alberta))* 94 D.L.R. (4th) 51, (sub nom. *Reference re GST Implementing Legislation)* 5 T.C.T. 4165, 1992 CarswellAlta 61, 1992 CarswellAlta 469 (S.C.C.) — referred to

Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 59 N.R. 321, 35 Man. R. (2d) 83, 1985 CarswellMan 183, 1985 CarswellMan 450 (S.C.C.) — considered

Sharwood & Co. v. Municipal Financial Corp., 2001 CarswellOnt 749, 197 D.L.R. (4th) 477, 12 B.L.R. (3d) 219, 142 O.A.C. 350, 53 O.R. (3d) 470 (Ont. C.A.) — referred to

Sprint Canada Inc. v. Bell Canada, 1997 CarswellOnt 4135, 79 C.P.R. (3d) 31 (Ont. Gen. Div.) — referred to

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd., [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 5 N.R. 23, 55 D.L.R. (3d) 1, 1975 CarswellSask 56, 1975 CarswellSask 97 (S.C.C.) — considered

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276 (S.C.C.) — referred to

Transport North American Express Inc. v. New Solutions Financial Corp., 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 40 B.L.R. (3d) 18, 316 N.R. 84, 235 D.L.R. (4th) 385, [2004] 1 S.C.R. 249, [2004] S.C.J. No. 9, 70 O.R. (3d) 255 (note), 18 C.R. (6th) 1, 17 R.P.R. (4th) 1, 183 O.A.C. 342 (S.C.C.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64
art. 1493 — referred to

art. 1494 — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91 ¶ 19 — referred to

s. 91 ¶ 27 — referred to

s. 92 ¶ 13 — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 15 — considered

s. 347 — referred to

s. 347(1) — considered

s. 347(1)(b) — referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55
Generally — referred to

Ontario Energy Board Act, R.S.O. 1990, c. O.13
Generally — referred to

s. 18 — considered

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B
s. 25 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 45.02 — considered

APPEAL by plaintiff from judgment reported at 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), dismissing plaintiff's appeal from judgment granting gas company's motion to dismiss action against it.

POURVOI du demandeur à l'encontre de l'arrêt publié à 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la requête de la compagnie de gaz en rejet de l'action intentée contre elle.

***Iacobucci J.*:**

1 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 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 5 per cent 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 5 per cent, 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 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 (S.C.C.) ("*Garland #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 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, Sched. 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 (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 language affords 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. Gen. Div.), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Ont. Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. 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 #1* with respect 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 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 insofar 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.* (1978), [1979] 1 S.C.R. 275 (S.C.C.)). 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, McMurty 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 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 (S.C.C.), 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 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 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, the Chief Justice 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 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 LLPs need not be paid?

    (c) What order should this Court make as to costs?

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 (*Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), 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 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 offset by a corresponding decrease in regular rates. Thus, McMurty C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

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

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit." It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic analysis" 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 (Ont. C.A.), at p. 478; Peter D. Maddaugh and John D. McCamus, *The Law of Restitution* (Aurora, Ont.: Butterworths, 1990), at p. 38; Lord Goff and Gareth Jones, *The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 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, *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.); *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor Jacob 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 *Journal of Contract Law* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP 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 (S.C.C.), 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 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.D. Smith, "The Mystery of 'Juristic Reason' " (2000), 12 S.C.L.R. (2d) 211, at pp. 212-213). 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, others 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 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 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 circumstance of a case but 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 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 Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.) ("*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 (Ont. C.A.), 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 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 writes, 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 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 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 (S.C.C.), at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.)). 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 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, their 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 (S.C.C.).

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 they 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 their crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22 (S.C.C.), at para. 11; *New Solutions*, *supra*). Borins J.A. focused on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland #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 #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 LLPs 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 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 per cent, as defined in s. 347 of the *Criminal Code*.

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 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. (Toronto: Carswell, 1992), at p. 458). In the leading British case on the defence, *Gorman v. Karpnale Ltd.* (1991), [1992] 4 All E.R. 512 (U.K. 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 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 McMurty 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 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 (S.C.C.); Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at pp. 369-370). 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 *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

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

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 (S.C.C.), 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.

(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 *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), 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 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 (S.C.C.). 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.

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 Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), this Court held, at p. 756, that:

> 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 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 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. Saskatchewan* (1976), [1977] 2 S.C.R. 576 (S.C.C.)). 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 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 Potash Ltd.* 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 Potash Ltd.*-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 R. 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, "Where 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.

88 Finally, the appellant's use of *Amax Potash Ltd.*, *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 #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 instalments," as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurty C.J.O., at para. 76 of his reasons:

> In this context, I note 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.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* On June 2, 2004, the court issued a corrigendum correcting text; the change has been incorporated herein.

