Borowski *v.* Canada (Attorney General), [1989] 1 S.C.R. 342

**Joseph Borowski** *Appellant*

*v.*

**The Attorney General of Canada** *Respondent*

and

**Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada and Women's Legal Education and Action Fund (LEAF)** *Interveners*

indexed as: borowski *v.* canada (attorney general)

File No.: 20411.

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

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

on appeal from the court of appeal for saskatchewan

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

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

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

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

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

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a foetus was not protected by either s. 7 or s. 15 of the *Charter* and also held that the s. 1 of *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of

legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the *Charter* applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the *Charter*; (2) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated the principles of fundamental justice contrary to s. 7 of the *Charter*; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the *Charter*; (4) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the *Criminal Code* were justified by s. 1 of the *Charter*. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler (No. 2)*.

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

*Held*: The appeal should be dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

**Cases Cited**

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

**Statutes and Regulations Cited**

*Canadian Bill of Rights*, R.S.C. 1970, App. III, s. 1.

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15, 24(1).

*Constitution Act, 1982*, s. 52(1).

*Constitution of the United States of America*, Art. III, s. 2(1).

*Criminal Code*, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).

*Rules of the Supreme Court of Canada*, SOR/83-74, s. 32.

**Authors Cited**

Kates, Don B., Jr. and William T. Barker. "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 *Calif. L.R.* 1385.

Macklem, Patrick and Eric Gartner. "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369.

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"The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R.* 373.

Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

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

*Morris C. Shumiatcher, Q.C.*, and *R. Bradley Hunter*, for the appellant.

*Claude R. Thomson, Q.C.*, and *Robert W. Staley*, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.

*Angela M. Costigan* and *Karla Gower*, for the intervener R.E.A.L. Women of Canada.

*Edward Sojonky, Q.C.*, for the respondent.

*Mary Eberts* and *Helena Orton*, for the intervener Women's Legal Education and Action Fund (LEAF).

//*Sopinka J.*//

The judgment of the Court was delivered by

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

From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable

whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

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

History of the Action

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

(a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;

(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;

(c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;

(d) The costs of this action; and

(e) Such further and other relief as to this Honourable Court seems just and expedient.

Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, was that Mr. Borowski had standing to attack the provisions of the *Code* referred to in his statement of claim. Martland J., speaking for the majority, stated, at p. 598:

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

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

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

(a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* to be *ultra vires*, unconstitutional, invalid, inoperative and of no force or effect;

(b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the *Criminal Code* are *ultra vires*, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:

(c) The costs of this action; and

(d) Such further and other relief as to this Honourable Court seems just.

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

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

On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and

concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

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

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

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

In July of 1988 in light of this Court's judgment in *R. v. Morgentaler (No. 2), supra*, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the *Criminal Code* had been nullified

and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child *en ventre sa mère* is entitled to the protection of ss. 7 and 15 of the *Charter* respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

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

Mootness

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

from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

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

When is an Appeal Moot? -- The Authorities

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

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

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-

> settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

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

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

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

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

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

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

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

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme Court" (1974), 88 *Harvard L.R. 373*, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a

challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

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

Is this Appeal Moot?

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

They were a mere step in the process of measuring the impugned provision against the *Charter*.

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

> **32.** (1) When a party to an appeal
>
> (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
>
> (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.
>
> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

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

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

<u>The Exercise of Discretion: Relevant Criteria</u>

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

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

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

the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in *Sibron v. New York*, *supra*. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

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

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

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration

scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

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

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

to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

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

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

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

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed

heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

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

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

> The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

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

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

Exercise of Discretion: Application of Criteria

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

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

mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

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

Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler (No. 2)*, *supra*, *per* Dickson C.J., at p. 75; *per* Beetz J. at pp. 122-23; *per* Wilson J. at pp. 181-82. A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night

to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

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

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

Standing

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

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

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

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

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

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

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

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

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

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

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

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

Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely

abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

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

*Appeal dismissed.*

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*Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.*

*Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.*

*Solicitor for the respondent: Frank Iacobucci, Ottawa.*

*Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.*